August 24, 2021

Via www.regulations.gov

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410

Re: Docket No. FR-6251-P-01: Notice of Proposed Rulemaking: Reinstatement of HUD's Discriminatory Effects Standard

To Whom It May Concern:

Thank you for the opportunity for the undersigned individuals and organizations to submit these comments on the Department of Housing and Urban Development's ("HUD") Reinstatement of HUD's Discriminatory Effects Standard ("Proposed Rule").[1] We support the Proposed Rule's reinstatement of HUD's previously promulgated rule titled, "Implementation of the Fair Housing Act's Discriminatory Effects Standard"[2] ("2013 Rule"). The Proposed Rule undoes the threat posed by the Trump Administration's "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard"[3] ("2020 Rule").

The 2020 Rule would have imposed substantial obstacles to meritorious civil rights cases relying on disparate impact claims in direct contravention of HUD's obligation to further the civil rights protections provided by the Fair Housing Act of 1968.[4] A preliminary injunction prevented the 2020 Rule from taking effect and left the 2013 Rule in effect;[5] the Proposed Rule will reinstate this critical component of those civil rights protections.

These comments attach and incorporate our comments on HUD's 2020 Proposed Rule, submitted by several of the same undersigned individuals and organizations interested in promoting civil rights at the intersection of housing and environmental justice ("2019 Environmental Justice Comments").[6] The 2019 Environmental Justice Comments spotlighted case studies of the Black communities in Tallassee and Uniontown, Alabama who have suffered

[1] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590 (June 25, 2021) (to be codified at 24 C.F.R. pt. 100) ("Proposed Rule").
[2] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500) ("2013 Rule").
[3] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) ("2020 Rule").
[4] Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 ("Fair Housing Act").
[5] *Mass. Fair Housing Center*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020).
[6] We defer to and direct you to other commenters, who are experts in the Fair Housing Act and housing issues, for deeper analysis related to the appropriateness of the 2013 Rule. See, e.g., comments of the National Fair Housing Alliance, the NAACP Legal Defense Fund, the Lawyers Committee for Civil Rights, and the Shriver Center on Poverty Law. We also support the comments of Father Philip A. Schmitter.

disparate health impacts due to pests and pollution from massive landfills; Black residents in Flint, Michigan who have been unfairly excluded from public participation in permitting actions; and Black and Latinx residents of East Chicago, Indiana who have suffered an array of serious health effects from exposure to extremely high levels of lead and arsenic soil contamination. The 2019 Environmental Justice Comments demonstrated the strong need for disparate impact claims as a civil rights tool to fight housing and environmental injustices and the perils of erecting barriers to these claims. Housing discrimination and/or environmental discrimination continue to cause grave harm to low-income and Black, Latinx, Indigenous, and other people of color ("BIPOC") and necessitate strong civil rights tools as well as other affirmative efforts.

In addition to the illustrations of disparate health impacts shared in the 2019 Environmental Justice Comments, the current reality of the COVID-19 pandemic and the growing climate crisis only further highlight the disparate environmental and health threats facing low-income communities and BIPOC communities. President Biden acknowledged the urgency of the moment when he issued a number of relevant executive orders and the Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies ("Discriminatory Housing Memorandum");[7] the Discriminatory Housing Memorandum directs HUD to examine recent regulations including the 2020 Rule and recognizes that the Fair Housing Act is "not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities."[8]

It is past time for HUD to step up to protect civil rights for residents disproportionately burdened by health impacts stemming from environmental and housing problems. HUD should not only reinstate the 2013 Rule, but it should also increase its own enforcement of the Fair Housing Act and undertake other measures to ensure equitable access to safe and affordable housing.

I. COVID-19 AND THE CLIMATE CRISIS HAVE INCREASED THE VISIBILITY OF THE HARM THAT STEMS FROM THE EXISTING INEQUITABLE ACCESS TO SAFE HOUSING.

The ongoing COVID-19 pandemic provides the latest example of the disparate environmental and health impacts people experience based on where they live. It is not random that communities of color are exposed to more air pollution and have had higher COVID-19 death rates. Throughout U.S. history, federal, state, and local agencies expressly discriminated against people of color, and sanctioned housing segregation.[9] Neighborhoods where Black, Latinx, and other people of color live are more likely to house power plants, refineries, and heavy traffic.[10]

[7] Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (January 26, 2021).
[8] Discriminatory Housing Memorandum, *supra* note 6, §1 at 7,488.
[9] *See* Attachment A (2019 Comments) at 3-4.
[10] *See* Attachment A (2019 Comments) at 4 n.19.

Researchers from the Harvard T.H. Chan School of Public Health found a direct link between places with high levels of air pollution in the United States and the probability of more severe COVID-19 cases in those locations.[11] One air pollutant, fine particulate matter ("PM2.5"), is generated by combustion from car engines, refineries, and coal or gas power plants.[12]. The Harvard study modeled the relationship between air pollution and coronavirus death by using 17 years of PM2.5 data from more than 3,000 counties, as well as COVID-19 death counts from the first couple of months of the pandemic. The results showed that long-term exposure to PM2.5 is linked to a greater chance of dying from COVID-19; at the county level, just a small increase in long-term exposure to PM2.5 pollution leads to a large increase in COVID-19 death rate.[13] The increase in COVID-19 mortality associated with PM2.5 was 20 times higher than all other causes.[14]

The health burden from air pollution is not limited to COVID-19 susceptibility. Small increases in PM2.5 pollution are associated with increased mortality from a variety of causes.[15] This exposure to PM2.5 is a housing issue, as communities of color tend to be exposed to higher levels of air pollution than affluent, white communities.[16]

PM2.5 is not the only problematic pollutant. Counties with chronic exposure to multiple hazardous air pollutants (i.e., air toxics such as formaldehyde, diesel particulate matter, and naphthalene) also had higher COVID-19 mortality rates than counties with less hazardous air pollution exposure.[17]

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[11] Wu, X., Nethery, R. C., Sabath, M. B., Braun, D. and Dominici, F., 2020. Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis. *Science advances,* 6(45), p. eabd4049 (hereinafter "Harvard Study").

[12] PM2.5 can cause serious health problems because when the very small particles are inhaled, they can get deep into the lungs and enter the bloodstream. *See* EPA, Particulate Matter Basics, https://www.epa.gov/pm-pollution/particulate-matter-pm-basics.

[13] *Id*. The Harvard researchers adjusted for other confounding factors known to affect health outcomes, such as smoking rates and diabetes.

[14] *Id*.

[15] The World Health Organization recognizes that air pollution increases mortality from stroke, heart disease, chronic obstructive pulmonary disease, lung cancer, and acute respiratory infections, attributing seven million premature deaths every year, worldwide to the combined effects of outdoor and household air pollution. World Health Organization, *Air Pollution*, (last visited Aug. 13, 2021), https://www.who.int/health-topics/air-pollution#tab=tab_1.

[16] *See also* Rashmi Joglekar, *Air Pollution Makes COVID-19 More Deadly*, Earthjustice (April 13, 2020) (discussing the Harvard study and also highlighting an area of southeastern Louisiana known as Cancer Alley with a high COVID-19 death rate, high rates of toxic air pollution, and a large portion of Black residents). *See also* Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, THE NEW YORK TIMES (April 7, 2020); Bowe, et.al., *supra* note 16.

[17] Michael Petroni, et al, *Hazardous Air Pollutant Exposure as a Contributing Factor to COVID-19 Mortality in the United States,* 2020 Environ. Res. Lett. 15 0940a9, available at https://legacy-assets.eenews.net/open_files/assets/2020/09/11/document_gw_15.pdf (suggesting that high levels of hazardous air pollutants could explain why some rural counties, such as those in Georgia and Louisiana, had high levels of COVID-19 mortality). Researchers have found a link between higher incidences of COVID-19 cases and/or deaths and increased air pollution in other nations, as well. *See, e.g.*, Fattorini D, Regoli F. Role of the chronic air pollution levels in the Covid-19 outbreak risk in Italy. Environ Pollut. 2020 Sep;264:114732. doi: 10.1016/j.envpol.2020.114732. Epub 2020 May 4. PMID: 32387671; PMCID: PMC7198142; Magazzino C, Mele

cont. next page.

The relationship between where people live and their health outcomes relates to other disproportionate environmental conditions including climate-related impacts.[18] Historic redlining practices and ongoing discrimination have led to heat disparities between Black and white neighborhoods.[19] Redlined neighborhoods, which continue to be home to mostly Black and Hispanic residents, tend to be 5 to 20 degrees hotter than whiter neighborhoods in the same city.[20] These neighborhoods often lack parks and trees, which could alleviate the heat.[21] Higher temperatures increase hospitalization rates and emergency visits.[22] With climate change and increasing incidences of heat waves, this disparity will only become more important to health outcomes. Nor is heat the only way that climate-related weather events are already disparately impacting racially segregated neighborhoods. Along the Gulf Coast, there is a higher concentration of urban flooding and disproportionate impacts on communities of color because they are lowest lying areas, in areas without green space to absorb water, and in areas where the stormwater infrastructure is incapable of handling excess water from rainfall or river overflows.[23] Heavier rains and flooding are on the rise, and heavy rains this summer have afflicted communities of color with flooding.[24] Indeed, a HUD official has testified that "the frequency and severity of disasters will increase due to climate change which, in turn, will magnify existing racial and socioeconomic gaps."[25]

M, Schneider N. The relationship between air pollution and COVID-19-related deaths: An application to three French cities. Appl Energy. 2020 Dec 1;279:115835. doi: 10.1016/j.apenergy.2020.115835. Epub 2020 Sep 12. PMID: 32952266; PMCID: PMC7486865; Vanessa Bianconi, Paola Bronzo, Maciej Banach, Amirhossein Sahebkar, Massimo R Mannarino & Matteo Pirro, Particulate Matter Pollution and the COVID-19 Outbreak: Results from Italian Regions and Provinces." 16 ARCHIVES OF MEDICAL SCIENCE 1 (Submitted); Vanessa Vasquez-Apestegui, Enrique Parras-Garrido, Vilma Tapia, Valeria M Paz-Aparicio, Jhojan P Rojas, Odón R Sánchez-Ccoyllo, & Gustavo F Gonzales, Association Between Air Pollution in Lima and the High Incidence of COVID-19: Findings from a Post Hoc Analysis, RESEARCH SQUARE (2020) (Pre-Print).[18] A few other examples of the many environmental threats disproportionately impacting BIPOC communities include proximity to Superfund Sites; lead in drinking water; lead paint and lead in soil and dust; failing sewage and stormwater infrastructure. See, e.g., Poisonous Homes report (Superfund sites near federally assisted housing): "'If White People Were Still Here, This Wouldn't Happen' the Majority-Black Town Flooded with Sewage," The Guardian, https://www.theguardian.com/us-news/2021/feb/11/centreville-illinois-flooding-sewage-overflow.

[19] Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, THE NEW YORK TIMES (Aug. 24, 2020); *see also* Attachment A (2019 Comments) (describing redlining as how federal, state, and local governmental policies that discriminated against people of color produced segregated neighborhoods).

[20] Plumer & Popovich, *supra* note 20.

[21] *Id.* Additionally, "trees have another climate benefit: Unlike paved surfaces, they can soak up water in their roots, reducing flooding during downpours." *Id*.

[22] *Id*.

[23] Thomas Frank, *Flooding Disproportionately Harms Black Neighborhoods,* Scientific American (June 2, 2020), https://www.scientificamerican.com/article/flooding-disproportionately-harms-black-neighborhoods/.

[24] *See* Laura Gersony, *In Chicago, Flooding Overwhelmingly Strikes Communities of Color*, Great Lakes Now (June 29, 2021), https://www.greatlakesnow.org/2021/06/chicago-flooding-infrastructure-communities-color/; Malachi Barrett, As Floods Continue to Pound Detroit, The City's Most Vulnerable Residents Face Crisis, MLive (July 17, 2021), https://www.mlive.com/public-interest/2021/07/as-floods-continue-to-pound-detroit-the-citys-most-vulnerable-residents-face-crisis.html.

[25] Written Testimony of James Arthur Jemison II, Principal Deputy Assistant Secretary for Community Planning and Development, HUD, Senate Committee on Appropriations, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, https://www.hud.gov/press/speeches_remarks_statements/Statement_20210519.

At bottom, racial segregation in housing will increasingly matter to health outcomes, making that much more imperative the existence of strong civil rights tools.

II. THE PROPOSED RULE IS CONSISTENT WITH JURISPRUDENCE AND WITH PRESIDENT BIDEN'S EXECUTIVE ORDERS ON RACIAL AND ENVIRONMENTAL JUSTICE

A. The Proposed Rule Restores a Critical Civil Rights Tool.

The Fair Housing Act sought to end entrenched racial segregation and exclusion in housing. It prohibited discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin.[26] As explained in the 2019 Environmental Justice Comments, HUD's 2013 Rule appropriately recognized the myriad forms in which housing discrimination can occur as well as the Fair Housing Act's prohibition of practices that lead to unjustified disparate effects regardless of whether they were motivated by discriminatory intent.[27] In *Texas Dept. of Housing and Community Development v. Inclusive Communities*, the Supreme Court of the United States agreed that the Fair Housing Act permitted disparate impact claims ―endorsing HUD's 2013 Rule's interpretation of the Fair Housing Act ―based on an analysis of the statutory language and appellate court precedent affirming that interpretation.[28]

Yet, the 2020 Rule asserted, without support, that the *Inclusive Communities* decision required changes to the standards and burdens for adjudicating disparate impacts. To the contrary, although the Supreme Court was asked to consider the question of what standards and burdens of proof should apply, it declined to do so and only addressed whether disparate impact claims are cognizable under the Fair Housing Act.[29] HUD's 2020 Rule would have nearly eliminated the ability to use a disparate impact claim as a tool to prove discrimination. It added arbitrary, stringent requirements for plaintiffs to make out a prima facie case, including a showing that: (1) the challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective"; (2) there exists a "robust causal link between the challenged policy or practice and the adverse effect on members of a protected class"; and that (3) the disparity caused by the policy or practice is "significant."[30]

The 2020 Rule's addition of inappropriate and burdensome requirements have analogues in the United States Environmental Protection Agency's ("EPA") informal imposition of hurdles to disparate impact claims; the imposition of these hurdles by EPA has left unaddressed harm to many overburdened communities of color. For instance, the 2020 Rule required plaintiffs to show that a policy or practice causes a significant disparity. As explained in more detail in the 2019 Environmental Justice Comments, EPA closed a civil rights complaint brought by the St. Francis Prayer Center against the Michigan Department of Environmental Quality concerning the construction of a steel mill near the low-income and majority Black city of Flint, Michigan; EPA acknowledged that the facility would emit lead and other harmful air pollutants but said the

[26] Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81.
[27] 2013 Rule, *supra* note 2.
[28] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015).
[29] *Id.* at 2513 ("The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq*.").
[30] 2020 Rule, s*upra* note 3, at 42,858-59.

alleged harms were not sufficiently adverse to warrant a review of whether the siting was disparate.[31] In contrast to EPA's and the 2020 Rules' added arbitrary hurdles, the 2013 Rule does not contain the unduly burdensome requirements.

B. President Biden's Executive Orders Mandate that HUD Restore Civil Rights Tools.

Reinstating the 2013 Rule is not only consistent with case law, but it is also necessary to comport with President Biden's relevant executive orders, memoranda, and other actions. These executive orders collectively direct HUD and other federal agencies to address the disproportionately adverse health and environmental impacts on low-income and BIPOC communities by ensuring access to clean air and water and limiting exposure to dangerous chemicals for all communities;[32] and redressing inequities in agency decision-making processes and programs.[33] Further, President Biden has called on the Department of Justice, and its client agencies, to develop a comprehensive environmental justice enforcement strategy.[34]

HUD must develop and invest in programs designed to reduce environmental harm in BIPOC and low-income, overburdened communities. First, Sections 4 and 5 of EO 13,985 instruct the Office of Management and Budget to work with HUD and other agencies to develop methods for and assess whether agency policies "exacerbate barriers"[35] It also calls on HUD and other federal agencies to consider whether "new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs."[36] The Proposed Rule can reduce barriers for individuals to rely on the civil rights tools set forth in the Fair Housing Act.

Second, Section 219 of Executive Order 14,008 ("EO 14,008"), "Tackling the Climate Crisis at Home and Abroad," directs HUD and other federal agencies to promote environmental justice by "[d]eveloping programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts."[37] The 2013 Rule is one tool that overburdened communities can use to seek relief for "the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts" they face as a result of housing discrimination. HUD should also identify

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[31] *See* Attachment A, at 11.
[32] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (January 20, 2021).
[33] Advancing Racial Equity and Support for Underserved Communities Through Federal Govt, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (January 20, 2021).
[34] *See* Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg., 7,619 (January 27, 2021); Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (January 20, 2021); Advancing Racial Equity and Support for Underserved Communities Through Federal Govt, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (January 20, 2021).
[35] Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,010.
[36] *Id.*
[37] Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,629. Section 220 of EO 14,008 creates an interagency working group, including HUD and EPA, and calls on the group to address "current and historic environmental injustice." *Id.* at 7,630. Note that although EO 14,008 and the implementing memos and materials use the phrase "disadvantaged communities," there are more appropriate terms that should be used and community members should be consulted on the preferred term.

other ways that it can address the health and environmental consequences of decades of housing discrimination.[38]

Third, Section 1 of Executive Order, 13,990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," recognizes the importance of ensuring access to clean air and water, limiting exposure to dangerous chemicals and pesticides, and holding polluters accountable.[39] It calls on all federal agencies to review actions taken by the Trump Administration that may conflict with the objective of protecting communities including low-income communities and communities of color. The 2020 Rule fits squarely within that charge because it would have thwarted HUD's ability to fulfill its duty to administer the Fair Housing Act "including by preventing practices with an unjustified discriminatory effect."[40]

HUD should not only ensure the opportunity for redress for impacted community members through promulgation and implementation of this Proposed Rule, but it also should initiate its own efforts to enforce the Fair Housing Act. EO 14,008 instructs the Attorney General to coordinate with client agencies "to develop a comprehensive environmental justice enforcement strategy to provide timely remedies for systemic environmental violations and contaminations, . . ."[41] The Discriminatory Housing Memorandum further recognizes the role that HUD should undertake "in overcoming and redressing this history of discrimination and in protecting against other forms of discrimination by applying and *enforcing Federal civil rights and fair housing laws*."[42]

III. CONCLUSION

HUD must act now to provide overburdened communities with the civil rights tools to redress housing and environmental injustices. The reinstatement of the 2013 rule is a necessary step to fulfill the mandates of President Biden's executive orders and memoranda calling on HUD to promote the civil rights for low-income and BIPOC communities facing housing discrimination. Increased federal enforcement of fair housing and civil rights laws is an essential companion to the reinstatement of the 2013 Rule.

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[38] EO 14,008 calls for the development of recommendations for how certain federal investments could make sure that 40 percent of the overall benefits flow to disadvantaged communities including "affordable and sustainable housing," "remediation and reduction of legacy pollution," and "development of critical clean water infrastructure." The Interim Implementation Guidance of the Justice40 Initiative released on July 20, 2021, specifies the need to improve indoor air quality, housing quality, safety, and enhanced public health in affordable and sustainable housing. Memorandum for the Heads of Departments and Agencies, "Interim Implementation Guidance for the Justice40 Initiative," M-21-28 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf.

[39] Exec. Order No. 13,990.

[40] Discriminatory Housing Memorandum, *supra* note 6, at Section 2.

[41] *Id.* at 7,631.

[42] *Id. (emphasis added).* Note that HUD has acknowledged the need to increase Fair Housing work and staff capacity to redress discriminatory housing practices by requesting a 17.2 percent budget increase for FY2022. *See* HUD, 2022 Budget in Brief, https://www.hud.gov/sites/dfiles/CFO/documents/2022_Budget_in_Brief_FINAL.pdf

Sincerely,

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Attachment A

October 18, 2019

Via Regulations.Gov

Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Washington, D.C. 20410-0001

Re: FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom It May Concern:

Thank you for the opportunity for the undersigned individuals and organizations to submit these comments[1] on the Department of Housing and Urban Development's ("HUD") Disparate Impact Standard ("Proposed Rule").[2] Many of these individuals and groups have directly experienced the harms associated with housing and/or environmental discrimination and have faced great obstacles in securing civil rights for their families and communities. Their experiences reinforce what studies have consistently shown: where people live determines their educational, environmental, health, and employment opportunities.[3]

The Fair Housing Act, passed in 1968,[4] was designed to prohibit and eradicate housing discrimination. More than fifty years after its passage, however, many communities remain largely segregated,[5] and residents of color continue to experience the economic, environmental, and health harms associated with this segregation. These comments are submitted on behalf of many groups and individuals, including some in Tallassee and Uniontown, Alabama, who suffer disparate health impacts due to pests and pollution from massive landfills; residents of Flint, Michigan who have been unfairly excluded from public participation in permitting actions and whose children have elevated blood lead levels from local toxic sources; and residents of East

[1] In addition to submitting these comments, we also support generally the comments of our civil rights and housing allies, including the Poverty & Race Research Action Council, the Shriver Center on Poverty Law, and the Metropolitan St. Louis Equal Housing & Opportunity Council.
[2] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).
[3] *See* Brief for The Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae Supporting Respondent ("*Inclusive Communities* Amicus Brief") at 20, n. 31, *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc.*. 135 S. Ct. 2507 (2015).
[4] Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 ("Fair Housing Act").
[5] *See* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, 3 US2010 Project (2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf; *see also* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, (2017); *see also* Rachel D. Godsil, *Environmental Justice and the Integration Deal*, 49 N.Y. L. Sch. L. Rev. 1109, 1113, n. 13 (citing Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News*, Brookings Inst., 3 (2001); Dorceta E. Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (2014).

Chicago, Indiana, who have suffered an array of life-altering health effects from exposure to extremely high levels of lead and arsenic soil contamination.

When Congress passed the Fair Housing Act in 1968, it prohibited both intentional discrimination and acts with unjustified disparate impacts that created "separate and unequal conditions,"[6] and it required HUD "affirmatively to further" the goals of the statute.[7] Disparate impact claims remain necessary to address the effects of discrimination. In fact, the United States Supreme Court's decision in *Texas Dept. of Housing and Community Development v. Inclusive Communities Project* confirmed that the Fair Housing Act includes disparate impact liability.[8] Yet HUD's Proposed Rule runs counter to the *Inclusive Communities* decision by nearly eliminating the ability of victims of housing discrimination to use a disparate impact claim to prove discrimination. Accordingly, we strongly oppose the Proposed Rule and urge HUD to withdraw it.

These comments demonstrate the compelling need for the civil rights protections provided by the Fair Housing Act and explain the threat the Proposed Rule poses to those protections. The comments first explain how the nation's history of segregation created inequities that continue today, including disproportionate environmental harmful exposures for low-income communities of color; the comments describe the stories of a handful of communities. The comments then explain that, despite the need for stronger civil rights protections, HUD's Proposed Rule moves in the opposite direction by making it more difficult for victims of discrimination to bring a case under the disparate impact rule. A look at EPA's implementation of similar barriers to disparate impact claims, brought by communities discussed herein, reveals the danger of HUD's approach.

I. The Legacy of Segregation Includes Environmental Injustices and Poor Public Health.

A. Segregation Created Inequity

Segregation was the product of governmental policies and private practices that discriminated against people of color. For example, federal, state, and local agencies expressly discriminated against people of color by denying them loans, designating residential areas with a large percentage of people of color as less desirable for investment purposes ("redlining"),[9] encouraging racially restrictive covenants,[10] and segregating public housing by race.[11] The effects of those policies remain today. As Richard Rothstein describes in *Color of Law*,

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[6] Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81; *see also Inclusive Communities*, 135 S. Ct. at 2516 (citation omitted).
[7] 42 U.S.C. § 3608(e)(5).
[8] *See* 135 S.Ct. at 2518.
[9] *See* Rothstein, *supra* note 5, at 36, 76.
[10] Dorceta E. Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility*, 243 (2014) (noting that the Federal Housing Administration's 1939 Underwriting Manual stated, "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes" and the Manual encouraged "suitable restrictive covenants").
[11] *See* Rothstein, *supra* note 5, at 36, 76.

> Today's residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States. The policy was so systematic and forceful that its effects endure to the present time.[12]

The legacy of segregation is ongoing.[13] Many people of color in the United States still live in communities that have high representation of people of color and relatively few white neighbors.[14] Further, census tracts with the highest poverty rates primarily include single minority racial or ethnic groups.[15] Additionally, economic mobility for people of color is impaired by ongoing disparities in investments in transportation, schools, and industrial zoning.[16]

The negative impacts of past and ongoing housing discrimination include the disproportionate exposure of communities of color to environmental harms, and the resultant adverse health impacts.[17] In 1987, the United Church of Christ's Commission for Racial Justice issued a report called *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*. The

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[12] *Id.* at 8.

[13] While these comments are focused largely on communities highlighting impacts on African Americans and Latinx communities, other communities of color, including Native Americans and communities of Asian descent, for example, have also been disproportionately affected in various regions of the country by segregation and environmental discrimination.

[14] *See* Logan & Stults, *supra* note 5; *see also* Rothstein, *supra* note 5; Godsil, *supra* note 5; Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 How. L. J. 913, n.18 (2005); John R. Logan, Lewis Mumford Ctr., *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (2002), https://files.eric.ed.gov/fulltext/ED471515.pdf; John R. Logan et al., Lewis Mumford Ctr., *Separating the Children* (2001), http://mumford.albany.edu/census/Under18Pop/U18Preport/page1.html (discussing segregation of Black and white children). *See generally* James W. Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005) (documenting the history of intentional residential segregation in United States); Douglas Massey & Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) (discussing the concept of urban residential "hypersegregation" in the United States); Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 Envtl. Res. Letters, (Nov. 2015); Luke W. Cole, *"Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 Envtl. L. Rep. 10775.

[15] *See Inclusive Communities* Amicus Brief, *supra* note 3, at 9 n. 12.

[16] Rothstein, *supra* note 5, at 201 (discussing the impact on communities pf color when transportation investments favored highways over investments in subways and other urban public transportation; the highways allowed suburban white residents to travel downtown for jobs); *See* Robert D. Bullard, *Addressing Urban Equity in the United States*, 31 Fordham Urban L. J. 1183 (2004).

[17] The heroic work of activists like Hazel Johnson in the Chicago, Illinois public housing project Altgeld Gardens and residents of a predominantly African American community in Warren County, North Carolina caught the attention of the civil rights movement and ultimately led to the United Church of Christ's seminal report. Indeed, many veteran civil rights leaders from the 1950's and 1960's supported the Warren County protesters in their fight against a toxic waste facility in their community, and classified the protest as a new fight in the civil rights movement—the fight against "environmental racism." *See* U.S. Comm'n on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898, at 7 (2016), https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf ("U.S. Comm'n on Civil Rights Environmental Justice Report").

report concluded that a community's racial composition was the strongest predictor of a hazardous waste facility's location.[18] Subsequent researchers have clarified this causal relationship: Sources of pollution tend to come to communities of color, rather than the other way around.[19] The 1987 report, combined with other advocacy, led President Clinton to issue Executive Order 12,898 in 1994, which ordered each federal agency, including HUD and EPA, "[to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[20]

Nonetheless, more than two decades later in 2016, the United States Commission on Civil Rights determined that

> Both historical and current housing segregation amplifies the burden of toxic industrial waste on communities of color. Insufficient public education often leaves residents unaware of the presence of dangerous toxins that are not immediately observable, while cultural, familial, and economic ties keep residents in the community despite these hazards.[21]

The legacy of government-sanctioned discriminatory housing practices is devastating to generations of low-income communities of color, whose injuries include disproportionate levels of lead poisoning, asthma, diabetes, heart disease, and other environmental health impacts.[22]

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[18] *See* Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites xiii (1987); *see also* U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 7–8 (2016).

