

December 28, 2018

Delivered via Electronic Mail

Mr. Russell A. Kelly, Chief
Permits and Services Division
Alabama Department of Environmental Management
1400 Coliseum Blvd.
Montgomery, Alabama 36110-2400
rak@adem.alabama.gov

**Re: Proposed Renewal & Modification of Municipal Solid Waste Landfill Permit
- City of Dothan Sanitary Landfill**

Dear Mr. Kelley:

On behalf of my clients, Bobby Lewis, David Del Vecchio, Peggy Del Vecchio, Michael Del Vecchio, Michael LeBleu, Charles Childree, and Vicki Ammons, I submit the following comments on the above-referenced proposed permit for your consideration and response:

1. ADEM incorrectly characterizes the proposed permit as a permit renewal and modification.

A permit may be issued for a term not to exceed 5 years. Ala. Admin. Code r. 335-13-5-.02(2). An application for renewal that is not timely or complete does not suspend the expiration date of an existing permit. Permit No. 35-06, Section I. E. 3. (Oct. 21, 2013). *See* Ala. Code 1975 § 41-22-19(b) (a timely and sufficient application for renewal of a permit suspends the expiration date of the existing permit). A timely application for renewal of an existing permit is one that is filed at least 180 days prior to the expiration date of the existing permit. Permit No. 35-06, Section I. E. 2. (Oct. 21, 2013). *See* Ala. Admin. Code r. 335-13-5-.02(3) (application for renewal of an existing permit shall be filed at least 180 days prior to the expiration date of the existing permit). A complete and sufficient application for renewal of an existing municipal solid waste landfill permit is one that includes all the application requirements identified in Ala. Admin. Code r. 335-13-5-.02(1)(a)-(f). Once a permit expires, it cannot be renewed or modified. Rather, an applicant must apply for and be issued a new permit.

Permit No. 35-06 (Oct. 21, 2013) included an expiration date of October 20, 2018. The City of Dothan filed ADEM Form 439 - Solid Waste Application on April 18, 2018. This timely filing purports to fulfill the application requirement of Ala. Admin. Code r. 335-13-5-.01(a). It does not fulfill the application requirements of Ala. Admin. Code r. 335-13-5-.01(b)-(f). The City of Dothan filed an Operation Manual and Major Modification Plans (drawings) on July 18, 2018. These untimely filings purport to fulfill the application requirements of Ala. Admin. Code r. 335-13-5-.01(b)-(f).

A timely and complete or sufficient application for renewal of Permit No. 35-06 (Oct. 21, 2013) was not filed prior to April 23, 2018. Accordingly, Permit No. 35-06 (Oct. 21, 2013) expired on October 20, 2018 and cannot be renewed or modified. Rather, a new permit must be issued to allow the City of Dothan to operate the City of Dothan Sanitary Landfill.

2. The City of Dothan failed to submit host government approval as provided in Ala. Code 1975 §§ 22-27-48 and 22-27-48.1.

Ala. Admin. Code r. 335-13-5-.02(1)(b) requires that a permit application include documentation of host government approval as provided in Ala. Code 1975 §§ 22-27-48 and 22-27-48.1. Ala. Code 1975 § 22-27-48(b) provides:

The department may not consider an application for a new facility unless the application has received approval pursuant to Section 22-27-48.1 by the affected local governing body. The department may not consider an application for a modified permit for a facility unless such application has received approval pursuant to this section by the affected local governing body.

The permit application submitted by the City of Dothan includes Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. This Resolution approved “the proposed expansion to the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres.” Resolution No. 2014-246 did not approve the permit application now pending before the Department. Resolution No. 2014-246 did not approve the same total facility acreage described in the permit application now pending before the Department. Resolution No. 2014-246 did not approve the same facility boundary described in the permit application now pending before the Department. Resolution No. 2014-246 did not approve the same legal description of the facility boundary described in the permit application now pending before the Department. Resolution No. 2014-246 did not approve the

same construction and demolition waste disposal area acreage described in the permit application now pending before the Department. Resolution No. 2014-246 did not approve the same municipal solid waste disposal area acreage described in the permit application now pending before the Department.