[19] *See* Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 Envtl. Res. Letters 15–16 (Nov. 2015).

[20] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). *See* Paul Mohai & Robin K. Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 Envtl. Res. Letters (Nov. 2015).

[21] U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 89.

[22] *See, e.g.*, Jyotsna S. Jagai et al.,*The Association Between Environmental Quality and Diabetes in the U.S.*, Journal of Diabetes Investigation (Oct. 2019), https://www.researchgate.net/publication/336234609_The_association_between_environmental_quality_and_diabetes_in_the_US; Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. of Pub. Health 480 (Apr. 2018) (concluding that disparities in the burden from particulate matter-emitting facilities exist and are more pronounced based on race), https://www.ncbi.nlm.nih.gov/pubmed/29470121; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism is Real*, The Atlantic (Feb. 28, 2018) (describing new report released by EPA National Center on Environmental Assessment), https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/; Office of Disease Prevention and Health Promotion, Healthy People 2010: Leading Health Indicators https://www.healthypeople.gov/2010/Document/HTML/uih/uih_bw/uih_4.htm#environqual (providing statistics on links between poor air quality and health outcomes).

B. *Environmental Injustice: The Stories of Impacted Communities*

East Chicago, Indiana

The low-income community of color[23] living in public and private housing on the USS Lead Superfund Site in East Chicago, Indiana knows well the environmental and health harms associated with systemic racism. The concentration of African American and Latinx community members on this contaminated land is not accidental but rather the result of federal guidelines that encouraged the construction of public housing in areas with large minority populations.[24] Lead smelters and a lead-arsenate pesticide facility surrounded their homes and left a legacy of severely contaminated soil. Residents continued to move into this community for decades without knowing that their children were being exposed to lead and arsenic at dangerous levels. After decades of inaction at all levels of government, the Mayor of East Chicago announced that public housing residents would be relocated due to extreme contamination. The public housing residents filed a civil rights administrative complaint before HUD based on concerns about the problematic relocation efforts; the administrative complaint led to a settlement that afforded them additional time for relocation, provided rent abatement while they remained on the toxic land, and guaranteed risk assessments of new housing for families with children with elevated blood lead levels.[25] Residents living in private homes were not relocated and remain at the Superfund Site. They continue to fight for a stronger cleanup effort and health protections.

Flint, Michigan

As the recent lead-in-water crisis has brought into stark relief, the community of Flint, Michigan has long suffered from environmental and civil rights injustices. Flint is a majority African American community with a poverty rate nearly three times the national average, ranking near last in various public health metrics compared to other areas of Michigan.[26] Decades of redlining, racially restrictive covenants, and harassment have led to the racially segregated Flint of today—the city has been labeled the most segregated non-Southern city in the country.[27]

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[23] The demographics for the community qualify it as an environmental justice community: 92% of the community is considered minority and 77% are deemed low-income. EPA, Region 5, USS Lead Superfund Site Action Memorandum—Fifth Amendment, Attachment 1 (Mar. 6, 2017), https://semspub.epa.gov/work/05/933033.pdf

[24] Housing Discrimination Complaint at 6 (Aug. 29, 2016) (filed on behalf of Calumet Lives Matters and individuals under Title VI, Title VIII, and Section 504 of the Rehabilitation Act of 1973), http://povertylaw.org/files/advocacy/housing/oberry-complaint.pdf.

[25] Dep't of Housing & Urban Development, Preliminary Voluntary Compliance Agreement and Title VIII Conciliation Agreement Between HUD, Calumet Lives Matter et al., and East Chicago Housing Authority at 8–12 (Nov. 3, 2016), https://www.hud.gov/sites/documents/ECHA_11032016.PDF.

[26] Flint Water Advisory Task Force, Final Report at 15 (Mar. 2016), https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf ("Flint Water Advisory Task Force Final Report").

[27] Peter J. Hammer, The Flint Water Crisis: History, Housing and Spatial-Structural Racism, Testimony Before Michigan Civil Rights Commission Hearing on Flint Water Crisis (July 14, 2016), https://www.michigan.gov/documents/mdcr/Hammer_PPt_for_MCRC_Flint_07-14-16_552224_7.pdf.

For decades, community activists have fought back against the disproportionate burdens that state permitting agencies have placed on the people of Flint.[28] In 1992, the St. Francis Prayer Center submitted a complaint to EPA, alleging that the Michigan Department of Environmental Quality ("MDEQ") violated the civil rights of the people of Flint in the permitting of a wood-burning incinerator in their community.[29] Just four years later, when MDEQ permitted another polluting facility in Flint—the *Select Steel* steel mill—the Prayer Center submitted another civil rights complaint to EPA contesting the disproportionate burdens faced by Flint residents.[30] While it took EPA just a few months to issue the findings of its investigation into the Select Steel complaint, EPA did not issue findings on the 1992 complaint until 2017—a quarter-century later. In both cases, EPA discounted allegations of disparate impacts under arbitrary standards similar to those that HUD proposes to adopt here, as discussed further below.[31] EPA did find that MDEQ had engaged in intentional discrimination in its handling of the 1992 permit hearings. But by the time EPA made this finding in 2017, it was too little too late, and EPA had long lost the opportunity to address the policies and practices of MDEQ that would eventually help cause the disastrous Flint water crisis.[32]

Tallassee, Alabama

Located just north of the civil rights landmarks of Tuskegee University, the majority African-American community members of Ashurst Bar/Smith outside of Tallassee, Alabama have lived off their land for generations, some owning property in the area since the end of the Civil War. This unbroken lineage of Black land ownership makes Ashurst Bar/Smith unusual in the State, since many Black communities could not own land in Alabama until the passage of the Civil Rights Act of 1964.[33] But the ever-expanding Stone's Throw Landfill immediately next to the community continues to displace community members and threatens to turn this historical community into yet another unfortunate example of black land loss.[34] The Ashurst Bar/Smith Community Organization ("ABSCO") has fought against the expansion and negative impacts from the landfill at the local, county, and federal level. They submitted a civil rights complaint

[28] *See* Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in Urban Communities*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 367, 367 (2001).
[29] Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Mr. Valdas Adamkus, Regional Administrator, Region 5, U.S. EPA (Dec. 15, 1992) enclosing letters dated Dec. 15, 1992, to Mr. Herb Tate, Environmental Equity, US EPA and Mr. William Rosenberg, U.S. EPA (attached to this letter as Attachment 1).
[30] Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Ms. Diane E. Goode, Director, Office of Civil Rights, U.S. EPA (June 9, 1998).
[31] Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA, to Heidi Grether, Dir., Michigan Department of Environmental Quality (Jan. 19, 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf; EPA, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998) ("Select Steel Investigative Report") (attached to this letter as Attachment 2).
[32] *See* Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 292 (2019).
[33] *See, e.g.*, Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. Black Studies, 646, 646–47 (Oct. 2013).
[34] *See* Ctr. for Social Inclusion, *Regaining Ground: Cultivating Community Assets & Preserving Black Land* at 6 (2011), http://www.centerforsocialinclusion.org/wp-content/uploads/2014/07/Regaining-Ground-Cultivating-Community-Assets-and-Preserving-Black-Land.pdf.

to EPA in 2003 concerning a permit modification that allowed further expansion of the landfill, but when EPA finally issued findings on its investigation in 2017, it disregarded the community's disparate impact allegations on faulty reasoning described further below.[35]

Uniontown, Alabama

Uniontown, Alabama, is a city of fewer than 3,000, where 88% of its residents are African American, and residents have a median household income of $13,800.[36] Once thriving with local businesses, it is now known for its environmental contamination. A cheese plant, a catfish mill, and a sewage lagoon are all located nearby, but those sites are dwarfed by Arrowhead Landfill, a municipal solid waste landfill. Arrowhead, which sits on what was once a plantation, is authorized to receive up to 15,000 tons of commercial and industrial waste per day from 33 states. After the largest coal ash spill to date occurred in majority white Roane County, Tennessee in 2008, the coal ash was dredged up and shipped more than 300 miles and dumped at the Arrowhead Landfill. As a result, today the landfill site holds 4 million tons of this coal ash, whose contents contain toxins such as mercury and arsenic that are known to cause cancer, neurological damage, and other detrimental health effects.[37]

In 2013, dozens of residents filed a complaint with EPA, alleging that the renewal and modification of Arrowhead's permit—increasing its size by 66 percent—adversely and disparately impacted the surrounding, primarily African American, community. The Complaint alleged various impacts, including odor, increased pollution, increased population of flies and birds, degradation of quality of life, increased noise from heavy machinery, increased emission of fugitive dust, illnesses, contaminated water, believed degradation of a community cemetery, and decline of property values. Community residents had previously filed complaints about the impacts of the landfill on their health and well-being with the state permitting agency. In 2018, on questionable reasoning described further below, EPA closed the complaint, finding that there was "insufficient" evidence the renewal and modification of Arrowhead's permit reflected any discrimination against African Americans.[38]

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[35] Letter, Tallassee Waste Disposal Center Expansion/Impact on the Ashurst Bar/Smith Community (Sept. 3, 2003) (sender and recipient redacted) ("Tallassee Complaint") (attached to this letter as Attachment 3); Letter to Karen D. Higginbotham, Dir., U.S. EPA Office of Civil Rights (Dec. 8, 2003) (sender redacted); Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., Visiting Clinical Professor of Law, Yale Law Sch. at 2–3 (Apr. 28, 2017), https://www.epa.gov/sites/production/files/2017-05/documents/06r-03-r4_closure_recipient_redacted.pdf ("2017 Tallassee Closure Letter").

[36] American Community Survey 5-year estimates from Census Reporter Profile Page for Uniontown, AL, U.S. Census Bureau (2017), https://censusreporter.org/profiles/16000US0177904-uniontown-al/.

[37] *See, e.g.,* Environmental Integrity Project, Coal's Poisonous Legacy: Groundwater Contaminated by Coal Ash Across the U.S., 9–11, (Mar. 4, 2019), https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf; Kristen Lombardi, *Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, Ctr. for Public Integrity (Aug. 5, 2015), https://publicintegrity.org/environment/thirty-miles-from-selma-a-different-kind-of-civil-rights-struggle/.

[38] Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4), (May 30, 2013) ("Uniontown Complaint") (attached to this letter as Attachment 4); Closure of Administrative Complaint, EPA File No. 12R-13-R4, (Mar. 1, 2018) ("Uniontown Closure Letter"); Lombardi, *supra* note 37.

II. The Fair Housing Act Provides a Critical Mechanism for Addressing Civil Rights Violations.

Enacted in the wake of Martin Luther King's assassination, the Fair Housing Act of 1968 aimed to end entrenched racial segregation and exclusion in housing that characterized the nation for decades. It prohibited discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin.[39] The statute provides that it shall be unlawful

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[40]

In its 2013 final rule ("2013 Rule"), HUD interpreted the Fair Housing Act to prohibit practices that give rise to unjustified disparate effects regardless of whether they were motivated by discriminatory intent.[41] The Supreme Court in *Inclusive Communities* endorsed HUD's interpretation of the Act in the 2013 Rule, construing the phrase "otherwise make unavailable" in the statute to "refer[] to the consequences of an action rather than the actor's intent."[42] The Court based its analysis on the text of the statute, overwhelming appellate court precedent affirming that interpretation, and the 1988 statutory amendments retaining the key language.[43]

The 2013 Rule reflects the realities of housing discrimination in the United States: it can take myriad forms, embedded in patterns of behavior or singular events, in the hands of individual or multiple actors. For these reasons, the 2013 Rule is appropriately flexible and anticipates evaluation of the merits of a plaintiff's claim on a case-by-case basis.

III. EPA's Roundly Criticized Civil Rights Program Serves as a Warning of the Dire Consequences of Weakening the Disparate Impact Standard, as HUD Proposes.

A. HUD's Proposal to Weaken the Disparate Impact Standard

HUD now wishes to graft onto the broad remedial language of the Fair Housing Act an arbitrarily stringent standard to prove housing discrimination. HUD proposes to require plaintiffs to prove the following five elements to make out a prima facie case for a disparate-impact claim under Title VIII:

1) the challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective";
2) there exists a "robust causal link between the challenged policy or practice and a disparate impact on members of a protected class";

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[39] 42 U.S.C. § 3604.
[40] *Id.* § 3604(a) (emphasis added).
[41] 24 C.F.R. § 100.5(b) ("The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent . . . .").
[42] 135 S. Ct. at 2518.
[43] *Id.*

3) the policy or practice identified has an "adverse effect on members of a protected class";
4) the disparity caused by the policy or practice is "significant"; and,
5) the alleged injury is "directly caused" by the challenged policy or practice.[44]

HUD has solicited comment on the "likelihood of success of disparate impact claims" if this framework were to be adopted.[45] EPA has informally and arbitrarily applied standards in the Title VI context analogous to some of those in the Proposed Rule. The undersigned thus have insight into how unworkable and inequitable the proposed standards are, and how many legitimate disparate impact claims may not succeed under these onerous standards, if adopted.

B. EPA's Abysmal Record of Civil Rights Enforcement

As with housing discrimination, the U.S. government and experts have recognized that environmental discrimination is a significant problem in this country and has been for decades.[46] In recognition of that problem, EPA enacted regulations in 1973 codifying that discrimination can be proven through a disparate impact analysis. Those regulations provide that a recipient of federal funds may not directly or indirectly use criteria or methods of administering its program, or choose a site or location of a facility, that has "the effect" of excluding individuals, denying them benefits, or otherwise subjecting them to discrimination because of race, color, national origin, or sex.[47]

Yet, EPA has woefully failed to hold recipients of federal funds accountable for discriminatory acts and policies, which has subjected the agency to repeated criticism from multiple sources.[48] For example, EPA's Office of Civil Rights, now called the External Civil Rights Compliance Office, has rejected or dismissed a majority of the hundreds of Title VI

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[44] Proposed Rule, *supra* note 2, at 42,858–59 (emphases omitted).
[45] *Id.* at 42,860.
[46] *See generally* Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (1987); U.S. Gov't Accounting Office, Siting of Hazardous Waste Landfills and Their Correlation with Race and Economic Status of Surrounding Communities (GAO/RCED-83-168), 3–4 (1983), http://archive.gao.gov/d48t13/121648.pdf; Mikati et al., *supra* note 22, at 480–85 (concluding that at local, state and national level, non-whites are burdened by environmental harms disproportionately to Whites). For an annotated bibliography of articles documenting environmental discrimination, see Luke W. Cole & Sheila R. Foster, *From The Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, 167–83 (2001).
[47] *See* 40 C.F.R. § 7.35(b), (c).
[48] *See, e.g.*, Deloitte Consulting LLP, Final Report: Evaluation of the EPA Office of Civil Rights (Order # EP10H002058) 1–2 (noting EPA's failure to "adequately adjudicate[] Title VI complaints . . . . has exposed EPA's Civil Rights programs to significant consequences which have damaged its reputation internally and externally."); Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Ctr. for Pub. Integrity, (2015) (noting EPA "the civil-rights office rarely closes investigations with formal sanctions or remedies," so EPA's Office of Civil Rights "appeared more ceremonial than meaningful, with communities left in the lurch."); U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 22, 25–33 ("The [United States Commission on Civil Rights], academics, environmental justice organizations, and news outlets have extensively criticized EPA's management and handling of its Title VI external compliance program."); *see also* Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 295–300.

complaints it has received.[49] A 2015 Center for Public Integrity investigative study showed that even where there was a reason to believe a recipient of federal funding had a discriminatory policy, the Office of Civil Rights failed to conduct an investigation.[50]

And most pertinent here, over time, EPA has informally applied needlessly heightened standards analogous to the ones set forth in the HUD Proposed Rule when conducting a disparate impact analysis. As a result, and as discussed further below, EPA has repeatedly concluded that no discrimination—or "insufficient evidence of discrimination"—exists under a disparate impact analysis in situations where a sensical and unencumbered application of the disparate impact standard would have led to the opposite conclusion. Indeed, in the 46 years since EPA's Title VI anti-discrimination regulations became effective, EPA has only once concluded that a prima facie case of alleged discrimination under the disparate impact framework was established.[51]

C. EPA Case Studies Against Arbitrarily Onerous Disparate Impact Pleading Standards

EPA's informal application of a subjective "significant" degree of harm standard and overly stringent (and often nonsensical) causality requirements help to explain the agency's lack of meaningful response to decades' worth of discrimination claims.

Case study against arbitrary "significance" requirements: Flint, Michigan

One of the new elements for demonstrating disparate impact that the Proposed Rule would require is for plaintiffs to show that a policy or practice causes a ***significant*** disparity.[52] EPA has in practice repeatedly injected an undefined "significance" qualifier into its disparate impact assessments, ensuring that disparate impact discrimination complaints could not, and would not, succeed.

For example, the St. Francis Prayer Center filed a civil rights complaint against the Michigan Department of Environmental Quality ("MDEQ") concerning the *Select Steel* steel mill proposed for construction near the low-income and majority African-American city of Flint, Michigan. EPA recognized that the facility would emit pollutants such as lead and volatile organic compounds into the air, but nevertheless closed the complaint on the basis that the alleged harms were not sufficiently "adverse" because modeling showed that the airshed would remain in attainment with National Ambient Air Quality Standards.[53] Thus, EPA concluded, it

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[49] *See* U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 40; *see also* Yue Qiu & Talia Buford, *Decades of Inaction*, Ctr. for Pub. Integrity (Aug. 3, 2015), https://publicintegrity.org/environment/decades-of-inaction/.

[50] U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 17, at 40 (citing Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Ctr for Pub. Integrity (2015), http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why.

[51] *See* Marianne Engelman Lado, *supra* note 48, at 303–05; Agreement between the California Department of Pesticide and Regulation & the U.S. EPA, Aug. 24, 2011, https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf.

[52] *See* Proposed Rule, *supra* note 2, at 42,858.

[53] *See* Select Steel Investigative Report, Attachment 2, at 16.

need not review whether the effect of the siting was disparate because, in EPA's eyes, the effect was insignificant—even though there is no safe level of lead exposure, and volatile organic compounds are also harmful. In essence, EPA determined that harm from pollution that was deemed "acceptable" under environmental laws categorically could not result in a violation of civil rights law.[54]

In the decades after *Select Steel*, EPA has continued to apply the faulty reasoning from that decision. Indeed, EPA similarly applied this reasoning to a separate Title VI complaint filed by the St. Francis Prayer Center in 1992 concerning the granting of a permit to construct a power plant in Flint, Michigan that burns wood waste, natural gas, animal bedding, and tire-derived fuel.[55] The Prayer Center's complaint included allegations that the facility would release lead, mercury, arsenic, and other pollutants and would have health and quality of life effects, which would in turn disparately affect the predominantly African-American population residing in Flint.[56] But in 2017, EPA closed its investigation into this complaint by once again determining there had been no discrimination because it did not find a "sufficiently adverse" impact.[57] And like it had done in *Select Steel*, EPA determined that the "adversity benchmarks" consisted of the level of pollution at which remedial action would have been required under environmental laws, explaining that certain levels of pollution may constitute "acceptable levels of cancer risk," and that increases in children's blood levels from the power plant's activity would not be "significant."[58]

EPA's arbitrary injection of a "significance" standard into disparate impact evaluations defies reality: increased pollution and exposure to lead is harmful, regardless of whether the polluter emits lead at levels that subject it to a fine or legal action. The very notion of "acceptable" levels of pollution makes no sense for toxics such as lead for which the CDC has determined that there is no safe level[59]—nor does it make sense for other, threshold pollutants given that scientific advances continuously lower our understanding of what a safe level of exposure would be.[60] Even if society must accept *some* level of pollution, as EPA rationalizes,[61] civil rights law does not allow that this pollution be disproportionately borne by protected groups. And even in instances where no "acceptable" level of pollution has been set, EPA assumes that any such pollution is acceptable, rather than harmful.[62] EPA's "significant harm"

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[54] *Id.* at 27.
[55] Letter from Lilian S. Dorka, Dir., External Civil Rights and Finance, U.S. EPA Office of Gen. Counsel, to Father Phil Schmitter, at 4, https://assets.documentcloud.org/documents/4432195/FINAL-Letter-to-Genesee-Case-Complainant-Father.pdf ("2017 Genesee Closure Letter").
[56] *See supra* note 29.
[57] 2017 Genesee Closure Letter, *supra* note 55, at 18, 23.
[58] *Id.* at 20 n.126, 21.
[59] EPA, Integrated Science Assessment for Lead lxxxviii (2013), http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=518908.
[60] Cole, *supra* note 14, at 7.
[61] *See* Select Steel Investigative Report, Attachment 2, at 27.
[62] *See, e.g.*, Preliminary Findings Letter, EPA Administrative Complaint No. 16R-17-R4 at 13 (Dec. 10, 2018), https://www.epa.gov/sites/production/files/2018-12/documents/preliminary-findings-letter-administrative-complaint-no-16r-17-r4.pdf ("2018 Tallassee Closure Letter") (discounting evidence of volatile organic compound concentrations in ambient air near community because "there are no federal standards" for concentrations of these pollutants).

theory has been roundly criticized as effectively "shut[ting] the door" for complainants because a permit could not be granted at all if environmental standards could not be met.[63] Thus, "EPA's [significance] hurdle is legally impossible to meet."[64]

Indeed, EPA's injection of undefined "significance" into a disparate impact assessment can lead and has led to disastrous consequences. EPA's *Select Steel* investigation found that in Genesee County, the county where Flint is located, 8% of children already had elevated blood lead levels (above the then-CDC level of 10microg/dL) and that African-American children there were four times more likely to have very high blood lead levels (over 15 microg/dL) than white children,[65] making the addition of a known lead-emitting facility a source of dangerous impacts disparately suffered by the community. Yet EPA shrugged off the facility's impact on blood lead levels as "de minimis."[66] So too did EPA disregard the lead emissions from the Genesee power plant, about which the community had complained starting in 1992. Decades later, the Flint Water Advisory Task Force found that MDEQ bore "primary responsibility" for the Flint Water Crisis that began in 2014 due, in part, to its "cultural shortcomings that prevent it from adequately serving and protecting the public health of Michigan residents."[67] Had EPA scrutinized—and potentially rectified—these "cultural shortcomings" of MDEQ in the 1990s, instead of letting them fester for decades, the Flint water crisis may have been abated or avoided.

Case study against onerous "causality" requirements: Tallassee and Uniontown, Alabama

The Proposed Rule also seeks to inject two causality requirements into the prima facie case for a disparate impact Title VIII claim. One would require plaintiffs to show a "robust causal link between the challenged policy or practice and a disparate impact on members of a protected class."[68] HUD cites as justification for this element the Supreme Court's desire to "protect[] defendants from being held liable for racial disparities they did not create."[69] The other "proximate cause" element would require plaintiffs to prove that "the complaining party's alleged injury is directly caused by the challenged policy or practice."[70]

HUD's proposed heightened causality requirements, which focus on connections between an individual policy or practice and a discrete injury, are problematic. First, they are undefined and as such, could be used arbitrarily to shut the door on disparate impact claims. Second, they are antithetical to the broad remedial purposes of civil rights anti-discrimination laws such as the

[63] *See* Cole, *supra* note 14, at 10 (arguing that since "[i]t is legally impossible under the [Clean Air Act] for an agency to grant a permit in an attainment area that would result in the violation of the NAAQS [(National Ambient Air Quality Standards)] . . . . EPA's hurdle—that a permit must cause a violation of NAAQS to have an impact—means that, legally, there can never be a successful Title VI claim filed in an [NAAQS] attainment area. EPA has effectively read Title VI out of the equation entirely.").
[64] *Id.*
[65] Select Steel Investigative Report, Attachment 2, at 32.
[66] *Id.* at 31.
[67] Flint Water Advisory Task Force Final Report, *supra* note 26, at 28.
[68] Proposed Rule, *supra* note 2, at 42,858 (emphasis omitted).
[69] *Id.* at 42,855–56 (citing *Inclusive Communities*, 135 S. Ct. at 2523).
[70] *Id.* at 42,859 (emphasis omitted).

Fair Housing Act.[71] Cumulative risk assessments are integral to a "more sophisticated" understanding of effects, and cumulative impacts result from "individually minor but collectively significant actions taking place over a period of time."[72] An artificially narrow "proximate cause" requirement does not logically flow from the Supreme Court's warning that parties should not be liable for disparities they did not create, and could leave civil rights plaintiffs without redress—tragically and ironically—for injuries caused by a host of collectively disastrous harms that tend to work in combination.

Indeed, EPA has arbitrarily imposed an onerous and ill-defined "causality" requirement to disparate impact claims that has led the agency to disregard legitimate allegations of disparate harm. Two locations in Alabama that were the subject of civil rights complaints illustrate this practice.

In 2013, dozens of residents of Uniontown, Alabama filed a complaint with EPA, alleging that the renewal of the permit for the Arrowhead Landfill and the permit modification, allowing an increase of its size by two-thirds, adversely and disparately impacted the surrounding, primarily African American, community. Even before the expansion, the permit authorized 15,000 tons of waste per day, twice the amount permitted at the next largest landfill in Alabama at the time.[73] And the landfill had already received and held 4 million tons of coal ash. The Complaint alleged impacts related to odors, increased population of flies and birds, increased noise from heavy machinery, increased emission of fugitive dust, illnesses, contaminated water, believed degradation of a community cemetery, and decline of property values, about which many community members had previously complained.[74]

Residents had submitted a study showing health impacts, and the record contained evidence that there had been an increase in flies and birds. Even without such evidence, straightforward logic compels a conclusion that renewing (the equivalent of granting) a permit for an enormous landfill, containing toxic coal ash and other industrial waste, causes adverse harms to the surrounding community. And once a finding of disproportionate adverse impact is made, the question shifts to the justification for the action and whether there is a less discriminatory alternative for achieving the objective.

Yet EPA used the cloak of "causality" in 2018 to find no prima facie case of discrimination. EPA ignored record evidence by residents that there had been an increase in pests and a decrease in quality of life—which should have been sufficient evidence of adverse

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[71] *See supra* notes 39–40 and accompanying text; *see also* 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

[72] U.S. EPA, Cumulative Risk Assessment Guidance-Phase I Planning and Scoping at 4 (July 3, 1997) (available from the ELR Document Service, ELR Order No. AD-3708), https://www.epa.gov/sites/production/files/2014-11/documents/frmwrk_cum_risk_assmnt.pdf); *see also* U.S. EPA, Memorandum, Cumulative Risk Assessment Guidance-Phase I Planning and Scoping at 1 (July 3, 1997), https://www.epa.gov/sites/production/files/2015-01/documents/cumulrisk.pdf ("[Today, better methods and data often allow us to describe and quantify the risks that Americans face from many sources of pollution, rather than by one pollutant at a time."); Gina M. Solomon et al., *Cumulative Environmental Impacts: Science and Policy to Protect Communities*, 37 Ann. Rev. Pub. Health 83, 84–85 (2016).

[73] Uniontown Complaint, Attachment 4, at 7–8.

[74] Uniontown Complaint, Attachment 4; Uniontown Closure Letter, *supra* note 38.

harm on its own. And even though ADEM allowed Arrowhead to use "alternates" for daily cover of the landfill, such as coal ash, in violation of state law requiring soil cover, EPA concluded it was "unable to identify any functions" related to that decision that could result in the alleged increased populations of flies and birds.[75]

At bottom, EPA indicated that the absence of "scientific proof of a direct link" compelled it to conclude that there was no evidence that the Alabama Department of Environmental Management's ("ADEM") permitting decisions caused any impact to the community. But the action of ADEM—approving the renewal and modification of the permit—clearly caused the adverse impacts; absent the permit, the facility would not be operating, or absent the permit terms ADEM had set, the facility would be operating with different conditions and requirements.

EPA's determinations that causation could not be established with respect to other parts of the Uniontown complaint were similarly far-fetched. The complainants alleged that they believed the permits interfered with the ability of community members to visit the cemetery because of loud nearby equipment and an acrid odor.[76] EPA nonsensically determined that causation could not be established because the cemetery was not within the operational boundaries of the landfill. But sound and odor do not stop at operational boundaries. EPA further stated that it decided that "it would not investigate substantively the alleged harm of diminution of property values" and, as a result, concluded that there "is insufficient evidence in the record to suggest that ADEM's permitting actions themselves resulted in a sufficiently significant harm with regard to property values."[77] Of course, if an agency not only fails to recognize that the decision to permit the facility directly causes adverse impacts, but also refuses to investigate or consider evidence of an obvious harm, it can and will find no causation.

* * *

In 2017, EPA similarly closed a 2003 civil rights complaint of the Ashurst Bar/Smith Community Organization ("ABSCO") that alleged that ADEM caused disparate adverse impacts when it approved a permit modification to expand a landfill adjacent to a low-income African-American community. In its closure letter, as it did with Uniontown, EPA systematically discounted the various harms alleged in the complaint under the assertion that there was "insufficient evidence in the record to show a causal link" between the permit modification and the alleged harm.[78]

For example, the 2003 ABSCO complaint raised the "alternate" daily cover issue also raised in the Uniontown complaint: ABSCO alleged that ADEM's grant of a waiver from the statutory requirement to use daily soil cover caused harm to the community by increasing exposure to rodents, wild dogs, and other pests, and the record contained evidence that

[75] Letter from Lilian S. Dorka, Dir., U.S. EPA, External Civil Rights Compliance Office, Office of Gen. Counsel, to Marianne Engelman Lado, Yale Law Sch., Envtl. Justice Clinic 15 (Mar. 1, 2018).
[76] *Id.* at 16.
[77] *Id.* at 18.
[78] Letter from Lilian S. Dorka, Dir. External Civil Rights Compliance Office, Office of Gen. Counsel, U.S. EPA, to Marianne Engelman Lado et al., Visiting Clinical Professor of Law, Yale Law Sch. (Apr. 28, 2017).

community members had observed increases in these pests since the 2003 modification.[79] EPA acknowledged that it was "possible" that the permit modification increased these pests, but, despite the record evidence and without further investigation, inexplicably concluded that it "could not establish a causal link between the 2003 permit modification and any changes in animal population numbers."[80] Yet after ABSCO filed a new Title VI complaint regarding ADEM's renewal of the landfill's permit in 2017, EPA did a more searching review and found that the evidence *did* "establish a causal connection" between the alleged harms stemming from the landfill's failure to use proper daily soil cover, but EPA steadfastly refused to make a finding of disparate impact.[81]

Then in 2019, in a distinct court proceeding, a unanimous opinion of the Alabama Court of Civil Appeals found that ADEM's policy of waiving the daily soil cover requirement violated Alabama statute, and ruled in favor of community members that challenged that practice.[82] Had EPA properly investigated the allegation about daily cover first raised in 2003—instead of dismissing it under an onerous "causality" requirement or faulty disparate impact logic—then perhaps the people of Tallassee and Uniontown would not have had to wait 16 years for some of their harms to be redressed.

* * *

As detailed above, by injecting arbitrary, undefined, and unattainable standards into its disparate impact assessments, EPA has dismissed or rejected almost all of the Title VI complaints it has received.[83] HUD's proposal to formally inject analogous heightened, conjured up qualifiers into a functioning disparate impact approach could similarly very well bring enforcement of housing discrimination to a standstill.

IV. Conclusion

As the stories of the undersigned individuals and groups demonstrate, the impacts of segregation persist today in the form of housing, environmental, and health injustices. HUD's Proposed Rule would impose needlessly onerous requirements at the prima facie stage and would prevent fair housing plaintiffs from obtaining any kind of factual investigation or fair hearing of the alleged violations of their civil rights.

Portions of HUD's Proposed Rule parallel EPA's additional requirements related to an element achieving "significance" and causation.[84] EPA's abysmal record of evaluating discrimination claims underscore that the additional requirements HUD proposed to enshrine in

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[79] 2017 Tallassee Closure Letter, *supra* note 35, at 11.
[80] *Id.* at 11–12.
[81] Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., (Dec. 10, 2018) at 20. In its second analysis, EPA found that ADEM's failure to adequately enforce daily cover requirements of the permit did cause harm, but nevertheless failed to find disproportionality based on a faulty analysis of only 3 of the state's 32 municipal solid waste landfills. *Id.*
[82] *Smith v. LaFleur*, No. 2180375, 2019 WL 5091863 (Ala. Civ. App. Oct. 11, 2019).
[83] *See supra* note 49 and accompanying text.
[84] *See supra* Section III.

Title VIII regulations are problematic for the furtherance of civil rights and eradication of discrimination.

We urge HUD to affirm its responsibility to further the goals of the Fair Housing Act, by addressing ongoing discrimination, rather than neglecting one of its core purposes.[85] For these reasons, we request that HUD withdraw its Proposed Rule.

Sincerely,

Earthjustice

By: s/ Suzanne Novak

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Sharmeen Morrison
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On behalf of:

Organizations

Fr. Philip A. Schmitter
Board Member and Civil Rights Contact
St. Francis Prayer Center, Flint, MI

Al Huang
Senior Attorney, Environmental Justice
Natural Resources Defense Council

Sherry Hunter
Thomas Frank
Co-Founders
Calumet Lives Matter

Joseph Kriesberg
President and CEO
Massachusetts Association of Community Development Corporations

Akeeshea Daniels
Maritza Lopez
Co-Chairs
East Chicago Calumet Coalition Community Advisory Group

Nancy C. Loeb
Clinical Associate Professor of Law, Director, Environmental Advocacy Clinic
Bluhm Legal Clinic, Northwestern Pritzker School of Law

Marianne Engelman Lado
Director
Environmental Justice Clinic,
Vermont Law School

Heather McMann
Executive Director
Groundwork Lawrence

[85] HUD's core mission includes "build[ing] inclusive and sustainable communities free from discrimination." *Mission*, HUD, https://www.hud.gov/about/mission (last visited Oct. 17, 2019).

Natalie Barefoot
Director
Environmental Justice Clinic,
University of Miami School of Law

Maria Belen Power
Associate Executive Director
GreenRoots

Trenise Bryant
Adrian Madriz
Housing Organizers
Miami Workers Center

Amy Laura Cahn
Senior Attorney & Interim Director
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Catherine Coleman Flowers
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Individuals

Tara Adams
Esther Calhoun
Akeeshea Daniels
Benjamin Eaton
Denise Ghartey
Phyllis D. Gosa
Lori A. Locklear
Maritza Lopez
Deborah Reade
Ellin Reisner
Errol A. Summerlin
Daniela A. Tagtachian, Esq.

Attachment 1

ST. FRANCIS PRAYER CENTER
1602 EAST CARPENTER RD.
FLINT, MICHIGAN 48505
PHONE: (313) 787-5330

December 15, 1992

Mr. Valdas Adamkus
Administrator, Region V EPA
77 W. Jackson
Chicago, IL 60604

Dear Mr. Adamkus, Kee, and Campbell,

Enclosed please find correspondence to Mr. William Rosenberg and Mr. Herb Tate at the EPA, Washington, DC..

Also enclosed find the petitions signed by over 1600 persons opposed to the Incinerator/Power Plant, Michigan DNR Permit #572-92. We urge you to deny approval of this permit because of significant deterioration of air quality.

Sincerely yours,

Fr. Phil Schmitter

Fr. Phil Schmitter

Sr. Joanne Chiaverini

Sr. Joanne Chiaverini

ST. FRANCIS PRAYER CENTER
1602 EAST CARPENTER RD.
FLINT, MICHIGAN 48505
PHONE: (313) 787-5330

December 15, 1992

Mr. Herb Tate
Environmental Equity
EPA
401 M St. SW
Washington, DC 20460

Dear Mr. Tate,

We turn to you with confidence that you can help us in our desperate situation to stop the granting of Michigan DNR Permit #579-92 for the Incinerator/Power Generating Station proposed by Genesee Limited Partnership at 5300 Energy Drive in Genesee Township, Michigan.

Enclosed is a letter to Mr. William Rosenberg that describes our technical concerns with this incinerator and a few of the procedural concerns.

But we write to you because this is a diabolical example of blatant environmental racism and classism-another time people of color and low income are targeted by the continuing rush for profit by our corporations regardless of who is victimized by the pollution. We are sure you are well aware of the higher percentage of poor and people of color who bear the onus of this pollution while receiving much less adequate health care.

One of the fundamental problems comes from the Incinerator/Plant proposed for Genesee Township on the north side of Carpenter Road. Directly across the street begins the City of Flint (south side of Carpenter Road) where many, many poor and predominantly people of color live, especially 2 low income housing complexes and 4 trailer parks within 1/3 mile.

The hardship of attending the DNR hearing 65 miles away in Lansing was much more a burden to the poor and people of color than for others. When people disagreed with the project they were told by the DNR "you just don't understand the technology; if you did you would welcome the project!" and "you'd better accept this because it's going to fly" from Mr. Shaw, a DNR engineer on the project. One woman who expressed fear of the project was told by a DNR engineer on the Air Quality Control Commission, Mr. Frank Ruswick, "I feel like we failed to make her understand the technology and how safe it is." This Afro-American woman understands the technology perfectly well. This racist put down of her intelligence was typical of the way all of us were treated who opposed the project.

The only public information session that was held in Genesee Township was at Genesee High School five and one half miles away from the site. No buses run there, to this all white neighborhood. Carpenter Road school was not selected, that has a nice auditorium and is a couple hundred yards from Energy Drive and is within walking distance of our poor and people of color.

We believe that our civil rights have been violated and that in addition to any satisfaction we might see in the courts, your office were created to rectify just such injustices. We trust that you will use your authority to prevent the issuing of permit #572-92 and to prevent the further significant deterioration of our air quality on the north end of Flint. Thank you for your prompt assistance.

Please find enclosed petitions with over 1600 signatures of people from people in our area highly opposed to this project.

Sincerely yours,

Fr. Phil Schmitter

Sr. Joanne Chiaverini

ST. FRANCIS PRAYER CENTER
1[illegible] EAST CARPENTER RD.
FLINT, MICHIGAN 48505
PHONE: (313) 787-5330

December 15, 1992

Mr. William Rosenberg
EPA
401 M St. SW
Washington, DC 20460

Dear Mr. Rosenberg,

We appeal to you regarding Michigan DNR Permit # 579-92 for the Incinerator Power Plant proposed by Genesee Limited Partnership at 5300 Energy Drive in Genesee Township, Michigan. We beg you to stop the issuance of this permit by January 4, 1993.

The site selection is in the midst of a highly residential area of 14 schools, 8 mobile home parks, 2 low income housing projects (one of them a HUD housing project) and many blocks of single family dwellings. Even if the proposed technology were absolutely flawless (which we do not concede) the site selection is ruthless, insensitive, dangerous, and only driven by purely economic factors. This is environmental racism.

The proposed fuel can be as much as 100% demolition waste and therefore heavily contaminated with lead, mercury, arsenic, and other pollutants related to pesticides, paint, or treatment with no established technology to really adequately assure such toxic pollutants will not go into the burn and up the stack. The emissions of lead, mercury, CO and NOx, and arsenic coming from the stack will further cause significant deterioration of air quality. No ambient air quality study in the immediate area of the plant has been done; so no adequate comparison will be possible after construction and operation of the incinerator/power station. There is no ambient air testing equipment for what comes out of Energy Drive as it is.

The control technology the DNR is allowing is primarily an electrostatic precipitator with no baghouse and dry scrubber. If this company is serious about the environment they should be required to spend the additional funds to include those safety features. (Given the fact we do not want this at all!)

Trucks will be bringing in the 600 tons/day on a mainly residential street with no sidewalks and our many children will be crossing this dangerous road.

The monitoring will be completely left to the company -"self-monitoring". The company self monitors with computers and then sends a quarterly report to the DNR; the DNR has said they may come once a year to check on the plant. A prototype plant in Grayling, Michigan that burns virgin wood has only operated for a one quarter. Neither the DNR nor the Air Quality Control Commission had read that report when the permit was granted. The plant was over emissions nearly 15% of the time. So we beg the EPA to withhold issuance of the permit for another such incinerator (this burning demolition waste) at least until a 2 or 3 year track record has been established by the Grayling Plant.

No noise study has been done on any level. The hearings were held in Lansing by the DNR making is difficult for people of color and people of low economic status to be heard on this issue. The DNR acted as promoters of this project rather than a neutral technical evaluator of this project.

The chief engineer on this project, Mr. Del Rector, was until recently assistant head of the DNR so you can imagine the "friendly" and uncritical partnership that has been created between the DNR and this company. The hearing at which the Air Quality Control Commission approved this permit pending EPA approval within 33 days, was a punishing, ludicrous caricature of a reasonable procedure. WE had to rent a bus, leave Flint at 8:00 A.M. and go to Lansing for the hearing. The commissary closed at 4 P.M.; we never got on the agenda until seven forty that evening. We had 3 diabetics (one who needed his insulin quickly) in the group and begged the commission to postpone the hearing till next month. The overriding concern was "will this be a problem for the company?" Of course it was, so the hearing continued until 1:00 A.M., the vote being taken at 12:40 A.M.. I hardly think rationality prevails after sitting in a stuffy room from 9 A.M. til 12:40 A.M. the next morning. Consideration of one of our speakers was declined but the other side were afforded all opportunities to speak including one unrecognized by the chair. Mr. Bill Ayre, the township supervisor, was allowed to speak last at both the October 27th hearing and the December 1st hearing. A coincidence? We think not.

We would be happy to supply any further information you need. We beg you to stop this project that will affect the health and safety of all of us, especially our children for the next 35 years. Please stop the issuance of this permit.

Please find enclosed petitions signed by more than 1600 very concerned citizens opposed to this project. We hope you will not treat this lightly.

Gratefully yours,

Fr. Phil Schmitter

Sr. Joanne Chiaverini

Attachment 2

U.S. Environmental Protection Agency
Office of Civil Rights

INVESTIGATIVE REPORT

for

Title VI Administrative Complaint File No. 5R-98-R5
(Select Steel Complaint)

I. INTRODUCTION

On August 17, 1998, the United States Environmental Protection's ("U.S. EPA") Office of Civil Rights ("OCR") accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini against the Michigan Department of Environmental Quality ("MDEQ") pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. ("Title VI"), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleged that MDEQ's issuance of a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee County would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. *See* Letter from Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, to Diane [sic] E. Goode, Director, US EPA OCR (June 9, 1998) ("Title VI Complaint").[3]

In addition, Fr. Schmitter and Sr. Chiaverini provided information in an earlier letter to Kary Moss of the Maurice & Jane Sugar Law Center. Letter from Fr. Schmitter and Sr. Chiaverini to Kary Moss (April 22, 1998). That letter was transmitted to the EPA and it expressed a number of concerns over the proposed Select Steel facility.

Fr. Schmitter and Sr. Chiaverini also submitted information regarding alleged discrimination in an earlier letter to EPA Region V. Letter from Fr. Schmitter and Sr. Chiaverini to David Ullrich, Acting Regional Administrator, EPA Region V (April 29, 1998) ("April 29th Letter"). This letter enclosed the testimony that Fr. Schmitter and Sr. Chiaverini provided to MDEQ at its April 28, 1998 public hearing on the proposed Select Steel permit. On May 15, 1998, David Ullrich forwarded the April 29th Letter to EPA because it expressed concerns about Title VI matters which are the responsibility of EPA to resolve.

Fr. Schmitter and Sr. Chiaverini also alleged that MDEQ violated Title VI in a June 9, 1998 petition to EPA's Environmental Appeals Board ("EAB"). Letter from Fr. Schmitter and Sr. Chiaverini to EAB (June 9, 1998) ("EAB Petition"). The EAB denied review of the Title VI claim on jurisdictional grounds citing EPA's responsibility for ensuring Agency compliance with Title VI. *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Sept. 10, 1998) ("EAB Decision"). The EAB also denied review of the other claims regarding the alleged deficiencies of the Select Steel permit because the petition identified neither clear error in MDEQ's decision making processes nor an important policy consideration that justified EAB review. 40 C.F.R. § 124.19(a).

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[3] The complaint filed by Fr. Schmitter and Sr. Chiaverini is supported by the community group Flint-Genesee United for Action, Justice, and Environmental Safety. Letter from Lillian Robinson, President, and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice, and Environmental Safety, to Patrick Chang, U.S. EPA (August 1, 1998); Telephone Interview with Fr. Schmitter, Sr. Chiaverini, and Ms. O'Neal (Sept. 17, 1998).

The MDEQ has received, and continues to receive, EPA financial assistance and, therefore, is subject to the requirements of Title VI and EPA's implementing regulations.[4]

[4] The $2.3 million in air grants for FY98 were awarded by EPA to MDEQ via grant A005711-98 (awarded on Sept. 30, 1997). There were three amendments: A005711-98-1 (Feb. 3, 1998); A005711-98-2 (April, 24, 1998); and A005711-98-3 (Sept. 21, 1998).

II. ALLEGATIONS

A. Allegation Regarding Air Quality Impacts

In the Title VI Complaint, Fr. Schmitter and Sr. Chiaverini allege that MDEQ's issuance of the Select Steel permit will result in "grievous discriminatory effects" and that a "disparate burden of pollution will fall upon a group of minority . . . people." Title VI Complaint at 1.

In their April 29th letter, Fr. Schmitter and Sr. Chiaverini stated they were sending the information "out of deep concern that another Title VI Civil Rights Violation is in the making, as the Michigan Department of Environmental Quality rushes to grant" the Select Steel permit in an "area near high concentrations of minority . . . residents." In that same letter, Fr. Schmitter and Sr. Chiaverini request relief from "the disregard the MDEQ has for considering high concentrations of minorities around potential sources of pollution."

In their EAB petition, Fr. Schmitter and Sr. Chiaverini make the general allegation that MDEQ's decision to grant this permit violates Title VI of the Civil Rights Act because "the vast majority of the people within 3 miles of the proposed site are minority Americans and will be burdened with a disparate impact of pollution in an already deeply polluted area." EAB Petition at 1.

In the testimony enclosed in the April 29th Letter, in their EAB petition, and during EPA's September 17th and 29th interviews, Fr. Schmitter and Sr. Chiaverini raised the following concerns about the disparate impact resulting from specific potential emissions from the proposed Select Steel facility:

1. volatile organic substances ("VOCs") (April 29th Letter, EAB Petition, Interview with Fr. Schmitter, Sr. Chiaverini, Ms. O'Neal, in Flint, MI (Sept. 29, 1998));

2. lead, including the effect of increased emissions will have on the children of Flint (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998));

3. manganese (Interview with Complainants (Sept. 29, 1998));

4. mercury (Interview with Complainants (Sept. 29, 1998)); and

5. dioxin (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998)).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

Complainants felt that the permit was "hastily sped through, and shepherded by the DEQ permit process" to avoid a potentially adverse decision in ongoing litigation over another facility in the area, the Genesee Power Station ("GPS").[5] Title VI Complaint. In the GPS case, MDEQ appealed a trial court's order that (1) a risk assessment must be performed before a major air pollution source may be permitted, (2) notice of the risk assessment and an opportunity to comment must be provided, and (3) all affected parties must be given a meaningful opportunity to participate in the permit process. *NAACP-Flint Chapter v. MDEQ*, No. 95-38228-CV (Mich. Cir. Ct. Genesee Cnty. July 28, 1997) (order granting plaintiffs' motion for a permanent injunction). Complainants in the Select Steel case, then, argued that MDEQ issued the PSD permit to Select Steel on an expedited basis to avoid having to perform those tasks in the event the Court of Appeals upheld the trial court's decision. *See* Title VI Complaint; Interview with Complainants (Sept. 29, 1998).

They indicated that the initial news about the proposed Select Steel facility came from an article published in The Flint Journal on December 6, 1997. Tom Wickham, *Steel Mill Eyes Local Site*, The Flint Journal (December 6, 1997). The story raised some concerns for the Complainants, so in January or February 1998, they contacted MDEQ's Thermal Process Unit Supervisor. During the course of that conversation, Complainants allege that the Supervisor said that the Select Steel permit process would take "a long time." Based on that conversation, Complainants felt that MDEQ misled them into thinking it would be at least a year until the permit was issued, but it was ultimately issued four months later, on May 27, 1998, shortly before the June 9, 1998 oral argument in the GPS case.

2. Relationship Between Select Steel and MDEQ

Complainants also believed that the integrity of the permitting process was compromised because Select Steel retained Dhruman Shah, a former MDEQ employee, as their consultant. From 1979 to 1995, Mr. Shah was employed by MDEQ in various positions in which he reviewed permit applications for compliance with state and federal requirements. After leaving MDEQ, Mr. Shah became a Senior Project Engineer for NTH Consultants, Ltd. Select Steel hired NTH Consultants to prepare and submit their PSD application to MDEQ. NTH Consultants, in turn, selected Mr. Shah as one of its engineers on the Select Steel project. Complainants felt that the relationship

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[5] Flint-Genesee United for Action, Justice, and Environmental Safety, and the NAACP-Flint Chapter filed an action in the Circuit Court for the County of Genesee against MDEQ concerning the issuance of a permit for the construction of GPS, a wood waste fired steam electric plant. MDEQ appealed. The Michigan Court of Appeals accepted the case and a stay of the Circuit Court's decision was issued. *NAACP-Flint Chapter v. MDEQ*, No. 205-264 (Mich. Ct. App. Oct. 2, 1997) (ordering stay of permanent injunction pending outcome of appeal).

between Select Steel's consultant and MDEQ led to some improprieties in the permitting process. *See* Telephone Interview with Complainants (Sept. 17, 1998).

3. Notice of Public Hearing

In addition, Complainants raised issues about the notice for the public hearing on the Select Steel permit application conducted by MDEQ. MDEQ published notices about the public hearing in The Flint Journal on March 27, 1998 and March 28, 1998, in The Suburban News on March 29, 1998, and in The Genesee County Herald on April 1, 1998. Complainants felt that notifications published in newspapers were not sufficient to inform their community about the public hearing. Complainants stated that few members of their community receive newspapers because they cannot afford to subscribe and because no one would deliver the newspapers to those areas. Moreover, Complainants alleged that MDEQ was aware of the insufficiency of newspaper notice because Complainants noted that members of the community did not have ready access to newspapers during the course of the GPS litigation. *See* Telephone Interview with Complainants (Sept. 17, 1998). Consequently, Complainants felt that MDEQ should have done more to notify the community about the public hearing. *See id.*

MDEQ mailed letters to some members of the community, including Fr. Schmitter and Sr. Chiaverini, notifying them about the public hearing. Complainants argued that MDEQ should have conducted a broader mailing that encompassed larger portions of the community. *See id.*

4. Location of Public Hearing

Complainants also alleged that the location of the public hearing made it difficult for minority members of the community to attend. MDEQ held the hearing at the Elizabeth Ann Johnson (Mount Morris) High School, 8041 Neff Road, Mount Morris, which is located approximately two miles from the site of the proposed facility. Complainants felt that the hearing should have been held at Carpenter Road Elementary School, 6901 Webster Road, Flint, Michigan, which is also located approximately two miles from the proposed site. *See* Telephone Interview with Complainants (Sept. 17, 1998). Carpenter Road Elementary School, however, is located south-east of the proposed site in a predominantly minority area, whereas Mount Morris High School is located north-west of the proposed site in a predominantly white area.[6]

[6] No concerns were raised about the manner in which the public hearing itself was conducted. *See* Telephone Interview with Complainants (September 17, 1998).

III. METHODOLOGY

In order to assure that EPA had the necessary information to assess the allegations raised by Complainants, the Agency undertook a comprehensive effort to collect data. That effort began by gathering all of the information that the Agency had in its possession relevant to the complaint. Then, an investigator conducted a telephone interview on September 17, 1998 with Complainants, including Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center; Lillian Robinson, President, Flint-Genesee United for Action, Justice, and Environmental Safety; and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice and Environmental Safety.

That was followed-up by a visit to Genesee County, Michigan and another interview with Fr. Schmitter, Sr. Chiaverini, and Janice O'Neal on September 29, 1998. That same day, investigators conducted an interview with representatives of the local health department, including Brian McKenzie, Jan Hendricks, and Toni McCrumb, Genesee County Health Department. The next day, the investigators collected documents from the Complainants.

On October 15, 1998, investigators visited Lansing, Michigan and collected documents from MDEQ. The next week, on October 21, 1998, investigators returned to Lansing and interviewed employees of MDEQ, including Brian Culham, Environmental Quality Analyst, Air Quality Division District Office; Dennis Drake, Chief, MDEQ Air Quality Division; Susan Robertson, State Assistant Administrator, MDEQ; Hien Nguyen, Permit Engineer, MDEQ; Lynn Fiedler, Supervisor, MDEQ Air Quality Division Permit Section; Robert Sills, Toxicologist, MDEQ; and Jeff Jaros, Modeling and Meteorology Unit, MDEQ.

Throughout the information collection effort, EPA was performing analyses on the available data. Regarding VOC-related concerns, EPA undertook a two-pronged approach that considered VOCs in their role both as precursors to ozone and, for some VOCs, as hazardous air pollutants. For the former approach, EPA examined the surrounding region to determine whether it satisfied the federal ambient air quality standards for ozone. Then, the Agency studied the additional contribution of ozone precursors from the proposed Select Steel facility to determine how those emissions would affect the region's compliance with the National Ambient Air Quality Standards ("NAAQS"). For the latter approach, reviewed MDEQ's analysis of Select Steel's potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory facilities, the Genesee Power Station, and other major sources in the surrounding area.

Similarly, for other hazardous air pollutants, an analysis of the distribution of airborne toxic emissions was conducted, based on the information presented in the permit application and MDEQ documents.

To evaluate lead emissions, EPA evaluated the contribution of airborne lead from the proposed facility and the NAAQS for lead. In addition, EPA examined health data from the community surrounding the proposed facility. Particular attention was paid to children's lead exposures based on Complainants' allegation that "'the children of Flint are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children'." EAB Petition (quoting Dr. Rebecca Bascomb, M.D.). The Genesee County Health Department submitted information about blood lead levels in local children. MDEQ provided an analysis of lead deposition that they conducted in response to comments received during the permitting process. EPA gathered that data and analyzed it in light of the complaint.

To assess the allegations concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The Agency then organized the information to determine how the process had been conducted and whether any problems arose.

IV. POSITION STATEMENT FROM THE RECIPIENT

A. Allegation Regarding Air Quality Impacts

MDEQ responded to the Title VI complaint on September 18, 1998. *See* Michigan Department of Environmental Quality's Response to the St. Francis Prayer Center Title VI Complaint of June 9, 1998 Regarding Select Steel at 1 (Sept. 18, 1998) ("MDEQ Response to Complaint"). MDEQ argued that an analysis of the air quality impacts of the proposed Select Steel facility should be limited to the impacts that fall within one mile of the site. Beginning from that position, MDEQ found that the population within 0.5 miles of the site is 88.5-93.1% white and 4.4-7.7% black. Within one mile, MDEQ found that the population is 93.3-94.3% white and 3.8-4.2% black. MDEQ stated that inclusion of populations beyond one mile was "virtually irrelevant." *Id.* at 2. MDEQ noted that the 0.5 mile and one mile population number show no disparate impact and that Michigan's population is 83.4% white and 13.3% black. In addition, MDEQ argued that "the levels of pollution emitted by Select Steel are safe for everyone."[7] *Id.* MDEQ concluded that "there is no evidence that the granting of a permit for Select Steel has had any disparate impact on minorities." *Id.* at 3.

1. VOCs

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini raise concerns that the Select Steel permit will allow VOC emissions to go unmonitored for the first eighteen months of the mill's operation. MDEQ felt that VOC emissions would not pose a problem. The Permit Engineer believed that VOC emissions from the proposed facility would be comparable to VOC emissions from one-gallon of paint. *See* Interview with Hien Nguyen (Oct. 21, 1998).

2. Lead

In their EAB petition, Fr. Schmitter and Sr. Chiaverini alleged that Select Steel's permit was deficient because it lacks a monitoring requirement for lead. In response to the EAB Petition, MDEQ stated the technology that would allow continuous monitoring of lead emissions does not exist. In the absence of such technology, MDEQ chose to ensure Select Steel's compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies the requirements of best available control technology ("BACT").

MDEQ determined that "even with the addition of the lead proposed to be emitted by Select Steel, the lead concentrations would be more than ten times lower than the National Ambient Air Quality Standards" of 1.5 micrograms per cubic meter (quarterly average). Response of the Michigan Department of Environmental Quality to the Petition of the St. Francis Prayer Center at

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[7] MDEQ noted, "'Safe' does not mean risk free," citing *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). MDEQ Response to Complaint at 2 n.2.

2, *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Aug. 19, 1998) ("MDEQ Response to PSD Appeal").

In the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that blood lead levels in children living in the vicinity of the proposed steel mill are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children." EAB Petition at 1. In response, MDEQ, however, cites a blood lead level study it conducted that indicates the "level of concern" for lead is 10 micrograms per deciliter ("μg/dL"). Robert Sills, MDEQ, *Evaluation of the Potential Dry Deposition and Children's Exposures to Lead Emissions from the Proposed Select Steel Facility*, at 2 (May 15, 1998) ("*BLL Study*"). At blood lead levels above this threshold, children's development and behavior may be adversely affected. *See id*.

MDEQ stated that it conducted the *BLL Study* to estimate the potential for air deposition of lead from Select Steel into soil around the proposed facility. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios, in each instance comparing current estimated background blood lead levels (alternative "a") to estimated blood lead levels after adding in Select Steel's projected emissions (alternative "b"). *See id.*

3. Manganese

In the permit application, Select Steel proposed a manganese emission limit of 0.24 lb/hr which resulted in ambient air impacts greater than the initial threshold screening level (ITSL) of Michigan Air Toxics Rule 230. Mich. Admin. Code r. 336.1230 ("Air toxics from new and modified sources"). The ITSL for manganese is 0.05 micrograms per cubic meter on a 24 hour basis. MDEQ notified Select Steel of this deficiency in a letter dated February 5, 1998. To correct this deficiency, Select Steel proposed to enclose the roof monitor above the electric arc furnace ("EAF"), and install a hood and vent the captured emissions to the EAF baghouse. Letter from John F. Caudell, NTH Consultants, to Hien Nguyen, MDEQ (Feb. 20, 1998). The size of the baghouse was increased from 350,000 actual cubic feet per minute ("acfm") to 400,000 acfm to accommodate the added flow from the new hood. In addition to the added control equipment, MDEQ imposed a BACT emission limit of 0.054 lbs/hr based on stack test data contained in another permit application (Republic Steel). The proposed changes resulted in a maximum impact on the ambient air of 0.03 micrograms per cubic meter, which is below the level specified by the State of Michigan as protective of human health for manganese. Air Quality Division, MDEQ, *Select Steel Corporation of America, Questions-and-Answers Document*, at 2 (April 28, 1998). MDEQ felt that those requirements for manganese from steel and iron mills are very strict. Interview with Hien Nguyen (Oct. 21, 1998).

4. Mercury

MDEQ stated that as a result of public comments, it requested additional analysis of mercury emissions. Briefing on Select Steel Air Use Permit (undated); Interview with Dennis Drake (Oct. 21, 1998). Because the facility is in the Mott Lake Watershed and could impact mercury levels in fish, the analysis supported the reduction of the mercury emission limit from 0.05 pound per hour in the draft permit to 0.005 pound per hour in the final permit. MDEQ personnel indicated that the mercury emission limit is the lowest of any permit issued for mini-mills and noted that most permits in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse have no mercury limits at all. Interview with Hien Nguyen (Oct. 21, 1998).

5. Dioxin

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that the permit allows dioxin emissions to be unmonitored for the first eighteen months of the mill's operation. MDEQ responded that it did not require dioxin monitoring because continuous emissions monitoring systems ("CEMS") for dioxin do not exist. MDEQ Response to PSD Appeal at 6. MDEQ also claimed that EPA conducted research on American electric arc furnaces and concluded that dioxin emissions are not a concern in the operation of such furnaces. EPA reportedly found that American electric arc furnaces do not use chlorinated solvents in the melting process, that the electric arc furnaces are operated at very high temperatures, and that radiant heat from electricity (rather than coke combustion) is used to melt the scrap metal.[8] MDEQ Response to PSD Appeal at 7; Air Quality Division, MDEQ, *Select Steel Corporation of America, Response to Comments Document* at 8 (May 27, 1998).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

MDEQ argues that Complainants' allegation that it accelerated the issuance of the permit in order to avoid consequences of a potentially adverse decision the GPS case is incorrect because (1) the Circuit Court's decision in the GPS case "expressly dismissed all disparate impact claims against the MDEQ" and (2) the Michigan Court of Appeals stayed the Circuit Court's decision pending the outcome of the appeal. MDEQ Response to Complaint at 1.

In addition, according to MDEQ staff, the five months that lapsed between the submission of the permit application and the issuance of the permit was fairly typical. Among the last twenty-six

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[8] The U.S. EPA has stated, in part, "No testing of CDD/CDF emissions from U.S. electric arc furnaces has been reported upon which to base an estimate of national emissions." Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was 242 days. The average time between the receipt of a complete application and approval was only 49 days. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years).

2. Relationship Between Select Steel and MDEQ

Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interviews with Dennis Drake and Robert Sills (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including the Permit Engineer and Thermal Process Unit Supervisor, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

3. Notice of Public Hearing

MDEQ argued that it went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998. Regarding direct notification about the hearing, MDEQ limited its mailings because they believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998).

4. Location of Public Hearing

To select a site for the public hearing, MDEQ considered a number of criteria: (1) proximity to proposed facility, (2) sufficient capacity for attendees, (3) rental cost, (4) other accommodation-related considerations (*e.g.*, lighting, acoustics, adjacent rooms), and (5) availability. Interviews with Lynn Fiedler and Brian Culham (Oct. 21, 1998). For the public hearing on the Select Steel permit application, MDEQ expected up to 200 attendees, which limited the possible venues for the hearing. Interview with Susan Robertson (Oct. 21, 1998).

A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8, 1997). The Air Quality Division Hearing Officer indicated that the first location she contacted was the Carpenter Road School. Other MDEQ employees felt that Carpenter Road School did not have adequate facilities for the Select Steel public hearing. Interviews with Brian Culham and Lynn Fiedler (Oct. 23, 1998). MDEQ also contacted the Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ felt that the administration of those schools seemed averse to hosting a controversial hearing. Interviews with

Susan Robertson and Lynn Fiedler (Oct. 21, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility, which they believed was a reasonable site. Interview with Lynn Fiedler (Oct. 21, 1998).

V. FINDINGS OF FACT AND STATUTORY/REGULATORY PROGRAMS

A. Allegation Regarding Air Quality Impacts

1. Background

a. Proposed Select Steel Corporation of America Facility

The proposed Select Steel facility is a steel mini-mill which is expected to produce 43 tons per hour of specialty steels. It will process scrap steel by "melting the scrap" in an electric arc furnace. The liquid steel is then transferred into a ladle furnace where it is reheated and chemically adjusted to required specifications. The molten steel is then cast and water-cooled in a mold to the desired shape.

The proposed Select Steel facility will be located near the boundary of census tract 122.01 within a 53 acre land parcel at the southwest corner of the intersection of Lewis Road and East Stanley Road, in Genesee County, Michigan, 48485. The facility will be located in Genesee County, Air Quality Control Region 122, *see* 40 C.F.R. § 81.195, less than one mile from the northern boundary of the city of Flint, Michigan at a latitude of 43° 6 '9" and longitude of 83° 40' 48".

The Select Steel facility is a major stationary source with the "potential to emit" 100 tons per year or more of the criteria pollutants, oxides of nitrogen ("NOx"), carbon monoxide ("CO"), particulate matter ("PM"), and lead. The facility is subject to the PSD regulations, 40 C.F.R. § 52.21, which require the installation of BACT for the four pollutants mentioned above. The facility is also subject to MDEQ rule 702 and 230 which requires the installation of BACT for VOC's.

The Select Steel Corporation of America submitted its initial PSD permit application under the Clean Air Act to MDEQ for the proposed mini-mill on December 30, 1997. MDEQ reviewed the application and sent a letter of deficiencies in the permit application on February 5, 1998, and requested additional information be submitted. Select Steel submitted their response on February 20, 1998. Changes and selection of BACTs for the criteria pollutants were made, including provisions to address the ambient air impacts of toxic air contaminants as required by MDEQ rule 230. Select Steel selected BACT for PM/PM10, NOx, CO, and VOCs. EPA reviewed the permit and supporting information (*e.g.*, staff report, BACT analysis, previous BACT determinations) and submitted comments during the public comment period. MDEQ approved the Select Steel permit on May 27, 1998.

b. Proximate Population Characteristics

In the 1990 Census, the total population of Michigan was 9,295,297 with 17.6 % minority population. The complaint alleges that minority populations within 3 miles of the proposed Select Steel will bear a "disparate impact of pollution." At one mile from a point location representing

the approximate center of the facility land parcel, the population is 13.8% minority, at two miles it is 37.2% minority, at 3 miles it is 51.1% minority, at 4 miles it is 55.2% minority. See Table II: EPA Estimates of Population Characteristics Near Proposed Site.

c. Air Quality Regulatory Programs

i. Overview of National Ambient Air Quality Standards

The Clean Air Act ("CAA") requires the Administrator of U.S. EPA to publish primary and secondary NAAQS for criteria air pollutants. Section 109 of the CAA, 42 U.S.C. § 7409. NAAQS are health-based standards which are established by the Administrator as necessary to "protect the public health" and must allow for an adequate margin of safety. Section 109(b) of the CAA, 42 U.S.C.§7409(b).

Under section 107(d) of CAA, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality meets or does not meet the NAAQS for each listed pollutant, or where the air quality cannot be classified due to insufficient data ("unclassifiable"). An area that meets the NAAQS for a particular pollutant is termed an "attainment" area, and an area that does not is termed a "nonattainment" area. Among the listed criteria air pollutants are ozone and lead.

NAAQS, when met, provide public health protection with an adequate margin of safety, including protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants. EPA recognizes that there is no discernible threshold of physiological effects identified for any of the NAAQS pollutants and that there is a wide variability of responsiveness among individuals. EPA further recognizes, however, that setting of the NAAQS ultimately requires public health policy judgments of the Agency as to when physiological effects become medically significant and a matter of public health concern.

ii. Overview of Prevention of Significant Deterioration (PSD) Standards

The Clean Air Act's PSD program applies to all areas of the country designated as "attainment" or "unclassifiable" relative to the NAAQS. CAA section 161, 42 U.S.C. § 7471. Genesee County is classified as an attainment area for all criteria pollutants except ozone. Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of "nonattainment" has been superseded by a determination that Genesee County was meeting the old ozone standard.

Under the Clean Air Act, each state must include a PSD program in its state implementation plan. CAA sections 110(a)(2)(C) and 161; 42 U.S.C. §§ 7410(a)(2)(C) and 7471. Among other things, a PSD program must ensure that new major stationary sources employ the best available control technology to minimize the emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. §§ 52.21(j)(2) and 51.166(j)(2). The statute gives permitting authorities substantial discretion to determine BACT in a manner consistent with the environmental protection goals of the PSD program, requiring consideration of "energy, environmental, and economic impacts." CAA section 169(3); 42 U.S.C. § 7469(3).

If a state does not submit an approvable PSD program, the federal PSD regulations at 40 C.F.R. § 52.21 governing permit issuance apply. EPA may in turn delegate its authority to the state to issue federal PSD permits. *See* 40 C.F.R. § 52.21(u). Whether EPA or a delegated state actually issues the permit, the appeal of a federal PSD permit is governed by the regulations at 40 C.F.R. Part 124.

Because Michigan's state implementation plan lacks an approved PSD program, the applicable requirements governing the issuance and appeal of PSD permits in Michigan are the federal PSD regulations at 40 C.F.R. § 52.21 and Part 124. *See* 40 C.F.R. § 52.1180. On September 10, 1979, pursuant to 40 C.F.R. § 52.21(u), EPA Region V delegated its authority to implement and enforce the federal PSD program to the State of Michigan. *See* 45 Fed. Reg. 8348 (1980). Although EPA Region V delegated administration of the PSD program in Michigan to the State, PSD permits issued by MDEQ follow the requirements in 40 C.F.R. § 52.21 and Part 124.

Having delegated its authority to administer the federal PSD program to Michigan, the relationship between EPA Region V and the MDEQ is an arms-length one. EPA Region V exercises careful oversight of the PSD program by reviewing permit applications and commenting where appropriate. Where the state issues a deficient permit, EPA Region V may appeal the permit to the Environmental Appeals Board.

The proposed Select Steel facility is a major stationary source with the "potential to emit" 100 tons per year or more of a regulated pollutant. In addition, the facility is proposed to exceed the "significant emission rate" as defined in the federal regulations for NOx, CO, PM, and lead. *See* 40 C.F.R. § 52.21(b)(23). Since Genesee County is designated attainment for these pollutants, the Select Steel facility is subject to PSD review for these pollutants. 40 C.F.R. § 52.21(i). The proposed Select Steel facility also has the potential to emit 38 tons per year of VOCs and sulfur dioxide. These levels of emissions are <u>not</u> considered "significant" under the PSD regulations. 40 C.F.R. § 52.21(b)(23). As a result, the facility need not undergo PSD review for these pollutants.

Select Steel submitted a BACT analysis as part of its December 30, 1997 PSD permit application. The analysis included a "top down" approach consisting of five steps to evaluate and determine BACT:

1. Identify all control technologies;
2. Eliminate technically infeasible options;
3. Rank remaining control technologies;
4. Evaluate most effective controls and document results; and
5. Select BACT.

2. Specific Criteria Pollutants of Concern

Air dispersion modeling was conducted by the Select Steel facility to support a December 1997 PSD permit application filed with MDEQ. Some changes were made to the permit at the request of MDEQ, and subsequent modeling was conducted by MDEQ. The air quality model and the methodology used followed the recommendations in EPA's Guideline on Air Quality Models (Revised), codified at 40 C.F.R. Part 51, Appendix W. The modeling conducted for the criteria pollutants (*i.e.*, NOx, SO2, PM10, and CO) showed predicted impacts well below the NAAQS.

The largest point of particulate air releases at the plant will occur at the electric arc furnace air pollution control equipment, described as the electric arc furnace or "melt shop" baghouse. Most fugitive emissions occurring within this area are captured and ducted to the baghouse for treatment. Other sources of criteria pollutants in the facility include: the lime silo; the baghouse dust silo; the boiler and the reheat furnace; nearby sources including the ladle dryer, preheaters, and dump station; tundish dump area, and material handling operation baghouses; and fugitive emissions from roads and the slagging operations. The location of the baghouse in at the northeast corner of melt shop. Carbon monoxide and VOC emissions will occur primarily at the output of the direct evacuation system canopy exhaust.

a. Volatile Organic Compounds

i. General Information

Volatile organic compounds are common reactive hydrocarbons which, together with nitrogen oxides, form ozone. The formation of ozone is a complex function of emissions and meteorological patterns and is the result of two coupled processes: (1) a physical process involving the dispersion and transport of the precursors (*i.e.*, VOCs and NO_x); and (2) the photochemical reaction itself. Both processes are strongly influenced by meteorological factors such as dispersion, solar radiation, temperature, and humidity. At ground-level, ozone is the prime ingredient of smog.

Short-term (1-3 hours) and prolonged (6-8 hours) exposures to ambient ozone concentrations have been linked to a number of health effects of concern. For example, increased hospital

admissions and emergency room visits for respiratory causes have been associated with ambient ozone exposures.

Exposures to ozone can make people more susceptible to respiratory infection, result in lung inflammation and aggravate preexisting respiratory diseases such as asthma. Other health effects attributed to short-term and prolonged exposures to ozone, generally while individuals are engaged in moderate or heavy exertion, include significant decreases in lung function and increased respiratory symptoms such as chest pain and cough. Children active outdoors during the summer when ozone levels are at their highest are most at risk of experiencing such effects. Other at-risk groups include outdoor workers, individuals with preexisting respiratory diseases such as asthma and chronic obstructive lung disease, and individuals who are unusually responsive to ozone. In addition, long-term exposures to ozone present the possibility of irreversible changes in the lungs which could lead to premature aging of the lungs and/or chronic respiratory illnesses. *See* U.S. EPA, National Air Pollutant Emission Trends, 1900-1996, EPA-454/R-97-011 (1997) ("Trends Report").

EPA promulgated a new NAAQS for ozone on July 18, 1997 (62 Fed. Reg. 38856). The new ozone standard is set at 0.08 parts per million and is calculated over an 8-hour averaging period. It replaces the old ozone standard of 0.125 parts per million based on a 1-hour averaging period.

Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of "nonattainment" has been superseded by a determination that Genesee County was meeting the old ozone standard.

On July 18, 1997, EPA established a new standard, effective on September 16, 1997, based on an 8-hour average. 62 Fed. Reg. 38856 (July 18, 1997). EPA examined recent air monitoring data (from 1995-97) from Genesee County in the context of investigating this complaint and has determined that Genesee County is also currently meeting the new 8-hour ozone standard (although official designations will not be made until the year 2000 and will be based on monitoring data from 1997, 1998, and 1999).

ii. Select Steel Permit Conditions for VOCs

The proposed Select Steel facility's potential to emit VOC's is <u>not</u> considered "significant" under the PSD regulations. However, the proposed facility is also subject to MDEQ rules 702 and 230 which requires the installation of BACT for VOCs.

In response to MDEQ concerns set forth in the deficiency letter of February 5, 1998, Select Steel reviewed additional information in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse ("the Clearinghouse") and found an emission

factor lower than initially proposed in the permit application. As a result of this finding, the VOC emission estimate was lowered to 32 ton/yr from the electric arc furnace. Additional controls to reduce carbon monoxide emissions will also serve to reduce VOC emissions. MDEQ approved the BACT determination in permit condition 19. EPA Region V did not object to the BACT determination.

The permit issued by MDEQ gives Select Steel one year from plant start-up to implement a continuous emissions monitoring system ("CEMS") for VOCs. The regulations give the permitting authority discretion in implementation of post construction monitoring. 40 C.F.R. § 52.21(m)(2). Pre-application monitoring of VOCs is not mandatory because Select Steel's potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2).

b. Lead

i. General Information

Lead accumulates in the blood, bones, and soft tissues and can also adversely affect the kidneys, liver, nervous system, and other organs. Excessive exposure to lead may cause neurological impairments such as seizures, mental retardation, and/or behavioral disorders. Even at relatively low doses lead exposure is associated with changes in fundamental enzymatic, energy transfer, and homeostatic mechanisms in the body, and fetuses and children may suffer from central nervous system damage. Recent studies show that lead may be a factor in high blood pressure and subsequent heart disease and also indicate that neurobehavioral changes may result from lead exposure during a child's first years of life. *See* Trends Report.

In its 1978 final decision of the lead NAAQS, EPA estimated a maximum safe blood lead level and stated, ". . . the Agency should not attempt to place the standard at a level estimated to be at the threshold for adverse health effects but should set the standard at a lower level in order to provide a margin of safety. EPA believes that the extent of the margin of safety represents a judgment in which the Agency considers the severity of reported health effects, the probability that such effects may occur, and uncertainties as to the full biological significance of exposure to lead." 43 Fed. Reg. 46247 (Oct. 5, 1978).

Since the lead NAAQS was set in 1978, ambient air concentrations of lead have declined by 97 percent, which tracks well with the decline of 98 percent in overall emissions since 1975. *See* Trends Report. Most decreases in emissions were the result of the phase-out of leaded gasoline.

ii. Select Steel Permit Conditions for Lead

The significance threshold for lead emissions under PSD is 0.6 tons per year ("tpy"). The proposed Select Steel facility's controlled maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. Select Steel concluded that 2.8% of the particulate emissions from the electric arc would be lead. MDEQ chose to ensure Select Steel's compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies BACT. The permit also mandates monitoring of baghouse operating parameters to ensure proper functioning, performance of a stack test to verify that lead emissions do not exceed the permit limit, visible emissions monitoring, and several maintenance and contingency measures. The lead BACT emission limit of 0.15 pounds per hour was approved by MDEQ in permit condition 18.

iii. Other Local Assessments of Lead in the Environment

In its review, MDEQ conducted an analysis of the impact of lead emissions from the proposed facility in addition to the NAAQS determination. This analysis assessed the impact on children who might be exposed to soil or household dust whose concentrations of lead would increase as a result of atmospheric emissions. MDEQ conducted this analysis based on issues raised during the permit public comment period and at the public hearing, MDEQ Response to PSD Appeal at 2, and published the results in its *BLL Study*, dated May 15, 1998.

The MDEQ analysis used a model of exposure to lead from several pathways (inhalation as well as ingestion of soil, house dust and water) to predict what fraction of a hypothetical group of children would have elevated blood lead levels under both baseline (existing) conditions and with the increase of emissions resulting from the operations of the proposed facility. EPA reviewed the MDEQ analysis of the predicted baseline incidence of elevated blood lead levels, and the incremental increase predicted to result from the new facility.

EPA, in addition to reviewing the assumptions used in the MDEQ lead modeling, also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA conducted this additional review to respond to Complainant's concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. *See* EAB Petition at 1.

iv. Background on Lead Exposures and Levels of Concern

Human exposure to lead now occurs mainly through ingestion of lead in household dust, water, food, and soil, as well as inhalation. Currently, the most likely pathways of lead exposure in young children are ingestion of interior house dust. A significant immediate source of lead in soil and dust is from deteriorating paint used before 1978, especially if unprotected renovation or remodeling activities have been conducted. Lead in exterior soils may migrate indoors on

residents' clothing and via winds. Other major historical sources of lead in soils include deteriorating exterior paint and rainwater runoff from structures, as well as atmospheric deposition from industry or historical use of leaded gasoline.

The Centers for Disease Control and Prevention (CDC) and EPA have identified a blood lead concentration of 10 μg/dL as a level of concern for sensitive populations (in particular young children) and have established health policy goals to limit the risk that young children would have blood lead levels above this value. According to the most recent CDC estimates, 890,000 U.S. children age 1-5 (or approximately 4.4% overall) have elevated blood lead levels, while more than one-fifth of African-American children living in housing built before 1946 have elevated blood lead levels.

v. Impacts from Proposed Facility - MDEQ's Lead Dispersion/Deposition Modeling

Using estimates of the modeled atmospheric concentrations of lead, the *BLL Study* assessed the likely impact of deposition of lead to nearby soil. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead already present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios using the Integrated Exposure Uptake Biokinetic Model for Lead in Children ("IEUBK"). In each scenario, MDEQ compared current estimated background blood lead levels (scenario alternative "a") to estimated blood lead levels after adding in Select Steel's projected emissions (scenario alternative "b"). MDEQ's findings are presented in Table 4 of the *BLL Study*.

vi. IEUBK Model

As previously mentioned, the MDEQ *BLL Study* attempts to predict blood-lead concentrations (blood lead levels) for children exposed to lead in their environment. The model allows the user to input relevant absorption parameters (*e.g.*, the fraction of lead absorbed from water), as well as rates for intake and exposure. Using these inputs, the IEUBK then rapidly calculates and recalculates a complex set of equations to estimate the potential concentration of lead in the blood for a hypothetical child or population of children (six months to seven years).

The IEUBK estimates exposure using age-weighted parameters for intake of food, water, soil, and dust. The model simulates continual growth under constant exposure levels (on a year-to-year basis). In addition, the model also simulates lead uptake, distribution within the body, and elimination from the body.

The IEUBK is intended to:

> Estimate a typical child's long-term exposure to lead in and around his/her residence based on inputs concerning the presence of lead in various environmental media;

Provide an accurate estimate of the geometric average blood lead concentration for a typical child aged six months to seven years;

Provide a basis for estimating the risk of elevated blood lead concentration for a hypothetical child;

Predict likely changes in the risk of elevated blood lead concentration from exposure to soil, dust, water, or air following activities which might increase or decrease such exposure.

A site-specific risk assessment requires information on soil and dust lead concentrations for the particular site in question. Variables affecting any consideration of lead exposure from soil and dust include: soil to indoor dust transfer; ingestion parameters for soil and dust (*i.e.*, how much soil or dust a typical child may ingest or inhale over a set period of time); and the amount of lead that can be absorbed from the soil. The model is quite sensitive to these parameters–that is, changing one variable can significantly affect the results. The IEUBK is designed to facilitate calculating the risk of elevated blood lead levels, and is helpful in demonstrating how results may change under different assumptions of inputs.

vii. MDEQ Inputs to the IEUBK Model

In its analysis, MDEQ used the point of maximum off-site atmospheric quarterly average concentration estimated to occur from lead releases from Select Steel. This maximum concentration point was located within about a hundred meters south and west from the facility fenceline, generally in an area listed on as U.S. Geological Survey ("USGS") map as being occupied by waste ponds. This level was used to estimate the dry deposition to soil, and in subsequent modeling of the potential effects on a population of children which were assessed as if they were exposed to soils containing the deposited lead at the maximum level.

The deposition estimate involved multiplying the quarterly maximum ambient lead concentration, determined by dispersion modeling, by a dry deposition velocity. The deposition velocity assumed was 5 centimeters per second. Although the preferable approach for calculating deposition flux values is through the use of the Industrial Source Complex ("ISC") model, the velocity assumed in the MDEQ seems reasonable and is comparable to a settling velocity for lead calculated using equation 1-55 in Volume II of the User's Guide for the Industrial Source Complex ("ISC2") Dispersion Models (a velocity of 6.8 cm/s can be calculated using the conservative assumption that all the particles were 10 microns in diameter). Wet deposition was not considered in MDEQ's assessment apparently due to the lack of precipitation data. Wet deposition can account for a significant portion of the total deposition with impacts often occurring much closer to the facility than the dry deposition impacts. The modeling of soil and air impacts methodology detailed in the MDEQ report is reasonable as an estimation of dry deposition of lead.

The *BLL Study* estimated the deposition rate at the point of maximum concentration, and assumed a constant deposition at that rate over a 30 year period. After mixing with the top 1 cm of soil, this would increase the estimated soil lead concentration by about 14 parts per million ("ppm"). At further distances and directions from the facility emission source, the predicted concentration and deposition would decrease, so the estimate of deposition at inhabited areas may be somewhat less.

viii. Results of the MDEQ IEUBK Model

The *BLL Study* found that the blood lead impacts from the facility would be small. The maximum air lead concentrations from the facility were estimated to result in changes in geometric mean (typical) blood lead levels of about 0.1 μg/dL. EPA's review identifies some refinements that would be appropriate in similar model applications in the future. However, EPA concurs that the predicted impacts on blood lead levels would be small.

3. Overview of Air Toxics

The CAA and state programs provide protection against the effects of toxic air pollutants. Title III of the CAA identifies 189 hazardous air pollutants ("HAPs") and establishes a regulatory program to control HAP emissions from many industrial sources. The federal program also controls air toxics from mobile sources and from area sources in urban areas. In addition, individual states, including Michigan, have developed and implemented air toxics legislation and regulatory programs.

EPA promulgates regulations for HAPs under section 112 of the CAA. 42 U.S.C. § 7412. This federal air toxics program requires maximum achievable control technology ("MACT") in its first phase and an assessment and control of residual risk remaining after the application of MACT. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category (electric arc furnaces) that includes steel recycling mini-mills was delisted because "there are no existing facilities which qualify as a major source,"[9] 61 Fed. Reg. 28,197 (1996), and, as a result, those sources will not be regulated under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

Michigan's Rule 230 requires permit applicants to install best available control technology for certain sources of air toxics ("T-BACT") and to perform a modeling analysis and compare those results with the initial risk screening levels. Rule 230 also allows MDEQ to establish a lower maximum emission limit if they determine T-BACT does not protect the public or the environment adequately.

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[9] A major source is a stationary source "that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1).

Potential emissions of toxic air contaminants were estimated by Select Steel using the average emission factors from similar facilities previously issued permits by the MDEQ and the Air and Waste Management Association compilation of baghouse dust compositions. Toxic air contaminants associated with mini-mills include metals and toxic components of VOCs. The toxic metals of concern were identified in the permit application to be cadmium, chromium, manganese, mercury, and nickel.

Modeling done by Select Steel's consultant indicated that the ground level impacts of air toxics were below the MDEQ screening levels for all air toxics of concern except manganese. As a result of the MDEQ review and public comment, permit changes were made to further reduce the emissions and impact of two of air toxics of concern to Complainants, namely manganese and mercury.

a. Select Steel Permit Conditions for Manganese

After the Select Steel permit application was submitted, additional stack test data was submitted to MDEQ in another permit application for Republic Steel (also a proposed steel mini mill) which indicated manganese emissions may be lower than previously predicted. Based on this information, a revised lower emission rate of 0.05 lb/hr was established for Select Steel. This emission limit along with closing the roof monitor and additional hooding resulted in predicted ambient air impacts below the MDEQ screening levels. The revised emission limit of 0.05 pounds per hour was approved by MDEQ as T-BACT in permit condition 25.

b. Select Steel Permit Conditions for Mercury

After an MDEQ review of other sources of data including the Ohio EPA's stack testing database, MDEQ determined that the prospective mercury emission levels outlined in the permit application were not representative of T-BACT. In a letter dated April 24, 1998, Select Steel agreed to reduce the mercury emission limits by a factor of 10. The draft permit was changed and the emission rate for mercury was lowered from 0.05 pound per hour to 0.005 pound per hour. The exhaust gas concentrations for mercury were also reduced by a factor of 10 to 3.84 micrograms/dscf, as specified in permit condition 25. In addition, permit condition 51 was added to require a further assessment of the impact of mercury emissions from the facility on the Mott Lake watershed, unless source testing reveals that the mercury emissions are less than 0.0004 lbs/hr.

c. Other Air toxics

To assess air toxics emissions from the proposed Select Steel facility, EPA assessed both the facility's air toxics emissions, as well as the existing level of air toxics in the surrounding area. Data on other sources of air toxics comes from EPA's Toxics Release Inventory ("TRI").

The facilities reporting to the 1996 Toxics Release Inventory (U.S. EPA 1998) are currently those facilities which are manufacturing facilities in Standard Industrial Classification ("SIC") codes 20-39 and employ at least 10 people. They must report annual releases and transfers of chemicals which are on the TRI list and which are manufactured, processed or otherwise used above threshold amounts. TRI reports include separate information on releases to each environmental medium (*e.g.*, air, water, land) and offsite transfers for treatment or disposal, as well as chemicals recycled, used in energy recovery, and present in waste streams. The list of chemicals subject to reporting in 1996 (the most recent year for which data are available) included approximately 650 chemicals and chemical classes. The TRI database contains a wide range of manufacturing facility types, including chemical, rubber, plastics, and petroleum refineries, food processing (*e.g.*, sugar refineries), electronics manufacturing, and other miscellaneous facilities, such as soft drink bottling facilities. Many sources of air toxics, including small sources (*e.g.*, dry cleaners or gasoline service stations) and non-manufacturing sources (*e.g.*, waste treatment facilities and energy generation plants) were not required to report even if they met the chemical quantity thresholds.

Should the Select Steel facility operate, it is expected to report to TRI. Sixteen TRI facilities are located withing 12 miles from the approximate center of the proposed Select Steel facility. Two had zero air releases reported to TRI in 1996; therefore they were not included in the modeling analysis.

4. Dioxin Monitoring

a. General Information

Chlorinated dibenzo-*p*-dioxins and related compounds (commonly known simply as dioxins) are contaminants present in a variety of environmental media. Human studies demonstrate that exposure to dioxin and related compounds is associated with subtle biochemical and biological changes whose clinical significance is as yet unknown and with chloracne, a serious skin condition associated with these and similar organic chemicals. Laboratory studies suggest the probability that exposure to dioxin-like compounds may be associated with other serious health effects including cancer.

EPA promulgates regulations for dioxin emissions under sections 112 and 129 of the Clean Air Act. 42 U.S.C. §§ 7412, 7429. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category that includes steel recycling mini-mills was delisted because "there are no existing facilities which qualify as a major source," 61 Fed. Reg. 28,197 (1996), and, as a result, those sources are not expected to be regulated at this time under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

In addition, EPA has no emissions data for American mini-mills to either support or contradict MDEQ's belief. A recent inventory of dioxin sources indicates that information has not yet been

developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel. Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

To the extent that any regulations may be applicable to dioxin in other circumstances, no continuous emission monitoring system has been proven for use with dioxin by EPA. *See* 40 C.F.R. Parts 60, 61, 63, and 64.

b. Select Steel Permit Conditions for Dioxin

The permit contains no monitoring or any other requirement for dioxin.

B. Allegation Regarding Discrimination in Public Participation

According to EPA's regulations for issuance of PSD permits, 40 C.F.R. Part 124, Subpart A, MDEQ is required to provide public notice that a draft permit has been prepared, 40 C.F.R. § 124.10(a)(1)(ii), with at least 30 days for public comment. 40 C.F.R. § 124.10(b). In addition, MDEQ must hold a public hearing whenever they find a significant degree of public interest based on requests for a hearing. 40 C.F.R. § 124.12(a). Public notice of the hearing must be given at least 30 days prior to the hearing. 40 C.F.R. § 124.10(b)(2). That notice must be provided by (1) mailing a copy of the notice to certain interested parties, (2) publishing in a weekly or daily newspaper within the affected area, and (3) any other method reasonably calculated to give actual notice. 40 C.F.R. § 124.10(c).

In this case, MDEQ published notices about the draft permit in The Flint Journal on March 26, 1998, and March 27, 1998, in The Suburban News on March 29, 1998, and in The Genesee County Herald on April 1, 1998. In the same notices, MDEQ indicated that a public hearing would be held on April 28, 1998, beginning at 7:00 p.m. at the Mount Morris High School. Mt. Morris High School is located approximately two miles from the proposed site. MDEQ also mailed the notice to Fr. Schmitter, Sr. Chiaverini, and several other individuals in the community who had expressed interest in the permit.

The permit applicant, Select Steel, and local government officials also held two informational meetings prior to MDEQ's public hearing. The first was held February 12, 1998, at Kearsley High School, 4302 Underhill Drive, Flint, Michigan, and the second was held February 19, 1998, at Mount Morris High School. These meetings were not required by any state or federal statute or regulation, and were held without the participation of MDEQ.

VI. ANALYSIS AND RECOMMENDED DETERMINATION

A. Allegation Regarding Air Quality Impacts

The environmental laws that EPA and the states administer generally do not prohibit pollution outright; rather, they treat some level of pollution as "acceptable" when pollution sources are regulated under individual, facility-specific permits, recognizing society's demand for such things as power plants, waste treatment systems, and manufacturing facilities. In effect, Congress--and, by extension, society--has made a judgment that some level of pollution and possible associated risk should be tolerated for the good of all, in order for Americans to enjoy the benefits of a modern society--to have electricity, heat in our homes, and the products we use to clean our dishes or manufacture our wares. Similarly, society recognizes that we need facilities to treat and dispose of wastes from our homes and businesses (such as landfills to dispose of our trash and treatment works to treat our sewage), despite the fact that these operations also result in some pollution releases. The expectation and belief of the regulators is that, assuming that facilities comply with their permit limits and terms, the allowed pollution levels are acceptable and low enough to be protective of most Americans.

EPA and the states have promulgated a wide series of regulations to effectuate these protections. Some of these regulations are based on assessment of public health risks associated with certain levels of pollution in the ambient environment. The NAAQS established under the Clean Air Act (CAA) are an example of this kind of health-based ambient standard setting. Air quality that adheres to such standards is presumptively protective of public health. Other standards are "technology-based," requiring installation of pollution control equipment which has been determined to be appropriate in view of pollution reduction goals. In the case of hazardous air pollutants under the CAA, EPA sets technology-based standards for industrial sources of toxic air pollution. The maximum achievable control technology standards under the Clean Air Act are examples of this kind of technology-based standard setting. After the application of technology-based standards, an assessment of the remaining or residual risk is undertaken and additional controls implemented where needed.[10]

[10] Clean Air Act § 112(f)(2)(A)(1) states ". . . If standards promulgated pursuant to subsection (d) and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such category." 42 U.S.C. § 7412(f)(2)(A)(1).

Title VI and EPA's implementing regulations[11] set out a requirement independent of the environmental statutes that all recipients of EPA financial assistance ensure that they implement their environmental programs in a manner that does not have a discriminatory effect based on race, color, or national origin. If recipients of EPA funding are found to have implemented their EPA-delegated or authorized federal environmental programs (*e.g.*, permitting programs) in a manner which distributes the otherwise acceptable residual pollution or other effects in ways that result in a harmful concentration of those effects in racial or ethnic communities,[12] then a finding of an adverse disparate impact on those communities within the meaning of Title VI may, depending on the circumstances, be appropriate.

Importantly, to be actionable under Title VI, an impact must be both "adverse" and "disparate." The determination of whether the distribution of effects from regulated sources to racial or ethnic communities is "adverse" within the meaning of Title VI will necessarily turn on the facts and circumstances of each case and the nature of the environmental regulation designed to afford protection. As the United States Supreme Court stated in the case of *Alexander v. Choate*, 469 U.S. 287 (1985), the inquiry for federal agencies under Title VI is to identify the sort of disparate impacts upon racial or ethnic groups which constitute "sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." *Id.* at 293-94 (emphasis added).

The complaint in this case raises air quality concerns regarding several NAAQS-covered pollutants, as well as several other pollutants. With respect to the NAAQS-covered pollutants, and as explained more fully below, EPA believes that where, as here, an air quality concern is raised regarding a pollutant regulated pursuant to an ambient, health-based standard, and where the area in question is in compliance with, and will continue after the operation of the challenged facility to comply with, that standard, the air quality in the surrounding community is presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI. By establishing an ambient, public health threshold, standards like the NAAQS contemplate multiple source contributions and establish a protective limit on cumulative emissions that should ordinarily prevent an adverse air quality impact.

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[11] Title VI of the Civil Rights Act of 1964, as amended, provides that "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 assistance." 42 U.S.C. section 2000d et seq. EPA's Title VI implementing regulations provide that recipients of EPA financial assistance "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" because of their race, color, or national origin. 40 C.F.R. § 7.35(b)

[12] For example, scenarios involving the combined impacts of multiple pollutants, multiple pathways, and multiple plants.

With respect to the pollutants of concern in the complaint which are not covered by the NAAQS, Title VI calls for an examination of whether those pollutants have become so concentrated in a racial or ethnic community that the addition of a new source will pose a harm to that community. Because EPA has determined that there is no "adverse" impact for anyone living in the vicinity of the facility, it is unnecessary to reach the question of whether the impacts are "disparate."

1. Volatile Organic Substances

a. VOCs as Ozone Precursor

Based on the information that was made available, EPA technical experts determined that MDEQ's regulatory modeling was generally conducted in accordance with EPA's Guideline on Air Quality Models. The proposed maximum allowable emissions for VOCs from the proposed Select Steel facility are 38.5 tpy. Sources with potential VOC emissions of less than 40 tons per year are not considered a significant source under federal PSD regulations. 40 C.F.R. § 52.21(b)(23)(i).

Genesee County has been effectively determined to meet the NAAQS for ozone (the pollutant of concern from VOC emissions) for both the old 1-hour standard and the new 8-hour standard. *See* 63 Fed. Reg. 31014 (June 5, 1998). Select Steel's maximum modeled impacts from the criteria pollutants of concern to the Complainants are below the NAAQS. In particular, for ozone, the proposed Select Steel facility's emissions are not expected to cause an increase in concentrations above a level deemed presumptively protective of public health. Accordingly, since the NAAQS for ozone is a health-based standard, which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, with regard to VOC emissions as ozone precursors, it is recommended that EPA find that MDEQ did not violate Title VI or EPA's implementing regulations.

b. VOC Monitoring

In response to the Complainants' allegation that the permit allows VOC emissions to go unmonitored for the first eighteen months of the mill's operation, the EAB found that this was "somewhat of a misreading of the permit." EAB Decision at 5. Permit condition 33 allows Select Steel to operate for one and possibly up to two years before it must begin VOC monitoring. MDEQ stated that because Select Steel's potential to emit VOCs is not significant, "VOC emissions monitoring is not required under federal law." MDEQ Response at 7. The EAB found that statement, while "technically true, is [was] somewhat misleading." EAB Decision at 5. The EAB stated that "*pre-application* monitoring of VOCs is not mandatory because Select Steel's potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. *See* 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines

it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2)." *Id.* at 6.

MDEQ's permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to implement a CEMS for VOCs.. However, Select Steel may choose to install an alternative monitoring system, called "parametric monitoring," instead of the CEMS. If Select Steel does so, MDEQ must first review, test, and accept the system. If MDEQ rejects the parametric system, the permit states that Select Steel must install CEMS within two years of plant start-up. The EAB noted that "MDEQ does not explain why Select Steel is given up to two years to bring VOC emissions monitoring on-line. However, the regulations give the permitting authority discretion in implementation. 40 C.F.R. § 52.21(m)(2)." EAB Decision at 6.

MDEQ is not required to prescribe immediate VOC monitoring because EPA's regulations allow the permitting authority to impose post-construction monitoring as it "determines is necessary." 40 C.F.R. § 52.21(m)(2). Moreover, as discussed elsewhere, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For these reasons, it is recommended that EPA find that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA's implementing regulations.

2. Lead

Genesee County has been determined to meet the NAAQS for lead. Based on the available information, EPA technical experts determined that MDEQ's lead modeling was generally conducted in accordance with EPA's Guideline on Air Quality Models. Overall, the maximum predicted impacts from the Select Steel facility are generally very close in to the facility; either at or near the fenceline.

The significance threshold for lead emissions under PSD is 0.6 tpy. The proposed Select Steel facility maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. MDEQ chose to ensure Select Steel's compliance with the permit's lead emissions limit of 0.15 pounds per hour by requiring the company to install a baghouse that MDEQ determined satisfied BACT.

Select Steel's maximum modeled impacts from lead are below the NAAQS. Accordingly, the proposed Select Steel facility emissions are not expected to cause an increase in lead concentrations above a level deemed presumptively protective of public health. Since the NAAQS for lead is a health-based standard which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. As discussed more fully below, EPA's analysis of data on blood lead levels in the vicinity of the facility does not suggest a different conclusion. For these reasons, it is recommended that EPA

find that, with regard to lead emissions, MDEQ did not violate Title VI or EPA's implementing regulations.

a. EPA's Review of the MDEQ *BLL Study*

In response to public concerns about lead in the local environment, MDEQ appropriately undertook an examination of children's blood lead levels in the area. EPA found that the *BLL Study* was a conscientious attempt to address the impact of air emissions from the facility on children's blood lead levels and that MDEQ's use of the IEUBK model in the report was generally applied in a reasonable manner. EPA determined that MDEQ did not explicitly consider one particular pathway of exposure, namely the additional lead in house dust directly resulting from increased lead concentrations in the atmosphere (*i.e.*, from emissions by proposed facility), but this fact did not affect EPA's conclusions regarding the integrity of the study.

EPA reviewed the MDEQ IEUBK report's conclusions, including the assertion that "the modeling of blood lead levels under these scenarios demonstrated little or no differences due to the proposed facility's maximum potential impact, for each scenario." *BLL Study* at 9. EPA concurs that any impacts would be small and found no reason to conclude that these results were not valid. Based on the available information concerning the releases, the additional deposits of lead in soil and dust from Select Steel are likely to have a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

b. EPA's Review of Other Available Data on the Incidence and Likelihood of Elevated Blood Lead Levels in Genesee County

As previously mentioned, EPA also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility, in view of complainant's concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. EAB Petition at 1.

EPA reviewed available county health data for children with measured elevated lead levels. The overall county average in 1997 was approximately 8%. In zip code 48458, which contains the site of the proposed facility and the expected maximum ambient lead concentration resulting from plant emissions, the incidence rate above 10 μg/dL in 1997 was about 3%, which is similar to the CDC estimate for the national average (4.4%).

In addition, EPA reviewed more specific geographic information than the zip code area totals because zip code areas are relatively large and may contain areas of high and low incidence which together combine in an average. For example, in 1995, when the Genesee County Health Department offered free testing to residents in the neighborhood of the Genesee Power Station facility at the Carpenter Road School, twenty-nine children under age 15 were tested, and none were found to have elevated levels of lead.

Further, EPA assessed another indicator of elevated lead levels: age of housing. The HUD national survey of lead in housing found a correlation among lead in interior house dust, the presence of lead paint, and age of housing (*e.g.*, built prior to 1950) (CDC, Screening Young Children for Lead Poisoning, 1997). While the presence of older housing units has been identified as an indicator of elevated blood lead levels, there is no explicit guidance as to the proportions which would be of concern. Interpreting these data can be informed by recent guidance on what levels might warrant a significant public health testing effort.

The Centers for Disease Control and Prevention ("CDC") and the American Academy of Pediatrics guidance on conducting testing of children in geographic areas suggests that, depending on the presence of several factors, either universal or targeted screening may be recommended. CDC suggests conducting universal screening if the prevalence of housing units built prior to 1950 in an area is above the national average (27%), or if the prevalence of measured blood lead levels above 10 μg/dL in 1- and 2-year olds is greater than 12%, then all children in the area should be routinely screened. If these criteria are not met, children should be screened on the basis of information collected about their specific situation (*e.g.*, for Medicaid recipients, children living in older (pre-1950) housing units, children present during a renovation of pre-1978 housing unit).

The zip code containing the proposed facility covers a large area, and includes Mt. Morris township, which contains a larger proportion of older housing than most of the county. On average, the percentage of pre-1950 housing in zip code 48458 is about 22%, or below the CDC suggested level which would trigger universal screening of blood lead levels in young children.

Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by lead emissions from Select Steel. EPA also concluded that lead emissions from the proposed Select Steel facility are unlikely to have significant impacts on blood lead levels of children living in the vicinity. While EPA believes that airborne lead emissions from the Select Steel facility are neither actionable under Title VI nor cause for particular concern, this does not mean that there is not a broader lead concern in Genesee County that warrants attention separate and apart from Title VI. EPA has noted that blood lead data available for Genesee County provide a basis for an ongoing lead exposure assessment. Approximately 8% of children screened for blood lead in Genesee County in 1997 exceeded the federal blood lead goal of 10 μg/dL. The available screening data also indicate a greater risk of elevated blood lead levels among African-African children. (Four percent of African-American children screened between July 1995 and June 1998 had blood lead levels greater than 15 μg/dL, while 1% of white children exceeded this level. Data tabulated by race were not available for all blood lead levels exceeding 10 μg/dL.) Under these circumstances, EPA believes that, separate and apart from this case, further locally focused efforts are warranted to reduce existing prevalence of elevated blood lead levels.

Public health efforts to mitigate existing blood lead risks can include:

- continued blood lead screening, outreach, and intervention efforts directed to at-risk populations;
- generation of additional data on patterns of the occurrence of damaged lead-based paint and elevated levels of lead in residential soils and dusts;
- focused educational and assistance programs to aid residents and dwelling owners in reducing existing sources of lead exposure.

EPA supports continued local efforts to assess and reduce potential lead exposures in children, and is prepared to provide assistance in the planning of intervention efforts and in the identification of resources to support this work.

3. Air Toxics

In its review of the permit for the proposed Select Steel facility, MDEQ used air models to estimate atmospheric concentrations and compare them to screening thresholds defined by the state. Modeled levels of air toxics emissions from the issued permit for the proposed facility did not exceed state thresholds of concern. These MDEQ assessments were performed on a chemical-specific basis, and did not attempt to aggregate the impacts of all releases combined.

EPA's approach to analyzing air toxics had some elements in common with MDEQ's NAAQS review, in that it used air models to evaluate potential concentrations of air emissions from multiple sources. It also extended this approach to include multiple chemicals, whose potential impacts were combined on the basis of similar health effects. Chemicals that may cause cancer were considered separately from those which may only cause other chronic toxic effects, because combining these different types of effects may significantly increase uncertainties. Acute effects were not considered in the analysis because neither appropriate emissions data nor toxicity data were available. For these air toxic releases, no ambient concentration regulatory standards are generally available, either singly or in combination. The EPA approach used the modeled concentration estimates along with residential population information for Census blocks to estimate exposures, and health based benchmarks to project risks of potential impacts.

a. Technical approach for air toxics evaluation

EPA conducted an analysis of the distribution of airborne toxic emissions from TRI facilities in the same area as the proposed facility. EPA modeled average concentrations at each inhabited Census block within six miles of the proposed site as a reasonable assumption of the likely maximum geographic extent of potential impacts. To assure that the contributions of the facilities outside the six-mile radius to blocks inside the circle were considered, all facilities in the analysis included those within an additional six miles (*i.e.*, all those within twelve miles) of the proposed Select Steel site.

The proposed Select Steel facility's air toxics emissions were obtained from MDEQ documents listing maximum permitted limits. Modeled chemicals included arsenic, barium, cadmium, chlorine, chromium, manganese, mercury, nickel oxide, and zinc oxide, as well as lead.

In addition to the proposed facility, a total of 16 facilities were modeled, composed of 15 TRI facilities plus Genesee Power Station ("GPS") (which was permitted to release lead and a number of other metals). Of the chemical-specific air toxics emissions listed, methyl pyrrolidone and benzo(a)pyrene (GPS only) were not modeled due to lack of available toxicity data. The proposed facility's emissions of vanadium pentoxide and aluminum chloride were also not modeled due to lack of available EPA toxicity information. If the MDEQ ambient concentration screening levels were used to rank the potential degree of toxicity of the permitted chemicals, the ranks for these substances would be the second and third least toxic of the 10 considered, or of slightly higher concern than zinc. This ranking would also place them nearly five orders of magnitude (or a factor of 100,000) less toxic than arsenic or cadmium, which were included in the analysis.

Table X: List of Additional Facilities Modeled

TRI Facility ID	Facility Name	Address	City
48423FRNCN300SO	Fernco Inc.	300 S. Dayton St.	Davison
48458NVRSL1167W	Universal Coating Inc	1167 W. Frances Rd.	Mount Morris
48503CMMRC711W1	Oil Chem Inc.	711 W. 12th St.	Flint
48503MCDNL609CH	McDonald Dairy	609 Chavez Dr.	Flint
48505LCKHR4701T	Lockhart Chemical Co	4302 James P. Cole	Flint
48505PPGND3601J	PPG Industries Inc	3601 James P. Cole	Flint
48506BBPNT2201N	B & B Paint Co	2201 N. Dort Hwy.	Flint
48506MDSTT624KE	Mid State Plating Co Inc	602 Kelso St.	Flint
48550BCFLN902EH	GMC -Buick Motor Div	902 E. Hamilton	Flint
48551GMCTRG3100	GMC Truck & Bus Group	G-3100 Van Slyke Rd.	Flint
48552CPCFLG3248	GM-CPC-Flint Engine Plt	G-3248 Van Slyke Rd	Flint
48553GMCTRG2238	GMC Metal Fabricating Div. Flint	G-2238 W. Bristol Rd	Flint
48554GMSRV6060W	GMC Motor Service Parts Ops.	6060 W. Bristol Rd.	Flint
48555CFLNT300NO	GMC AC Delco Systems Div Wes	300 N. Chevrolet Ave	Flint
48556CSPRK1300N	AC Spark Plug GMC	1300 N. Dort Hwy.	Flint
NA	Genesee Power Station	5300 Energy Drive	Genesee Township

EPA's analysis was performed both with and without Select Steel to examine incremental effects, using an approach that is similar to one developed earlier for Title VI investigations and that is undergoing scientific peer review by EPA's Science Advisory Board ('SAB").[13] Modifications were made to address suggestions from the SAB.

To determine how permitted air toxic emissions are distributed geographically and on the basis of population subgroups, EPA used 1990 Census data and modeled average air concentrations on a census block level. The TRI air release data used was for 1996, the most recent year for which TRI data is available. The concentrations of chemicals in the various Census blocks were examined relative to known chemical-specific values such as Unit Risk Factors or Reference Concentrations ("RfCs"), and for those chemicals where these values have not yet been established, the *OPPT's Risk Screening Environmental Indicators* (dated April 28, 1998) tables were used. As a conservative screening method, the carcinogenic risk estimates for all carcinogens in each block were added together as an indication of possible cumulative effects on cancer probability.

Because the probability of contracting cancer is not generally assumed to have a threshold level (*i.e.*, there is some probability, however small, at any level of exposure), the decision regarding a level necessary to cause an adverse effect is a matter of policy. In the past, EPA has based regulatory actions at a wide spectrum of levels, generally in the range of 10^{-6} (one in one million) to 10^{-4} (one in ten thousand) lifetime cancer risk.[14] Estimated lifetime individual risks below 10^{-6} have rarely been found to be sufficient basis for action, while in most cases, levels above 10^{-4} have resulted in some form of action, although not necessarily regulation.

Similarly, on the non-cancer side, the 1986 EPA guidelines for dealing with chemical mixtures discusses the concept of hazard index, where a level below 1 means that untoward effects are thought unlikely to occur. Because of the use of safety factors in determining the RfCs used to construct a hazard index, the meaning of a hazard index above 1 cannot be used to predict that unwanted health effects *will* occur. There are usually safety factors of from 3 to 1000 times between calculated RfC levels, which are used as screening thresholds here, and concentrations found to cause adverse effects in animals or humans. Scientists have not agreed, at this point, on a scheme for predicting if and when effects will occur based on the hazard index values between 1 and the lowest concentrations found to cause adverse health effects, often considerably higher.

Major uncertainties in this kind of analysis include the specific chemicals' toxicity potencies, which are not always based on a comparable amount or quality of information, and may include significant "safety factors" to reflect uncertainties in the degree of potency. Other uncertainties include not being able to account for all significant sources, since mobile and area sources of

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[13] The approach presented for SAB review was called the Enhanced Relative Burden Analysis.

[14] *See, e.g.*, CAA § 112(f)(2)(A); 42 U.S.C. § 7412(f)(2)(A).

certain air toxics may be as significant as point sources, especially in urban areas. The point source TRI emissions information used was based on industry-reported data which can be derived using a variety of approaches with varying degrees of accuracy, and in the case of two facilities, the maximum permitted emission levels. In interpreting combined effects of multiple chemical exposures, hazard ratios based on additive combinations of chemicals whose predicted effects are on different parts of the human body may significantly overestimate potential impacts.

Adding carcinogenic risk and construction of hazard indexes for multiple chemicals both involve "adding" various health effect "endpoints" that may result from entirely different biological mechanisms and therefore may not be strictly additive in a biological sense. In this methodology, the chemicals are added as a worst case assumption, and if added levels do not raise concern when compared to benchmarks such as a cancer risk level or a hazard index, an assumption would be that they would not be of concern if a more detailed methodology were applied.

b. Results of Air Toxics Analyses

The analysis focuses on whether the permitted Select Steel emissions**C**either in and of themselves or in combination with other emissions in the area**C**result in concentrations that may adversely impact the health of the residents in the surrounding area. The analysis found that the locations of the blocks with the maximum predicted impacts from the Select Steel Facility were very close in to the facility, near the fence line. None of the Census blocks were found to be significantly adversely impacted solely by projected emissions from the proposed facility. The Census block with the highest projected potential risk from potential carcinogens was estimated to have a lifetime risk of just above 10^{-6} (1 in 1 million) associated with emissions from the proposed facility. The hazard index for all blocks in the six-mile circle due to the Select Steel emissions was well below the screening threshold of 1, the highest block being about 0.03. The analysis does not support, therefore, the allegation that the proposed Select Steel facility emissions themselves, as permitted, will be the cause of health effects in the surrounding area. In addition, the levels from the Select Steel facility are also projected to be fairly low compared to the levels contributed by the other TRI sources collectively.

The cumulative results for the entire six-mile circle indicate the lifetime carcinogenic risk estimates for the highest single block is about $6x10^{-5}$. While the estimates for several blocks fall within the 10^{-5} range, these estimates are thought to be quite conservative for the following reason. Virtually all the blocks where risk is above the low 10^{-6} range are dominated by the release of chromium. The methodology makes two very conservative assumptions regarding chromium: first, that all releases are assumed to be the more toxic chromium VI valence state, as opposed to the significantly less toxic chromium III; and second, that the released particles are small enough to be carried with the wind dispersion and not fall to earth and be substantially removed through dry or wet deposition. The ratio of chromium VI to total chromium in emissions is usually much less than 1, with estimates in the 10% range not uncommon. Were this ratio factored into the methodology, none of the blocks would have shown an estimated risk

above the 10^{-6} range. Even so, the conservatively derived levels are not such that they go above the 10^{-4} level.

On the non-cancer side, most of the blocks within the six-mile circle are below the hazard index of 1, even with all non-carcinogenic chemical effects combined. There are a substantial number of blocks, however, which have hazard indexes between one and 10, and some**C**just under 6%**C**which have hazard indexes between 10 and 80. In all of the blocks with hazard indices above 1, glycol ethers[15] is the predominant cause. Therefore, uncertainties that might arise from adding different chemicals together largely do not apply.

There is considerable uncertainty about the meaning of the estimated hazard indices here, for several reasons. First, as previously discussed, scientists have not yet agreed on how to interpret hazard index values above 1. Second, the value used for glycol ethers in this screening methodology was not a formally established RfC, but a value derived from an similar type of toxicity study which used oral rather than inhalation exposure, introducing some additional uncertainty. Third, there are usually uncertainty factors applied to any RfC or reference dose calculation, so values above 1 cannot be easily (or at all) translated into predictions of probabilities of adverse health effects. At this point, these values can be termed "not necessarily safe," but neither can there be adverse health effects definitely predicted upon this basis alone. In any event, the analysis suggests that Select Steel's emissions will contribute minimally, if at all, to the possibility of adverse health effects.

Overall, the EPA analysis does not support the contention that the combined modeled emissions in the six mile area near the proposed facility indicate the likelihood of adverse health impacts. For all of these reasons, with regards to air toxic releases, it is recommended that EPA find no violation of Title VI or EPA's implementing regulations.

4. Dioxin Monitoring

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.[16] No performance specifications for CEMS have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source.

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[15] Glycol ethers are industrial solvents used in paints and other products.

[16] In the EAB's analysis of Complainants' PSD appeal concerning dioxin monitoring, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

In addition, MDEQ believed dioxins are not emitted by steel recycling mini-mills. EPA has no emissions data for American mini-mills to either support or contradict MDEQ's belief. *The Inventory of Sources of Dioxin in the United States* indicates that information has not yet been developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel.

Furthermore, at this time, EPA does not expect to regulate air toxic emissions from steel recycling mini-mills under CAA section 112. Without regulations or other guidance to direct the Agency's review of this issue, EPA is not in a position to contradict the conclusions of MDEQ.

For these reasons, a finding of no disparate impact associated with MDEQ's decision not to include monitoring requirements for dioxin in the permit is recommended.

B. Allegation Regarding Discrimination in Public Participation

The evidence indicates that the permitting process for the proposed Select Steel facility's PSD permit did not violate Title VI or EPA's implementing regulations. The investigation's results as to each of the allegations are detailed below.

1. Timing of Permit Issuance

EPA reviewed a variety of documents from MDEQ concerning the timing of the permitting process for the proposed Select Steel facility and interviewed the MDEQ employees who participated in that process. Neither the documents nor the interviews revealed anything indicating that MDEQ expedited the permitting process for Select Steel in order to preempt an adverse holding in the GPS case or for any other improper reason. In addition, EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process.

The five months that lapsed between the submission of the permit application and the issuance of the permit appears to be normal. Among the last twenty-six PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was eight months, but the average time between the receipt of a complete application and approval was only one and a half months. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years). Judging by those averages, delays that may occur in the issuance of PSD permits could be attributed to incomplete applications. In this case, significant pre-application discussions occurred before the application was received on December 30, 1997. *See, e.g.*, Memorandum from Lynn Fiedler to the file (December 8, 1997). As a result, MDEQ was able to perform a completeness determination the same day the application was submitted, thereby shortening the time required to process the application.

In addition, during a pre-application meeting with Select Steel on December 2, 1997, rather than attempting to ignore the Circuit Court's holding in the GPS litigation, the Thermal Process Unit Supervisor said she provided a copy of the decision to the applicants. She went on to note that MDEQ "is a neutral party and . . . we would be following the process as required by the state and federal regulations." Memorandum from Lynn Fiedler to the file (December 8, 1997).

Although Complainants may have gotten the initial impression that the permit process would take over one year based on Ms. Fiedler's alleged comment that it would take "a long time," subsequent communication between Complainants and MDEQ should have clarified the timetable for Complainants. On February 17, 1998, Fr. Schmitter and Ms. Fiedler discussed the timing of the hearing. Ms. Fielder indicated that it would be at least 30-45 days away. Notes from Lynn Fiedler (Feb. 17, 1998).

Moreover, nothing in the public participation process was compromised by the pace of the permit process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits. *See infra* discussion about notice and location of public hearing. For all of these reasons, it is recommended that EPA find that the circumstances surrounding the timing of the Select Steel PSD permit issuance did not violate Title VI or EPA's implementing regulations.

2. Relationship Between Select Steel and MDEQ

EPA reviewed a variety of documents from MDEQ concerning the relationship between MDEQ and Mr. Shah, and interviewed the MDEQ employees who participated in the permitting process. Neither the documents nor the interviews revealed anything indicating improper or unlawful actions by the MDEQ, NTH Consultants, or Mr. Shah in their interactions during the permitting of Select Steel. Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interview with Dennis Drake (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including Hien Nguyen, Permit Engineer, and Lynn Fiedler, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

In some government organizations, regulations prescribe certain limitations on post-employment interactions with the former government employee. In this case, Michigan does not appear to have any such regulation. *See*, *e.g.*, Mich. Stat. Ann. Title 4, Part 7, Chapter 31c (1998) (Standards of Conduct); Michigan Civil Service Commission Rules § 2-12 (Retirement) and § 2-21 (Conflict of Interest). Notwithstanding the absence of state regulations, the circumstances of this situation do not indicate any impropriety. Mr. Shah was never involved in the permitting of the Select Steel facility during his tenure at MDEQ because he resigned from MDEQ approximately two years prior to the submission of Select Steel's application. Telephone Interview with Dhruman Shah (Oct. 23, 1998). Furthermore, even if the federal rules concerning subsequent employment had applied to this situation, Mr. Shah would have been free to participate in the Select Steel permit. *See* 5 C.F.R. §§ 2637.201 to 2637.204 (regulations concerning post-employment conflict of interest).

Without some evidence of impropriety in the relationship between the permit authority and the permittee, EPA cannot assume that any such impropriety existed. Accordingly, it is recommended that EPA find that nothing about the relationship between MDEQ, Select Steel, NTH Consultants, and Mr. Shah violated Title VI or its implementing regulations.

3. Notice of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the notice provided for the public hearing and interviewed the MDEQ employees who were involved in providing that notice. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of

the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in providing notice for the public hearing.

EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998.

EPA's regulations also require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed letters dated March 25, 1998 to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the permit. That letter was also transmitted by facsimile machine to Fr. Schmitter and Sr. Chiaverini on March 25, 1998. Nonetheless, Complainants believed that MDEQ should have mailed the notice to more members of the community, particularly in light of the alleged inadequacy of the notice mentioned in the GPS case. MDEQ, however, believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998). More importantly, the mailing list prepared by MDEQ included individuals who had expressed interest in the Select Steel permit application and who had participated in other permitting decisions that involved the area, consistent with the requirements of EPA's regulations. *See* Select Steel Mailing List (undated).

The information examined during the investigation indicates that MDEQ provided sufficient notice of its public hearing. In terms of newspaper publication, MDEQ went beyond the requirements of EPA's regulations and issued the notice in three, rather than just one, local newspapers. The mailing list that MDEQ developed also met EPA's requirements and was not inadequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community. Consequently, it is recommended that EPA find that the method of notification for the public hearing did not violate Title VI or its implementing regulation.

4. Location of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the location of the public hearing and interviewed the MDEQ employees who were involved in selecting that location. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in selecting a location for the public hearing.

Complainants wanted the hearing held at Carpenter Road Elementary School. It is not clear whether MDEQ contacted the school in its search for a hearing site. A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8,

1997). The Air Quality Division Hearing Officer indicated that she contacted the Carpenter Road School. Interview with Susan Robertson (Oct. 21, 1998). The Principal of Carpenter Road Elementary School, however, has no recollection of being contacted about such a hearing and said that he normally welcomes such events. Telephone Interview with Charles Atwater (Oct. 23, 1998).

MDEQ contacted the Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility.

Notwithstanding the uncertainty about Carpenter Road Elementary School, the location chosen for the public hearing is in close proximity to the proposed site. In addition, it is accessible by the general public. The Genesee County Metropolitan Transit Authority provides public transportation (*e.g.*, "Your Ride") to the location. Telephone Interview with Ronda Jenkins, Customer Service Representative, Genesee County Mass Transit Authority (Oct. 28, 1998). It is recommended that EPA find that MDEQ's decision to host the hearing at Mount Morris High School does not raise to the level of a violation of Title VI or its regulations.

C. Conclusion

Having analyzed all of the materials submitted and information gathered during the investigation regarding each allegation, it is recommended that EPA not find any violations of Title VI and EPA's implementing regulations by MDEQ.

Attachment 3

RECEIVED 9/11/2003 MJ

EA-03-R

[redacted]

September 3, 2003

Re: Tallassee Waste Disposal Center Expansion/ Impact on the Ashurst Bar/ Smith Community

To Whom It May Concern:

Please accept this as an effort on my part to continue to inform of the environmental travesty that the local governing body (The Tallapoosa County Commission) has participated in creating for this small rural community in East Tallassee, Alabama.

As a result of a public hearing for comments on August 26, 2003, that was nothing more than a formality, are additional comments and concerns that I submitted to the Alabama Department of Environmental Management (ADEM) for inclusion in the record. Please be mindful that this meeting was the first opportunity granted to the people who are directly impacted by this landfill to seek answers to their concerns.
To be poor and Black does not mean that a people should not have due process in decisions that effect their health, safety, property, and overall well being.

The people of the Ashurst Bar/Smith Community have been in opposition to the operation of this landfill since it was sited in the neighborhood since 1970. Therefore, because it is now being expanded and proposed to be expanded to a total of 200 acres in the most populated part of the community we are seeking leadership and intervention from all aspects of our Government to address the concerns that are and have been ignored by our local, state regulatory agency, and other elected officials.

The concern or effort given to the issues that are within your realm of authority would be greatly appreciated.

[redacted]

[redacted]

Mr. James Warr, Director
ADEM
P.O. Box 301463
Montgomery, Al 36130-1463

Re: Public Hearing for Permit 62-11 Modification and Expansion of the Tallassee Waste Disposal Center Landfill

Dear Mr. Warr,

As a landowner and a product of the Ashurst Bar/Smith Community I am taking this opportunity to thank ADEM for fulfilling the requirement to grant a public hearing. The attorney presiding over the meeting conducted it in a most professional manner and the public did so as well based on the ground rules set forth for the process.

The following are comments and concerns that I am submitting for the placement in the records:

1. The card registration was a hindrance to participants entering into the meeting room. It established a long line outside of the door while the meeting was being conducted. The personal information requested on the card was intimidating and prevented some from speaking out of fear. The public assumed that they could rise, give their names, and proceed with their statements or ask questions.
2. The public was informed that this was not a question and answer session, but instead comments on solid waste issues and they had to be limited to 5 minutes.
3. The public was told that the comments and/or SCOPE would be limited to technical issues, and specifically that socio-economic issues were outside of ADEMS SCOPE but were to be evaluated by the local authority none of whom were available to address these critical issues at the Public Hearing. Out of a community like the Ashurst/Bar community how many scientist do you think live there or could pay someone to represent them on technical issues? Even more so ADEM representatives decided not to discuss technical issues. Without dialogue there is no discovery or resolution.
4. There appears to be a discrepancy about the acreage included in this request for expansion and modification between ADEM and the US Corp of Engineers.
5. Why is the sedimentation pond being moved and exactly where is it being located?
6. Prior to the reopening of this land fill in April 2002 it was the site of an unlined landfill that turned up with the presence of toluene in a local drinking spring 600

feet south of the perimeter of the boundary, what measures are in place to protect the community from the continued possibility of these safety hazards?

7. The expansion of this landfill as documented by the maps supplied by the US Corp of Engineers includes property purchased on the opposite side of Washington Boulevard, which will border the Local Church and the most populated area in the community. This is a rural community and many people still use well water. Where is the documentation that impact studies were done to protect these sources of water for these people?

8. What is the impact of water run-off on to adjacent property owners south and to the east of this site and to the west after expansion on to the opposite side of Washington Boulevard?

9 The community is concerned about wind patterns since this landfill is within a one to two and a half mile radius of the most populated area or in the case of Mr. Horace Geter in his back yard.

10. Entry of the landfill traffic is limited to entering from highway 49, but instead it has been reported that the traffic is entering from other directions. Has this previous permit specification been revised?

11. We are concerned about the setbacks of homes on the roads. Many of the residencies are very close to the roads.

12. Washington Boulevard and Ashurst Bar roads are very narrow two lane rural community roads that are not designed to handle eighteen-wheeler trucks and the continued increase in the number of garbage trucks. The roads are very curvaceous and have several snake pattern curves with homes situated near them. We are concerned about " the level of service/accident ratings."

13. We are concerned about the traffic by workers who are coming into the neighborhood to pick up their trucks and the subsequent movement of the trucks on to the roads during the hours our children are loading and dismounting the school buses.

14. We are concerned about the lack of traffic signs throughout the community indicating the speed limit, school bus loading, and children playing.

15. We are concerned about surface water and foliage used by the wild life in the area, and the impact this will have on our hunting capabilities.

16. With the close proximity of the landfill to the most populated area we are concerned about the transmission of diseases by rodents, insects and other wild life including wild dogs that are exposed to hazardous or other unsafe waste that these animals are exposed to since, a request was made by the owner to use a tarp instead of dirt cover except once a week.

17. We are concerned about the wetlands, the natural occurring springs, and the impact this landfill is having on the environmental natural balance in this part of our state.

18. We are concerned about the impact of the landfill on our farmers' animals and the gardens that people use for food.

19. Since the reopening of the Tallassee Waste Disposal center in April 2002 there has been numerous non-compliance reports of high methane gas levels. We are concerned that the community was not notified and to date there is not in place a mechanism to alert the community of such dangers. It is indeed the responsibility of every governmental agency including the owner, the local government, ADEM, the State of Alabama Health Department, EPA and whom ever else that has enforcement authority to guarantee the safety of its citizens from such potential danger and it surely should inform the people of a situation that has their lives and property at risk.

20. There are no fire hydrants from the entrance of Washington Boulevard to the site.

21. We are concerned that this site was ever permitted as suitable based on (a) the moisture problem, (b). a natural gas line, (c). the close proximity to the most populated area, (d). the site is accessed by two (2) very narrow two-lane highways (Highway 49 and Washington Boulevard). Both of these roads were designed for local residential traffic and not large commercial trucks.

22. We are concerned about the lack of emergency equipment, (ambulances, fire trucks, etc.).

23. We are concerned about the lack of an evacuation and decontamination plan.

24. We are concerned about the total disregard of our local church by situating a landfill near by and also the proposed design to relocate Washington Boulevard closer to its site.

25. We are concerned about the impact on the Tuscaloosa aquifer that is in the area.

26. We are concerned about the Gleeden Branch and other streams that leave the area and merge with larger bodies of water, which eventually empty into the Alabama River, specifically of water sources of other municipalities down stream.

27. We are concerned that the owner is being granted such a large service area and such wide latitude of waste types it can accept.

28. We are concerned about the displacement of landowners currently four (4), since the required boundary of a landfill owner is 200 or fewer feet.

29. We are concerned about the placement of the large garbage containers on the newly acquired Lanear property to the south of the existing landfill since in a letter dated May 2003 stated that this " 80 acre parcel was being withdrawn form the permit and modification request". Additionally since this parcel of property is separated from the existing landfill by a natural gas line we are concerned how the existing landfill will be merged with this property. We are concerned that an access road to a piece of private property south of the existing land fill was fenced off and included in the Lanear property, requiring the property owner to get a key from the owner to open a gate to enter their property.

30. We are concerned as to whether the Tallapoosa County Commission (the local authority) submitted a detailed analysis addressing the six minimum siting factors as set out in the Alabama Solid Waste Disposal Act (ASWDA) and ADEMS implementing regulations when selecting the Ashurst/Bar/Smith/Community as the

site for The Tallassee Waste Disposal Center. In as much were alternate sites considered by the Tallapoosa County Commission in selecting a site to consider for the waste for this area. Additionally in that the site was closed for lack of space and available land for expansion is it documented that the Commission weighed this issue in granting approval of the 2002 reopening of the landfill?

31. We are concerned as to whether a need based analysis was done with statistics to support that the 90 % African American Community of the Ashurst Bar/ Community should overwhelmingly bare the burden for the benefit of 74% of the communities served which are majority white. In view of the articles in the local paper concerning the litigation between Sunflower Inc. and Waste Management concerning the collecting of trash in Montgomery and Elmore Counties it appears that the need for an expansion is not supported by statistics generated by the integration of a statewide network of facilities that aid in the planning, development, and operation of facilities.

32. We are concerned that the Tallapoosa County Commission and ADEM have approved 4 out 5 landfills in majority African-American communities and this is in violation of Title VI and is blatant racial discrimination. In reopening the Tallassee Waste Disposal Center, if the proper criteria was used by the local authority the site should have been eliminated and even more so further scrutinized by ADEM for compliance since the Tallapoosa County Commissioners were already in violation of Title VI. Tallapoosa County is a majority white county why is the African-American population bearing the burden for waste disposal in this county? The continued failure of the Commission to comply with Title VI in preventing a disparate impact on majority African –American communities (protected communities by EPA Part 7 regulation) only concerns us more that ADEM the recipient of Federal Funds are not performing its duties as overseers for legal implementation of the laws of this land.

33. We are concerned about the devaluation of our properties and the social and community perception, even though there have been disparaging comments made in regards to the way the property owners maintain their properties.

34. We are concerned that in spite of the recent investigative report submitted by The U.S. Environmental Protection Agency Office of the Civil Rights, in June 2003 to ADEM in regards to the TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 28R-99-R4, that the attorney opened the meeting by stating that ADEM only considers technical issues and not socio-economic impact issues. As you are well aware this report found that ADEM is not limited or prohibited by any legislative act from exerting its authority to oversee that local bodies, consider safety and socio-economic impacts, but also ADEM should, " undertake additional and independent analyses of such impacts during the State permitting phase for a facility if necessary." In this report EPA found that ASWD Act, "gives ADEM broad authority to manage and regulate all aspects of solid waste disposal in Alabama." It is the EPA's position that the ASWD Act, "directs ADEM, in developing the State Solid Waste Management Plan to ensure that all aspects of local, regional, and state planning, zoning, population estimates, and economics are take into consideration." You should note that the files available at ADEM concerning the Tallassee Waste

Disposal Center includes pictures of abandon homes, rather than the homes within the 2 ½ mile radius surrounding the landfill.

In conclusion there were many issues that were not addressed because of the format of the hearing, and the lack of the public to participate by questions to really ascertain valid information to determine why the Ashurst/Bar/Smith Community was chosen as a site when clearly there are natural and population issues that should have sent up questions to ADEM when the owner began making application for a landfill in this protected community. The Tallassee Waste Disposal Center's proposed permit has received strong community opposition due to the racial and environmental disparities related to it. Despite this opposition, ADEM as failed to provide the Ashurst Bar/Smith Community with adequate opportunities to participate in the decision-making process related to the proposed permit. This procedural failure by ADEM violates Title VI. As much ADEM's August 26, 2003 Public hearing was neither early, inclusive, or meaningful for the Ashurst Bar/Smith Community based on the issues, procedures and concerns listed earlier.

According to EPA, it is possible to violate Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the environmental decision-making process. USEPA, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, Federal Register / Vol .65, No. 124 / Tuesday, June 27, 2000,39658. Early, inclusive, and meaningful public involvement in the environmental decision-making process is recommended for compliance with Title VI.

It is most disappointing to think that the governmental agency charged to protect the well being of the citizens of the State of Alabama, had knowledge of the June 2003 EPA report and its recommendations, but still chose to announce its ability to consider issues in the permitting process to its perceived limited scope.

Please enter this letter into the comment report.

cc: Mr. Jonathan Crosby

Alabama State Health Department

U.S. Environmental Protection Agency Office of Civil Rights

U.S. Corp of Engineers, Mobile District

U.S Department of Transportation

The Alabama Department of Transportation

Governor Bob Riley

Alabama Attorney General

The U. S. Justice Department

Janette Wipper

Senator Richard Shelby

[redacted]

December 8, 2003

United States Environmental Protection Agency
Office of Civil Rights
Mail Code 1201 A
1200 Pennsylvania Ave. NW
Washington, DC 26460

Attn: Karen D. Higginbotham, Director

Re: Tallassee Waste Disposal Center, Inc./ Sunflower, Inc.
East Tallassee Alabama, Tallapoosa County
Permit 62-11
EPA OCR file No. 06R-03-R4

Dear Ms. Higginbotham,

The purpose of this letter is to inform the EPA of the decision by the Alabama Department of Environmental Management (ADEM) to issue the permit for modification of the Tallassee Waste Disposal Center. I received notification via a letter dated October 20, 2003. Included with the notice of approval were responses to comments made during the August 26,2003 public hearing and also additional written comments submitted for inclusion in the record due by the August 29, 2003 deadline. A copy of this letter is enclosed.

I submitted to EPA a copy of my written comments to ADEM dated August 29,2003, and I have been notified an investigation will be conducted to review the comments for acceptance as an administrative complaint.

For the purpose of background, the existence of this landfill began in the 1980's. Prior to the August 26, 2003 date the people of this community were never granted a public hearing in spite of ongoing public protests and complaints. It is our contention that this hearing was neither early, inclusive, or of substantive value since the process for the expansion/modification reached ADEM as early as March 2003. (See March 14, 2003 letter) As an adjacent landowner I received my first information concerning this expansion June 9, 2003 and was given until July 9, 2003 to respond and prepare. This written notice was the first time I was informed of any activity concerning the Tallassee Waste Disposal Center. It was of little value because a preliminary determination of renewal application was written June 5, 2003 (letter enclosed).

ADEM's response to comment 3 in the public hearing report that, "EPA has found no direct evidence of intentional discrimination in its investigation of ADEM's permitting process for municipal solid waste landfills", does not address the concerns of the people

of the Ashurst Bar/Smith Community by its continued refusal to address the recommendations listed in the June 2003 EPA investigative report. To be clear we are concerned that based on this EPA report ADEM should "undertake additional and independent analyses of such impacts during the states permitting phase for a facility if necessary". It is our contention that because of the many complaints from the community of the local authority's failure to conduct the site evaluations according to recommended site factors; ADEM should have conducted an independent analysis and submitted to the community its findings on socio-economics, population estimates, safety, and other health impact issues. Specifically, ADEM's acknowledgement that The Alabama Solid Wastes Disposal Act required the local authority (Tallapoosa County) to document its consideration of the site factors is what we were seeking to support our concern as to whether this was done.

In the many years that the citizens of the Ashurst Bar/ Smith Community have protested and pursed inclusion to participate in the policy making decisions in the locating or re-opening of the landfill in our community a satisfactory response has not been granted to support any effort by the governing authorities to allow our involvement. As evidence of the local authority's policy to ignore, in the event of this most recent modification request the local authority did not notify the community of the decision to authorize the relocation of a public road. I am particular concerned about the procedures of the local authority since the road's proposed design will to go through the middle of my property, which is a violation of my rights to have due process in regards to the State seizing my land.

I am appalled at the continuing attitude and disregard of ADEM toward the recommendations in the investigative report of the US PROTECTION AGENCY OFFICE OF CIVIL RIGHTS FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 28R-99-R4, YERKWOOD LAND FILL COMPLAINT JUNE 2003. Not only were the opening statements at the August 26, 2003 public hearing contrary to the report, this interpretation of limited scope to technical issues continues in the written October 2003 report as well.

Such blatant disregard of these recommendations warrants asking when and how the environmental policies mandated by our Federal Government are going to be enforced at the state and local level in Alabama? ADEM sites the Georgia case (Rozar v. Mullis, 85 F.3d 556) to justify its position, even though the EPA reports supporting documentation was not supplied in a previous request. Is it EPA's position to allow this trivialization or indifference to policy recommendations that protect the citizens of this country? What reasons contribute to the difference in what EPA interprets as the governing authority of ADEM and what this regulatory agency subscribes as its scope and functions?

It appears site has everything to do with landfill permitting, yet the agency charged to be the ultimate implementer of Alabama environmental policies will not assume responsibility for this very critical factor.

Due to ADEM's lack of involvement in site selection, the Tallapoosa County Commission has allowed four out of five landfills to be situated in majority African-American communities. Tallapoosa County is a majority White county, yet the African – American population is overwhelmingly baring the burden of having landfills placed in their neighborhoods. (See [redacted] report) It is on this premise that we allege specific targeting of African –American Communities by landfill owners in Tallapoosa County and the failure of the Tallapoosa County Commission to properly utilize the siting factors required by EPA to make sure that a disparate situation is not caused. Based on the June 2003 report of EPA to ADEM, this agency is also in violation of Title VI, because in the absence of an adequate siting process the ultimate responsibility for compliance rests with ADEM.

Another point of concern is whether or not ADEM was completely honest and forthright with the information supplied to the citizens of the Ashurst Bar/Smith Community. The early documents listed the project as a major modification permission request (see letter dated April 30,2003 ECE to Jonathan Crosby at ADEM). The US Corp of Engineers notice dated June 13,2003 Public notice No. Al03-0181-R Public notice to fill in wetlands to expand the use capabilities of the Tallassee Waste Disposal Center included property outside the existing permitted area. (See the Corp's Notice) The documents referred to the facility as 200 plus acres yet in other places it is listed as 120 plus acres, therefore confusing the community as to the size of the facility and the area included. Clearly the maps provided by the Corp included the relocation of Washington Blvd, the new boundaries bordering the local Church and the most populated area in the community. Wetlands were to be addressed by the Corp, yet in the ADEM's comment report we were told that the wetlands were approved August 2002 and were in the permitted area. Furthermore if the initial proposed work was changed a clarification notice should have been addressed to the adjacent property owners specifically identifying the property involved and the work to be done.

Although technical issues, such as continuous abnormal methane gas levels for the entire first year of the reopening, water run-off (compliance issues), the possible contamination of Gleeden Branch, the trespass of industrial chemicals which traversed the southern boundary of the landfill to contaminate a drinking water spring, the close proximity of the landfill to the natural gas line, inadequate roads through a rural neighborhood, the LOCATION of the new sedimentation pond, and the concern about the Tuscaloosa Aquifer were addressed to ADEM, these issues were not addressed in the comment report. So, it is not that ADEM does not address socio-economic issues, the agency apparently does not address any of the concerns raised by the people who are adversely impacted.

In summary, my complaint is that the public hearing was a formality and not of any substance since the only statement by ADEM was the opening statement that addressed its perceived limited scope to technical issues only, nor early when in fact a preliminary letter had been issued in June 2003. Additionally, ADEM's intention seems to be of non-compliance to the recommendations issued in the EPA June 2003 report. It leads me to

surmise that ADEM continues to ignore EPA's interpretation of the Alabama Solid Waste Act as not being as restrictive as the agency claims.

It is troubling that this governmental agency that receives tax funds and is charged to insure the well being and health of the citizens of this state is resorting to ignoring mandated policies in regards to maintaining a safe and healthy environment for its fellow citizens. In Tallapoosa County the African- American Communities should not overwhelmingly bare the waste disposal burden for the county. More specifically the Ashurst Bar/Smith Community is baring the burden for the 74 % majority White communities serviced out of the 19 counties by the Tallassee Waste Disposal center. It is not by accident that the Ashurst Bar/Smith Community was chosen, for it is an identified pattern by the Commissioners of Tallapoosa County to select sites in poor Black communities.

The overall impact of this landfill is the creation of a living environment that is inhumane which will continue the displacement of people and the ultimately loss of the land owned by African-Americans since the 1800's. Politicians grant permits for industries to locate in low income communities that cause environmental concerns and injustice issues on the premise that economic gains will be received by the communities affected. The Ashurst Bar/Smith Community has not received any financial or economic benefits from the Tallassee Waste Disposal Center. The workers are majority W hite and are from outside of the community and county. Therefore strengthening our charge of being left out of all aspects of this project.

The question more importantly is who will enforce TITLE VI or Executive Order 12,898, Federal Legislations passed to protect targeted groups of citizens such as the population of the Ashurst Bar/Smith Community in Tallapoosa County, Alabama against disparate situations when there is overwhelmingly evidence of disregard and discrimination?

Thanks in advance.

Sincerely,

[redacted]

cc: Sen. Richard Shelby
Sen. Jeff Sessions
Rep. Mike Rogers

Rep. Artur Davis
Governor Bob Riley
Al. Sen. Hank Sanders
Al. Rep. Ted Little
Al. Rep. Betty Carol Graham
Al. Rep. Yusuf Salaam
U.S. Justice Department
[redacted]

Attachment 4

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

May 30, 2013

Overnight Delivery
Ms. Vicki Simons, Director
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: **Title VI Civil Rights Complaint and Petition for Relief or Sanction - Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4)**

Dear Ms. Simons:

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

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

Complainants allege that the Alabama Department of Environmental Management (ADEM) violated Title VI and EPA's implementing regulations by reissuing and modifying, on September 27, 2011 and February 3, 2012 respectively, Solid Waste Disposal Facility Permit No. 53-03 authorizing Perry County Associates, LLC to construct and operate the Arrowhead Landfill, a municipal solid waste landfill in Perry County, Alabama which has the effect of adversely and disparately impacting African-American residents in the adjacent community.

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

9150 McDougal Court ◆ Tallahassee ◆ Florida 32312-4208 ◆ Telephone 850-386-5671
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I. Title VI Background

"Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating." *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) ("*Interim Guidance*") at 2 (footnote omitted); *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39680 (2000) ("*Draft Guidance*").[1] "Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2.

A complete or properly pleaded complaint must (1) be in writing, signed, and provide an avenue for contacting the signatory (*e.g.*, phone number, address); (2) describe the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act that has the effect of discriminating on the basis of race, color, or national origin); (3) be filed within 180 calendar days of the alleged discriminatory act(s); and (4) identify the EPA financial assistance recipient that took the alleged discriminatory act(s). *Interim Guidance* at 6; *Draft Guidance*, 65 Fed. Reg. at 39672. In order to establish a *prima facie* case of adverse disparate impact, EPA must determine that (1) a causal connection exists between the recipient's facially neutral action or practice and the alleged impact; (2) the alleged impact is "adverse;" and (3) the alleged adversity imposes a disparate impact on an individual or group protected under Title VI. *Yerkwood Landfill Complaint Decision Document*, EPA OCR File No. 28R-99-R4 (July 1, 2003) at 3; *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000); *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24739, 24741 (2013).

"If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to 'justify' the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient." *Interim Guidance* at 11. *See Draft Guidance*, 65 Fed. Reg. at 39683. "Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity." *Interim*

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[1] On June 27, 2000, EPA published *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667-39687 (2000). The Preamble to the *Draft Guidance* states that "[o]nce the *Draft Revised Guidance for Investigating Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*) issued in February 1998." 65 Fed. Reg. at 39650. The *Draft Guidance* has never been made final and consequently, the *Interim Guidance* issued in February 1998 has not been replaced.

Guidance at 11. "[A] justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id*. *See Draft Guidance*, 65 Fed. Reg. at 39683.

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

II. Complainants

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

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

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[2] The *Draft Guidance* purports to establish more stringent standing requirements than are contained in 40 C.F.R. § 7.120(a). The former establishes the following standing requirements:

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

Id., 65 Fed. Reg. at 39672. Notably, the *Draft Guidance* requires that a complainant be the victim of the alleged discrimination or a member of the protected class discriminated against. The *Draft Guidance* omits the option in 40 C.F.R. § 7.120(a) that *any person* – including a person who is not a member of a protected class – who believes that a specific class of persons has been discriminated against in violation of 40 C.F.R. Part 7 may file a complaint. An agency construction of its regulations that is inconsistent with the plain language of those regulations is unlawful. *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency* , 276 F.3d 1253, 1263 (11th Cir. 2001); *Sierra Club v. Johnson*, 436 F. 3d 1269, 1274 (11th Cir. 2006).

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Valerie Milton Gibbs
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Cynthia Thomas-Holmes
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Ella White Murdock
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Esther Calhoun P.O. Box 523 Uniontown, AL 36786 (334) 267-9763	Ellis B. Long Mar Leila Schaeffer P.O. Box 878 Uniontown, AL 36786 (334) 628-8278	Rev. J. Thompson Brown 4157 Winston Way Birmingham, AL 35213 (205) 870-4244
Rev. Mark Johnston 105 DeLong Road Nauvoo, AL 35578 (205) 387-1806	John Wathen 5600 Holt Peterson Rd. Tuscaloosa, AL 35404 (205) 507-0867	

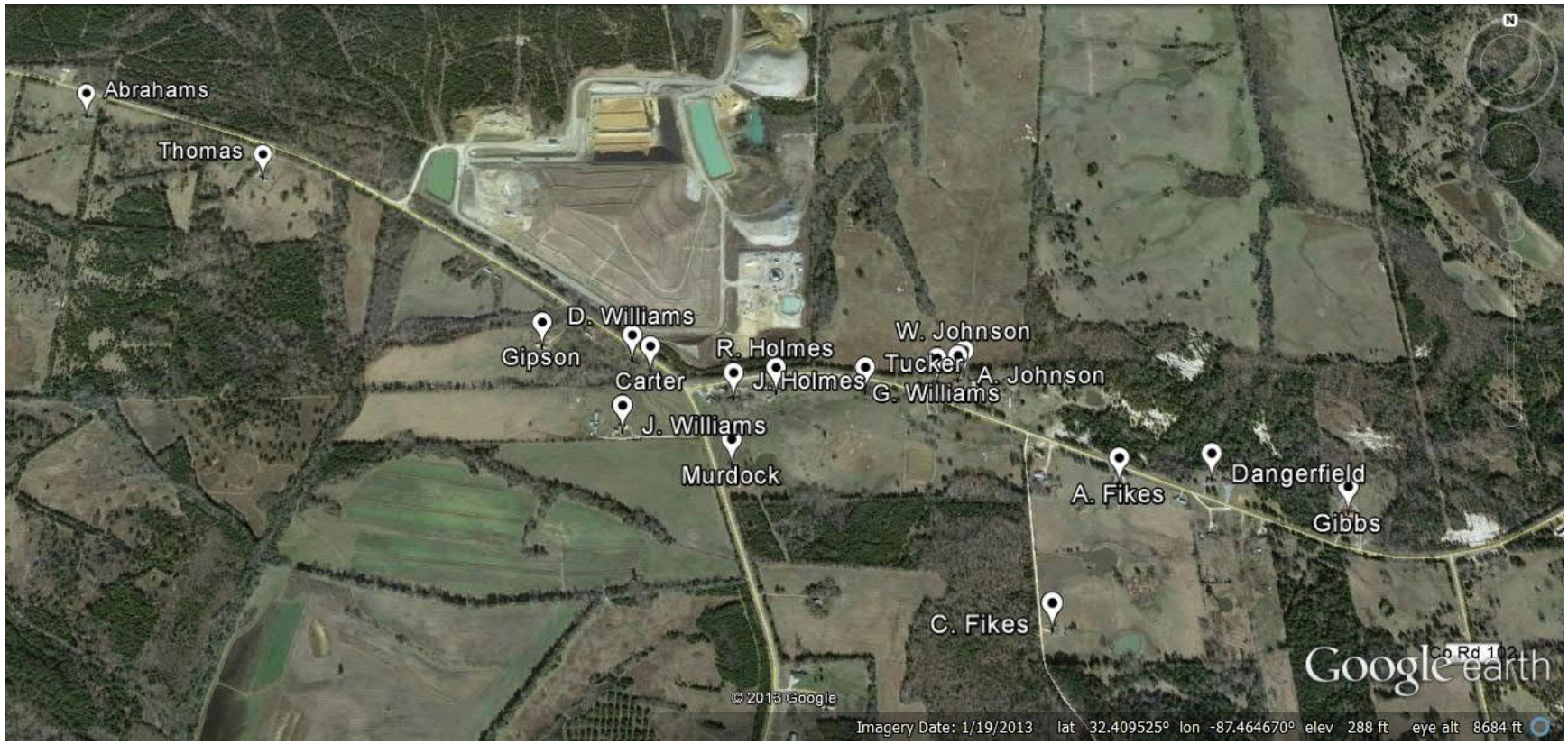
Many of the Complainants are African-Americans who live within one mile of the Arrowhead Landfill and who believe that they have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. **Figure 1**. A few of the Complainants are members of the African-American race who, though not themselves discriminated against by ADEM, believe that African-Americans as a class have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. In addition, several of the Complainants are not members of the African-American race who, though not themselves discriminated against by ADEM, believe that African-Americans have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. The undersigned is the authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

III. Recipient

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

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

Figure 1
PROXIMITY OF AFFECTED AFRICAN-AMERICAN COMPLAINANTS TO ARROWHEAD LANDFILL



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

Interim Guidance at 2-3 (footnotes omitted).

ADEM was a recipient of financial assistance from EPA at the time of the alleged discriminatory acts. For example, EPA recently awarded grants to ADEM as shown in **Exhibit A** (EPA Grants to ADEM).

IV. Discriminatory Acts

The first alleged discriminatory act is the reissuance (renewal) of Solid Waste Disposal Facility Permit No. 53-03 by ADEM to Perry County Associates, LLC on September 27, 2011. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011). [3] The permit authorizes Perry County Associates, LLC to construct and operate the Arrowhead Landfill, a municipal solid waste landfill. Permit No. 53-03 authorizes the disposal of "[n]onhazardous solid wastes, noninfectious putrescible wastes including but not limited to household garbage, commercial waste, industrial waste, construction and demolition debris, and other similar type materials" from thirty-three states. *Id*. The permit authorizes the disposal of 15,000 tons of waste per day – the largest authorized waste disposal volume in Alabama. **Figure 2**. The authorized disposal area is 256.151 acres. The facility is located in Perry County, Alabama at approximately Latitude 32.4115 ° North, Longitude 87.4675 ° West. **Figure 3**.

The second alleged discriminatory act is the modification of Permit No. 53-03 by ADEM on February 3, 2012. **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). The permit modification authorizes Perry County Associates, LLC to expand the disposal area at the Arrowhead Landfill by 169.179 acres (66%). [4]

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

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

Figure 2
AUTHORIZED WASTE DISPOSAL VOLUMES AT ALABAMA LANDFILLS (TPD)
Source: Permitted Solid Waste Landfills in the State of Alabama (ADEM, June 29, 2011)
(available at http://www.adem.alabama.gov/programs/land/landforms/MSWLFMasterList08-11.pdf)

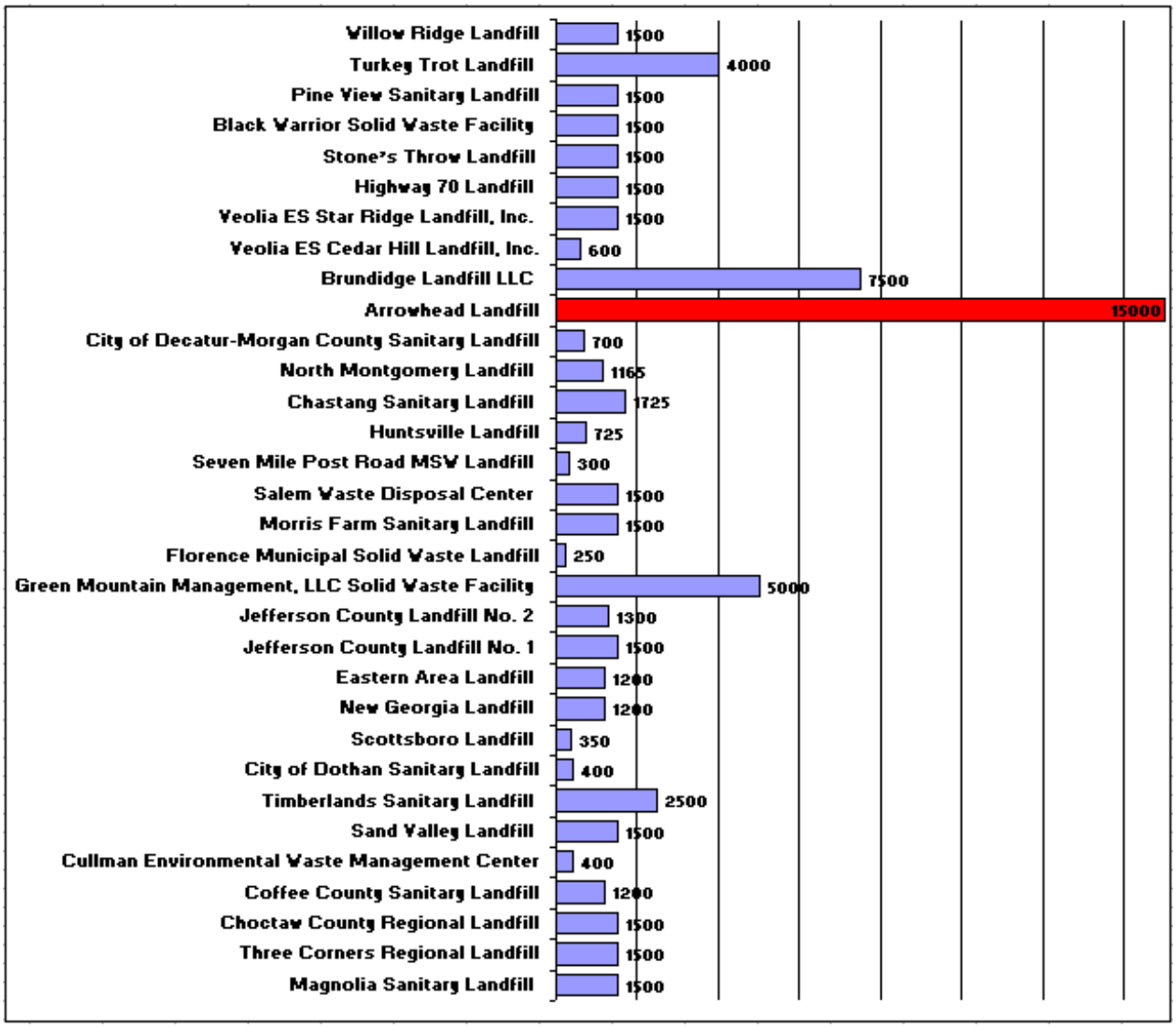
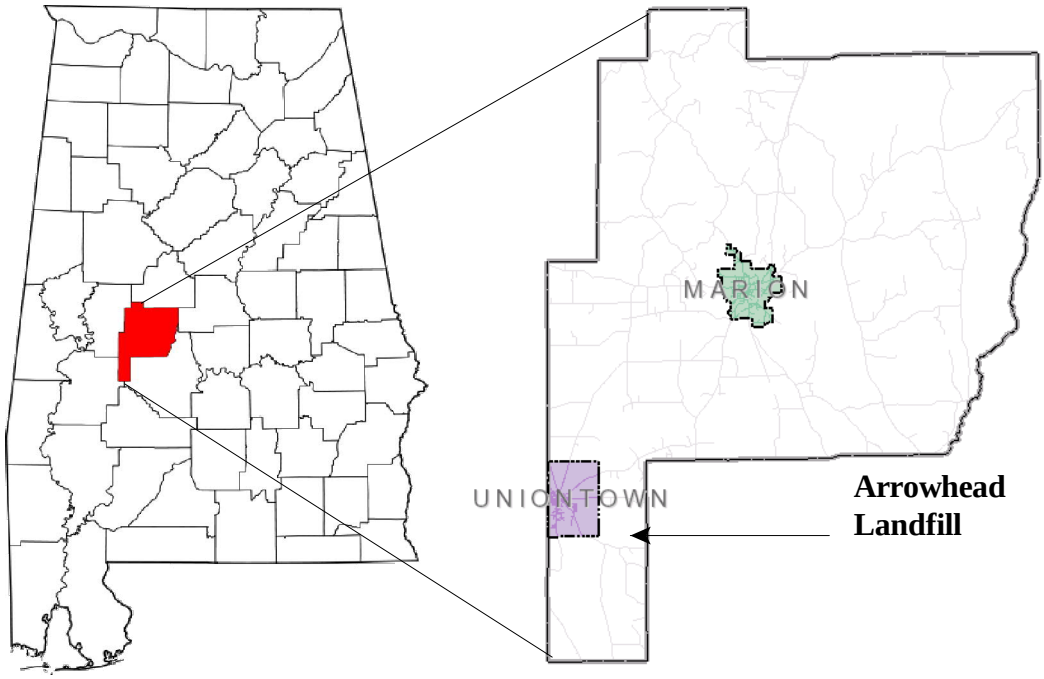


Figure 3
LOCATION OF THE ARROWHEAD LANDFILL
PERRY COUNTY, ALABAMA



V. Timeliness

40 C.F.R. § 7.120(b)(2) requires that a complaint alleging discrimination under a program or activity receiving EPA financial assistance must be filed within 180 days after the alleged discriminatory act. The reissuance of Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC occurred on September 27, 2011. A complaint dated January 3, 2012 was received by EPA 101 days after the permit was reissued, *i.e.*, on January 6, 2012. **Exhibit D** (*Letter from Rafael DeLeon to David A. Ludder dated June 14, 2012 Re: Acceptance of Administrative Complaints*). The modification of Solid Waste Disposal Facility Permit No. 53-03 was granted to Perry County Associates, LLC on February 3, 2012. A complaint dated February 16, 2012 was received by EPA 18 days after the permit was modified, *i.e.*, on February 21, 2012. *Id.*

On September 26, 2012, EPA dismissed the above-referenced complaints without prejudice to refiling "within 60 days following termination or conclusion of" litigation styled *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC* , No. No. 2:10-cv-00326-WS-N (S.D. Ala.) and *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC and Phillips & Jordan, Inc.* , Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). **Exhibit E** (*Letter from Rafael DeLeon to David A. Ludder dated September 26, 2012 Re: Dismissal without prejudice of Administrative Complaint*). The foregoing litigation was terminated on April 16, 2013. **Exhibit F** (*Ethel L. Abrahams, et al. v. Phill-Con Services, LLC*, No. 2:10-cv-00326-WS-N (S.D. Ala. Apr. 16, 2013), Doc. 44). Accordingly, refiling of this complaint is timely if received by EPA on or before June 15, 2013.

VI. Litigation

As previously noted by EPA,

> [I]n 2010, certain residents of Perry County filed a civil action in the U.S. District Court for the Southern District of Alabama, Northern Division, against Phill-Con Services, LLC, the operator of the Arrowhead Landfill, to enforce an emission standard or limitation under the Clean Air Act, 42 U.S.C. 7401–7671q, and to enforce a standard, regulation, requirement, or prohibition under the Solid Waste Disposal Act, 42 U.S.C. 6901-6992k. Also in 2010, certain residents of Perry County filed a civil action in state court against Phill-Con and Phillips & Jordan, Inc. (a contractor at the landfill), asserting state law claims including negligence, wantonness, nuisance, and trespass resulting from the construction and operation of the landfill. In addition to other remedies, the Plaintiffs seek a permanent injunction that the landfill ceases operating in such a manner as to cause certain impacts. Both of these actions were subsequently removed to the U.S. Bankruptcy County for the Southern District of Alabama, Selma Division, where the litigation has been consolidated. OCR understands that the litigation is still ongoing.

Exhibit E (*Letter from Rafael DeLeon to David A. Ludder dated September 26, 2012 Re: Dismissal without prejudice of Administrative Complaint*) at 1. On the basis of these findings, EPA dismissed the January 3, 2011 and February 16, 2012 complaints without prejudice pending results of the litigation.

> OCR may choose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by a Federal court. For example, if a Federal court reviewed evidence presented by both parties and issued a decision that stated the allegations of discrimination were not true, OCR may choose not to investigate allegations in the complaint that deal with those same issues. In addition, if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process.
>
> Generally, OCR may choose to investigate if the complaint raises issues that were not actually litigated or substantively decided by a Federal court, or if it raises unique and important legal or policy issues.

Draft Guidance, 65 Fed. Reg. at 39673.

On April 16, 2013, the foregoing litigation was dismissed with prejudice on motion of the parties. **Exhibit F** (*Ethel L. Abrahams, et al. v. Phill-Con Services, LLC* , No. 2:10-cv-00326-WS-N (S.D. Ala. Apr. 16, 2013), Doc. 44). The Court did not review any evidence, make any findings of fact, or otherwise decide any substantive issues. Accordingly, the now terminated litigation does not present an impediment to EPA investigation and disposition of this Complaint.[5]

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[5] The permittee of the Arrowhead Landfill, Perry County Associates, LLC., was not a party to *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC* , No. No. 2:10-cv-00326-WS-N (S.D. Ala.) or *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC and Phillips & Jordan, Inc.* , Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). Perry County Associates, LLC was a "debtor" in bankruptcy. *In re Perry County Associates, LLC* , No. 10-00277 (Bankr. S.D. Ala. filed Jan. 26, 2010). The only asset possessed by Perry County Associates, LLC was Permit No. 53-03. The landfill itself was owned by Perry-Uniontown Ventures I, LLC, which was also a "debtor" in bankruptcy. *In re Perry-Uniontown Ventures I, LLC* , No. 10-00276 (Bankr. S.D. Ala. filed Jan. 26, 2010). Perry-Uniontown Ventures I, LLC was the sole member of Perry County Associates, LLC. Phill-Con Services, LLC and Phillips and Jordan, Inc. ceased doing work at the landfill in October 2011. The Arrowhead Landfill is now owned by Howling Coyote, LLC, a wholly-owned subsidiary of Green Group Holdings, LLC. **Exhibit G** (*Letter from T. Shane Lovett to David A. Ludder dated November 5, 2012*). An application for permit transfer from Perry County Associates, LLC to Howling Coyote, LLC was submitted to ADEM on or about January 4, 2012. **Exhibit H** (*Application for Transfer of Permit dated December 27, 2012*). "A notification must be submitted to and approved by the Department prior to any proposed transfer from one person

VII. Impacts

The impacts resulting from the activities authorized by Permit No. 53-03 include the following:

A. The frequent emission of odors from the landfill that are unpleasant to persons and that cause lessened human food and water intake, interference with sleep, upset appetite, irritation of the upper respiratory tract (nose and throat) and eyes, headaches, dizziness, nausea, and vomiting among many of the Complainants; and interference with outdoor activities and the enjoyment of property of many of the Complainants. *See e.g.*, **Exhibit J1** (2010 Odor Complaints), **Exhibit J2** (2011 Odor Complaints), **Exhibit J3** (2012 Odor Complaints), and **Exhibit J4** (2013 Odor Complaints).

B. Increased populations of flies in and around the homes of many of the Complainants that are bothersome and that may be carriers of dozens of infectious viruses, bacteria, and parasites. **Exhibit K** (2013 Fly Complaints).

C. Increased populations of birds around the homes of many of the Complainants that deposit droppings and that may be carriers of dozens of infectious viruses, bacteria, and parasites. **Exhibit L1** (Video), **Exhibit L2** (2011 Bird Complaints), **Exhibit L3** (2012 Bird Complaints), and **Exhibit L4** (2013 Bird Complaints).

D. Increased noise from operation of heavy machinery (*e.g.*, steel wheel compactor, bulldozer, excavator, off-road haul truck, small farm tractor, clamshell buckets, railcars) 24-hours per day, 7-days per week causing headaches and interference with sleep, conversations, television and radio listening and other activities within and without the homes of many of the Complainants. **Exhibit M1** (2010 Noise Complaints), **Exhibit M2** (2011 Noise Complaints), **Exhibit M3** (2012 Noise Complaints), and **Exhibit M4** (2013 Noise Complaints).

E. The frequent emission of fugitive dust from the landfill that causes particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. *See e.g.*, **Exhibit N1** (2010 Dust Complaints), **Exhibit N2** (2011 Dust Complaints), **Exhibit N3** (2012 Dust Complaints), and **Exhibit N4** (2010 Dust Video).

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or company to another or name change of any permitted facility." Ala. Admin. Code R. 335-13-5-.07. There is no evidence in the ADEM eFile system that ADEM ever approved the transfer of Permit No. 53-03 to Howling Coyote, LLC. Perry County Associates, LLC was dissolved on October 31, 2012. **Exhibit I** (*Articles of Dissolution dated October 11, 2012*). If the permit transfer has not been approved by ADEM, the Arrowhead Landfill is being operated by a party that does not have a permit.

F. Decreased property values of many of the Complainants. *See e.g.,* **Exhibit O1** (Affidavit of Diane Hite), **Exhibit O2** (Cameron, T.A. "Directional Heterogeneity in Distance Profiles in Hedonic Property Value Models," *Journal of Environmental Economics and Management* 51(1) (2006): 26-45), **Exhibit O3** (Guntermann, K.L. "Sanitary Landfills, Stigma and Industrial Land Values," *Journal of Real Estate Research* 10(5) (1995): 531-542), **Exhibit O4** (Hirshfeld, S. et al. "Assessing the True Cost of Landfills," *Waste Management and Research* 10 (1992): 471-484), **Exhibit O5** (Hite, D. "A Random Utility Model of Environmental Equity," *Growth and Change* 31(4) (2000): 40-58), **Exhibit O6** (Hite, D. "Information and Bargaining in Markets for Environmental Quality," *Land Economics* 74(3) (1998): 303-316), **Exhibit O7** (Hite, D., et al. "Property Value Impacts of an Environmental Disamenity: The Case of Landfills," *Journal of Real Estate Finance and Economics* 22 (2001): 185-202), **Exhibit O8** (Kinnaman, T.C. "A Landfill Closure and Housing Values," *Contemporary Economic Policy* 27(3) (2009): 380-389), **Exhibit O9** (Lim, J.S., et al. "Does size really matter? Landfill scale impacts on property values," *Applied Economics Letters* 14 (2007): 719-723), **Exhibit O10** (Nelson, A.C., et al. "Price effects of landfills on house values," *Land Economics* (1992)), **Exhibit O11** (Ready, R.C., "Do Landfills Always Depress Nearby Property Values?," *Journal of Real Estate Research* 32(3) (2010): 321-339), **Exhibit O12** (Reichert, A.K., et al. "The Impact of Landfills on Residential Property Values," *Journal of Real Estate Research* 7(3) (1992): 297-314), **Exhibit O13** (Wilson, S.E., "Evaluating the potential impact of a proposed landfill," *Appraisal Journal* 77 (2009): 24-__), and **Exhibit O14** (Spector, K., et al. "Review of Current Property Valuation Literature," Industrial Economics, Inc. (1999)).

See also **Exhibit P1** (EPA Listening Session Invitation), **Exhibit P2** (EPA Listening Session Video, June 15, 2011), and **Exhibit P3** (ADEM Public Hearing on Permit Renewal, July 14, 2011)[6] and **Exhibit P4** (Nov 2012-May 2013 Written Complaints).

VIII. ADEM Authority

EPA guidance provides that "OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program." *Interim Guidance* at 8; *Draft Guidance*, 65 Fed. Reg. at 39678. "In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." *Draft Guidance*, 65 Fed. Reg. at 39678. *See id.*, 65 Fed. Reg. at 39670, 39671. Complainants

[6] In the complaints filed on January 6, 2012 and February 21, 2012, Complainants also alleged "the frequent tracking of dirt and other solids from the landfill onto County Road 1 where through traffic causes the dirt and other solids to become airborne particulates resulting in particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. *See* Exhibit M (Mud in Road Sign)." Subsequently, the Arrowhead Landfill relocated its entrance to Tayloe Road off U.S. Highway 82. **Exhibit Q** (*Letter from William F. Hodges to Scott Story dated October 30, 2012*). This relocation has eliminated tracking of dirt on County Road 1.

submit that both the *Interim Guidance* and *Draft Guidance* are wrong as a matter of law on this point.

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

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

A. Odors

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

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

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

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

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

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

Ala. Admin. Code R. 335-13-4-.22(1) provides:

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

(Emphasis added). [8]

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[7] Permit No. 53-03 provides that "[t]his landfill may be subject to ADEM Admin. Code Division 3 . . . and the Federal Clean Air Act." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section VI; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section VI. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* provide that "[t]his facility will comply with all Clean Air Act requirements." **Exhibit R1** at 2-33; **Exhibit S1** at 2-33.

[8] Permit No. 53-03 grants a variance from the requirement to use compacted earth as daily cover and authorizes the use of alternative cover materials (petroleum contaminated soil, automotive shredder residue, synthetic tarps and posi-shell). **Exhibit B** (Permit No. 53-03, Sept.

Ala. Admin. Code R. 335-13-4-.22(1)(b) provides:

> All waste shall be confined to as small an area as possible and spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 4 to 1 (25%) or as otherwise approved by the Department.[9]

27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Alternative cover materials may be inferior to compacted earth cover in the control of odors. In any case, the use of alternative cover materials is contrary to Alabama law. Ala. Code § 22-27-2(23) defines a "municipal solid waste landfill" as a "sanitary landfill." Ala. Code § 22-27-2(32) defines "sanitary landfill" as "[a] controlled area of land upon which solid waste is deposited and is compacted and *covered with compacted earth each day* as deposited, with no on-site burning of wastes, and so located, contoured, and drained that it will not constitute a source of water pollution as determined by the department." (Emphasis added). ADEM is authorized to "adopt such rules and regulations as may be needed to meet the requirements of this article" and to "[a]dopt rules to implement this article." Ala. Code §§ 22-27-7 and 22-27-12(1). Ala. Code Title 22, Article 1 provides for no exceptions or variances from the requirement to use compacted earth as daily cover. Therefore, that language in Ala. Admin. Code R. 335-13-4-.22(1) which purports to permit ADEM to authorize the use of alternative cover materials is unlawful and void. *See Ex parte Crestwood Hosp. & Nursing Home, Inc.* , 670 So.2d 45, 47 (Ala. 1995) ("It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation"); *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala. 1991) ("An administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy."); *Jefferson County v. Alabama Criminal Justice Information Ctr. Comm'n* , 620 So.2d 651, 658 (Ala. 1993) (an administrative agency cannot "claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation"). The variance in Permit No. 53-03, Section III., H. is also unlawful and void.

Permit No. 53-03 currently authorizes *six inches* of compacted earth, petroleum contaminated soil, and automotive shredder residue as daily cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Greater depths of cover material are authorized and may be necessary to effectively control odors.

Permit No. 53-03 currently authorizes the same minimum cover frequency as provided in ADEM rules, *i.e. daily* cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. *See* Ala. Admin. Code R. 335-13-4-.22(1)(a)1. More frequent application of cover material is authorized and may be necessary to effectively control odors.

[9] Permit No. 53-03 requires that "[a]ll waste shall be confined to *an area as small as possible* . . .. Arrowhead Landfill is granted a variance to operate two working faces: one for the placement of MSW/Construction and Demolition waste, and one for the placement of coal ash waste (See Section X., A.). Each of the two working faces should still be confined to *as small an*

Ala. Admin. Code R. 335-13-4-.13(2)(f) 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. [10]

Finally, Ala. Admin. Code R. 335-13-4-.22(3)(b) 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. [11]

The foregoing authorize ADEM to require that landfill operations not result in offensive odors. In addition, the foregoing authorize ADEM to require the use of compacted earth as cover, to require that the depth of cover be more than six inches, to require that waste be covered

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area as possible." (Emphasis added.). **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., J.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., J. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that the maximum size of each of two working faces shall be 200 feet by 200 feet when waste receipts equal or exceed 1,500 tons per day and 150 feet by 100 feet when waste receipts are less than 1,500 tons per day. **Exhibit R1** at 2-28; **Exhibit S1** at 2-28. Reducing the size of the working face is authorized and would reduce the solid waste exposed to the air and thus odor emissions.

[10] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones for landfill odor impacts can be scientifically determined. *See e.g.*, **Exhibit T1** (Cooper, David C., *Atmospheric Dispersion Modeling for Odor Buffer Distances from Florida Landfills* , University of Central Florida (Report # 16207042, June 2009), **Exhibit T2** (Figueroa, V.K., *Determining Florida Landfill Odor Buffer Distances Using Aermod* , University of Central Florida (Masters Thesis, Summer 2008), and **Exhibit T3** (Tarr, J., *An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill* (Aug. 2012)).

[11] Permit No. 53-03 provides that "[t]he Department may enhance or reduce any requirements for operating and maintaining the landfill as deemed necessary by the Land Division." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., T.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., T.

more frequently than once each day, to prohibit leachate recirculation, [12] and to further restrict the size of the working face. Moreover, the foregoing authorize ADEM to establish a larger buffer zone for aesthetic purposes, including odor reduction.

B. Flies and birds

ADEM has ample authority to regulate and control disease vectors such as flies and birds. For example, Ala. Admin. Code R. 335-13-4-.22(1) provides:

> Daily Operation.
> (a) All waste shall be covered as follows:
> 1. A minimum of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by the Department shall be added at the conclusion of each day's operation *or as otherwise approved by the Department to control disease vectors* , fires, odors, blowing litter, and scavenging. [13]

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[12] Permit No. 53-03 currently authorizes leachate recirculation and states that leachate distribution *should* be at a rate and manner that does not cause odor. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section VII; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section VII . Recirculation accelerates organic decomposition and generates more off-gases. EPA "recognizes that potential operational problems associated with leachate recirculation, such as increase in leachate production, clogging of the leachate collection system, buildup of hydraulic head within the unit, increase in air emissions and odor problems, and increase in potential of leachate pollutant releases due to drift and/or run-off, may result in adverse impacts on human health and the environment." 56 Fed. Reg. at 51056 (1991). *See Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.10.3 ("In some cases, [leachate] discharge points have been a source of odor.").

[13] Permit No. 53-03 provides that "[t]he Permittee shall provide for vector control as required by ADEM Admin. Code Division 13." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., Q.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., Q. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* state that "[v]ectors shall be controlled by compaction and the use of daily cover, or approved ADC materials." **Exhibit R1** at 2-32; **Exhibit S1** at 2-32.

Permit No. 53-03 currently authorizes the use of alternative cover materials (petroleum contaminated soil, automotive shredder residue, synthetic tarps and posi-shell). **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Such alternatives are not authorized under Alabama law. *See supra* n. 8. Moreover, requiring compacted earth cover is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

Permit No. 53-03 currently authorizes *six inches* of compacted earth, petroleum

(Emphasis added).

Ala. Admin. Code R. 335-13-4-.22(2) (d) 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. [14]

Ala. Admin. Code R. 335-13-4-.22(1)(b) provides:

> All waste shall be confined to as small an area as possible and spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 4 to 1 (25%) or as otherwise approved by the Department. [15]

Finally, Ala. Admin. Code R. 335-13-4-.22(3)(b) provides:

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contaminated soil, and automotive shredder residue as daily cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Increasing cover thickness is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

Permit No. 53-03 currently authorizes the minimum cover frequency provided in ADEM rules, *i.e. daily* cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. *See* Ala. Admin. Code R. 335-13-4-.22(1)(a)1. More frequent application of cover material is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

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

[15] *See supra* n. 9. EPA has recognized that reducing the size of the working face may be appropriate to control disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

> 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.[16]

The foregoing authorize ADEM to require that landfill operations incorporate controls on disease vectors, such as flies and birds, in addition to daily cover.

C. Noise

ADEM has ample authority to regulate and control noise impacts. For example, Ala. Admin. Code R. 335-13-4-.13(2)(f) 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.[17]

In addition, Ala. Admin. Code R. 335-13-4-.22(3)(b) 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.[18]

The foregoing authorize ADEM to require buffer zones exceeding 100 feet where necessary to control adverse impacts on aesthetics from landfill operation. Such aesthetics are not limited to visual aesthetics. They include auditory aesthetics. Thus, ADEM is authorized to require an increased buffer zone to reduce disturbing noise at the Complainants' residences

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[16] *See supra* n. 11.

[17] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones for landfill noise impacts can be scientifically determined. *See e.g.*, **Exhibit U1** (ARM Group Inc., *Noise Impact Assessment Resource Recovery Landfill* (ARM Project 04117, Mar. 2006)) and **Exhibit U2** (Barton & Loguidice, P.C., *County of Franklin Solid Waste Management Authority Proposed Landfill Expansion Noise Assessment*, (Sep. 2008)).

[18] *See supra* n. 11.

D. Fugitive Dust

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

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

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

> **Fugitive Dust and Fugitive Emissions**
>
> (1) No Person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
>
> (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading or reads, or the clearing of land;
>
> (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems;
>
> (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dusty materials. Adequate containment methods shall be employed during sandblasting or other similar operations.
>
> (2) Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

Although ADEM's fugitive dust rule was declared to be unconstitutional by the Alabama Supreme Court in *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So.2d 82 (Ala. 1983), Alabama has neither repealed the rule nor sought or obtained EPA approval of a revision of the State Implementation Plan. Accordingly, the rule continues to be included in the "applicable implementation plan" under the Clean Air Act. *See e.g., Gen. Motors Corp. v. United States* , 496 US 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has

submitted a proposed revision."); *Safe Air for Everyone v. United States Envtl. Prot. Agency* , 475 F.3d 1096, 1105 (9th Cir. 2007) ("[A] state may not unilaterally alter the legal commitments of its SIP once EPA approves the plan").

In addition, Ala. Admin. Code R. 335-13-4-.13(2)(f) 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. [19]

In addition, Ala. Admin. Code R. 335-13-4-.22(3)(b) 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. [20]

The foregoing rules authorize ADEM to require controls on fugitive dust emissions and buffer zones exceeding 100 feet where necessary to control adverse impacts on aesthetics from landfill operation. Thus, ADEM is authorized to require reductions in the adverse impacts of fugitive dust at the Complainants' residences.

E. Property values

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan* , 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds* , *Alexander v. Sandoval* , 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Transportation's English-only language requirement for

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[19] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones to protect against adverse aesthetic impacts, such as from fugitive dust, are authorized. It may be possible to model these impacts. *See e.g.,* **Exhibit T3** (Tarr, J., *An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill* (Aug. 2012)).

[20] *See supra* n. 11.

motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because its 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 Arrowhead Landfill, with all its associated odor, noise, birds, flies, and fugitive dust, has an adverse effect on the property values of Complainants and other members of the African-American race in the community. ADEM cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider property values. ADEM does have authority to regulate landfill construction and operation (including buffer zones) which directly impact property values.

VIII. Disparate Impacts

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

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated by the 2010 census block data included in **Figure 4**. The impacted census blocks are 87 to 100 percent African-American.

The designated service area for the Arrowhead Landfill is thirty-three states. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) and **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). The predominant race in these states is White. **Figures 5 and 6**. The percentage of African-Americans among the total population in the designated thirty-three state service area is only 15.1%. The percentage of African-Americans among the total population in Alabama is 26%. Inasmuch as the percentage of African-Americans impacted by the Arrowhead Landfill far exceeds the percentage of African-Americans in the service area and State of Alabama, the alleged impacts are "disparate" impacts. *See Yerkwood Landfill Complaint Decision Document* , EPA OCR File No. 28R-99-R4 at 5.

Figure 4
AFRICAN-AMERICAN POPULATION IN 2010 CENSUS BLOCKS SURROUNDING THE ARROWHEAD LANDFILL
Source: http://1.usa.gov/10MLwGe

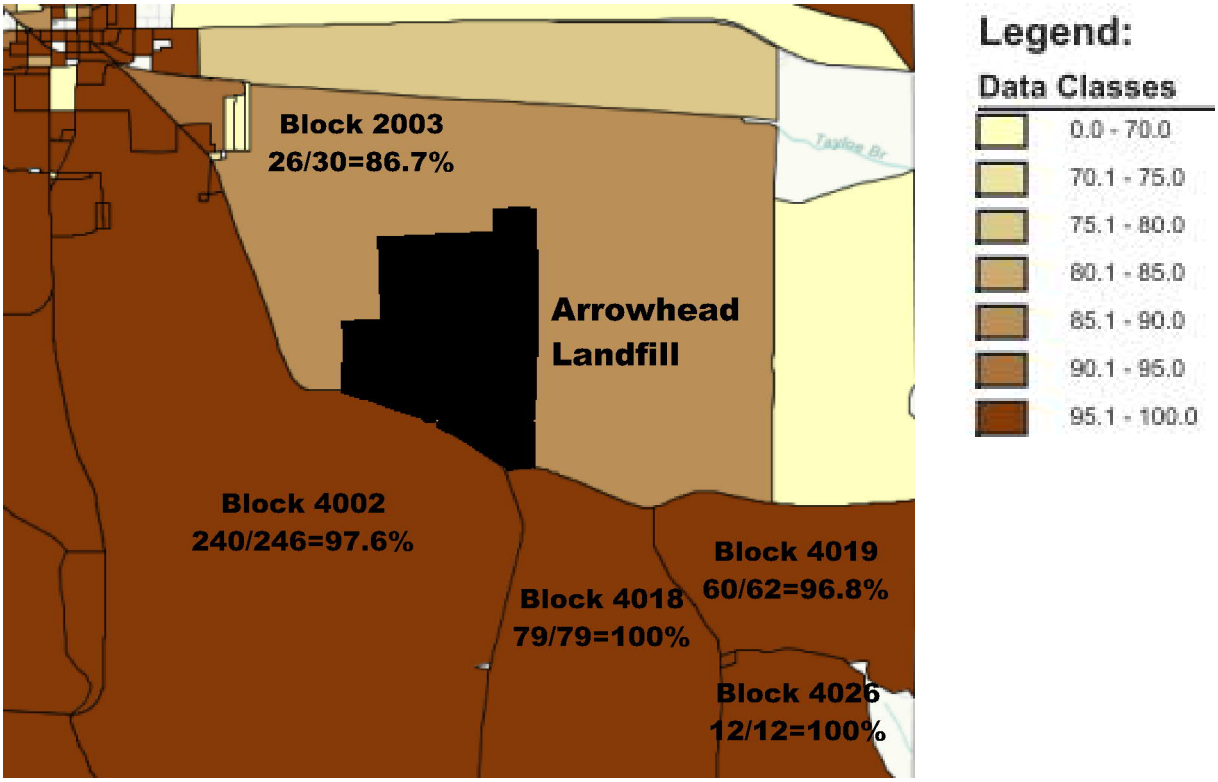


Figure 5
LARGEST RACIAL AND ETHNIC GROUPS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map

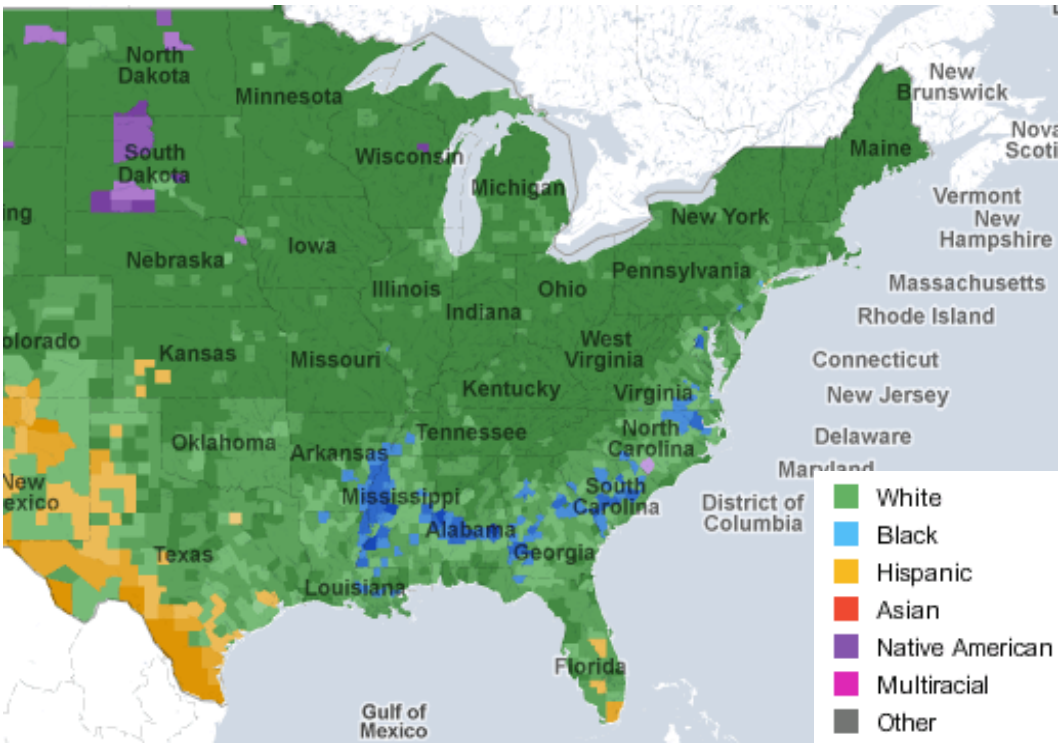
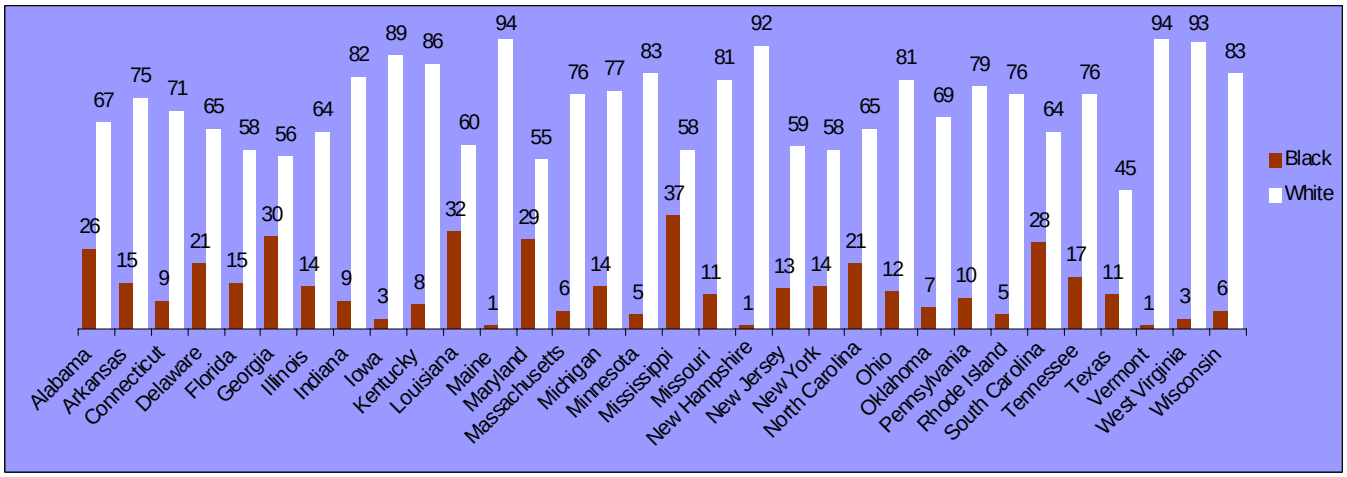


Figure 6
PERCENT AFRICAN-AMERICAN AND WHITE POPULATIONS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map and Exhibits B and C



IX. Justification and Less Discriminatory Alternatives

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

ADEM has not articulated a value to ADEM or the State of Alabama in the permitting of the Arrowhead Landfill. It is not likely that ADEM or the State of Alabama has a substantial, legitimate interest in the permitting of the Arrowhead Landfill.

Less discriminatory and practicable alternatives to the Arrowhead Landfill are available for the disposal of municipal solid waste generated in Perry County.

The BFI-Selma Transfer Station is located at 1478 Ala. Hwy. 41 in Selma, Alabama (Latitude 32.34773 ° North, Longitude 87.00067 ° West), approximately 31miles east-southeast of Uniontown. "Marion and unincorporated Perry County's use of BFI-Selma assures them access to a facility that will be able to accommodate the changing MSW needs of its residents throughout the life of this plan. * * * BFI-Selma is expected to remain an active disposal option to the City of Marion and unincorporated Perry County through 2014." **Exhibit V** (*10-Year Solid Waste Management Plan [for] Perry County, Alabama* (Nov. 2004)) at 22,. "[G]iven their market share and financial resources, BFI is not likely to run out of space to dispose of waste collected at BFI-Selma during the life of this plan." *Id*. at 38. There appear to be no more than a few residences within one mile of the BFI-Selma Transfer Station.

The Pine Ridge Landfill is located at 520 Murphy Road in Meridian, Mississippi (Latitude 32.37677 ° North, Longitude 88.61435 ° West), approximately 70 miles west of Uniontown. "The City of Uniontown send[s] waste generated within its jurisdiction and the Town of Faunsdale to the Pine Ridge Landfill. Pine Ridge is a Subtitle D facility located approximately 75 miles west of Uniontown in Meridian [Mississippi] . . .." *Id*. "Pine Ridge's Landfill Operations Manager estimated that the facility has enough remaining capacity to dispose of waste for at least the next 30 years." *Id*. at 23. There appear to be a number of residences within one mile of the Pine

Ridge Landfill along Murphy Road and Sweet Gum Bottom Road. 2010 census data for Census Blocks 106.4000 and 106.5000 indicate that the African-American population surrounding the Pine Ridge Landfill is significantly less than that surrounding the Arrowhead Landfill.

The Choctaw County Regional Landfill is located at 1106 Fire Tower Road in Butler, Alabama (Latitude 32.04541 ° North, Longitude 88.27016 ° West), approximately 52 miles southwest of Uniontown. The Choctaw County Regional Landfill is authorized to accept solid waste from all of Alabama. The Choctaw County Regional Landfill is located in an unpopulated area.

X. ADEM's Assurances and Defenses

With each application for EPA financial assistance, ADEM is required to provide assurances that it "will comply with the requirements of" 40 C.F.R. Part 7 implementing Title VI. 40 C.F.R. § 7.80(a)(1). *See* Standard Form 424B ("As the duly authorized representative of the applicant, I certify that the applicant: * * * Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; . . .."). [21] 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 this case, as in others, ADEM alleges that it grants permits in accordance with applicable laws and regulations without regard to the racial composition of any impacted communities. *See* **Exhibit X** (*Letter from Lance LeFleur to Rafael DeLeon dated July 19, 2012*). This allegation is, in essence, a claim that ADEM's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize ADEM's obligation under Title VI to avoid unintentional discriminatory effects. "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

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[21] Effective January 23, 2013, EPA is requiring that grant recipients (including states) 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.

Exhibit W (*Civil Rights Obligations*).

EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2 (footnote omitted).

Often, ADEM asserts that it grants permits in accordance with applicable laws and regulations ("criteria") that are designed to protect human health and the environment. Compliance with these "criteria," ADEM suggests, ensures that racial minorities are impacted no differently than other races. *See* **Exhibit X** (*Letter from Lance LeFleur to Rafael DeLeon dated July 19, 2012*). This allegation ignores the fact that members of the African-American race are disparately affected by the Arrowhead Landfill, notwithstanding ADEM's alleged compliance with the applicable criteria. **Exhibit Y** (*Draft Title VI Guidance Documents Questions and Answers*) at 4.[22]

ADEM has also been known to allege that it does not make landfill siting decisions and that its permitting of a landfill cannot cause adverse impacts on Complainants. *See* **Exhibit Z** (*Summation of Comments Received and Response-to-Comments, Proposed Arrowhead Landfill Renewal, Permit 53-03 (Sept. 27, 2011)*) ("[A]ny alleged discriminatory impact would come as a result of the actual siting of the landfill near an area whose residents are protected by Title VI. ADEM, however, does not site landfills; that responsibility lies with the local host government."). This position ignores several facts. First, the permit granted by ADEM to Perry County Associates, LLC is to construct and operate a landfill at a specific site – Sections 21, 22, 27, and 28, Township 17 North, Range 6 East in Perry County. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) and **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). But for the ADEM permit authorizing construction and operation of the landfill at this specific site, adverse impacts to Complainants might not result. Second, ADEM determined that the landfill site is compliant with ADEM's "Landfill Unit Siting Standards" at Ala. Admin. Code R. 335-13-4-.01. But for ADEM's determination that the landfill site is compliant with the siting standards, the landfill might not have been constructed at the site and might not result in adverse impacts to Complainants. Finally, ADEM has imposed or failed to impose, permit conditions on the operations of the landfill that have allowed odors, leachate recirculation, minimal cover depth, minimal cover frequency, alternative daily cover, disease vectors (birds and flies), working face areas, noise,

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

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

Exhibit Y (*Draft Title VI Guidance Documents Questions and Answers*) at 4.

nighttime and weekend operations, fugitive dust, minimal buffer zones and property devaluation. Operation of the landfill under these conditions causes adverse impacts to the Complainants.

XI. Request

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency - Office of Civil Rights accept this complaint and conduct an investigation to determine whether ADEM violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the issuance and modification of Solid Waste Disposal Facility Permit No. 53-03 on September 27, 2011 and February 3, 2012, respectively. If a violation is found and ADEM is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further petition the EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to ADEM, and after the conclusion of those proceedings, deny, annul, or terminate EPA financial assistance to ADEM.

Sincerely,

David A. Ludder
Attorney for Complainants

Enclosures:

Compact Disc 1 of 5 (Exhibits A thru L4)
Compact Disc 2 of 5 (Exhibits M1 thru O14)
Compact Disc 3 of 5 (Exhibits P1 thru R1)
Compact Disc 4 of 5 (Exhibits R2 thru S1)
Compact Disc 5 of 5 (Exhibits S2 thru Z)