The Department may not consider the City of Dothan's application for renewal and modification of Permit No. 35-06 because such application has not been approved by the Board of Commissioners of the City of Dothan, after notice and hearing, as required by Ala. Code 1975 § 22-27-48.

3. The proposed permit impermissibly authorizes the location of landfill units in wetlands.

Ala. Admin. Code r. 335-13-4-.01(2)(c) prohibits the location of landfill units in wetlands. The intent of r. 335-13-4-.01(2)(c) is to be more stringent than 40 C.F.R. § 258.12, *i.e.*, the intent is to establish an absolute prohibition on the location of landfill units in wetlands, regardless of whether the Corps of Engineers determines that there are no practicable alternatives to the proposed landfill location or whether the Corps of Engineers determines that wetland impacts can be offset through appropriate and practicable compensatory mitigation actions.

Proposed Permit No. 35-06 (Nov. 23, 2018) authorizes the location of landfill units in 2.25 acres of wetlands in violation of Ala. Admin. Code r. 335-13-4-.01(2)(c).

4. The proposed permit impermissibly authorizes the location of landfill units that will cause a discharge of pollutants into waters of the State that is in violation of the Alabama Water Pollution Control Act.

Ala. Admin. Code r. 335-13-4-.01(2)(a) prohibits the location of landfill units that will cause a discharge of pollutants into waters of the State, including wetlands and streams, that is in violation of the Alabama Water Pollution Control Act. The Alabama Water Pollution Control Act prohibits the discharge of pollutants into waters, including wetlands and streams, without a permit issued by the Department under the Alabama Water Pollution Control Act. Ala. Code 1975 § 22-22-9(i)(3).

Proposed Permit No. 35-06 (Nov. 23, 2018) authorizes the location of landfill units that will cause the discharge of pollutants (fill material) into 2.25 acres of wetlands, 890 feet of

ephemeral stream, and 270 feet of intermittent stream without a permit issued by the Department under the Alabama Water Pollution Control Act in violation of Ala. Admin. Code r. 335-13-4-.01(2)(a).

5. The minimum daily cover requirement is inadequate to ensure compliance with odor requirements applicable under the State Implementation Plan (SIP) approved by the Administrator pursuant to Section 110 of the Clean Air Act.

Ala. Admin. Code r. 335-13-4-.22(3)(a) requires that municipal solid waste landfills must ensure that landfill units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 110 of the Clean Air Act. The Alabama SIP approved by the Administrator provides that “[n]o 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).” Ala. Admin. Code r. 335-3-1-.08. An “air contaminant” includes “odor.” Ala. Admin. Code r. 335-3-1-.02(d). “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 . . .” Ala. Admin. Code r. 335-3-1-.02(ss). “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(e).

Proposed Permit No. 35-06 (Nov. 23, 2018) requires that solid waste disposed of in the municipal solid waste disposal area be covered with a minimum of six inches of compacted earth at the end of each day’s activities to control odors. Proposed Permit No. 35-06, Section 3. H. (Nov. 23, 2018). *See* Ala. Admin. Code r. 335-13-4-.22(1)(a)1. (waste shall be covered with a minimum of six inches of compacted earth at the conclusion of each day’s operation to control odors). Proposed Permit No. 35-06 (Nov. 23, 2018) includes no other requirements to control odor. Previous permits for the City of Dothan Sanitary Landfill have required the same minimum daily cover requirement as in the proposed permit. This minimum daily cover requirement has proven to be incapable of preventing smells that 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. These smells tend to be injurious to human health or welfare or

interfere with the enjoyment of life or property. Accordingly, the minimum daily cover requirement in Proposed Permit No. 35-06 (Nov. 23, 2018) is not adequate to ensure that the landfill will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a).

6. The proposed permit does not include requirements that are adequate to control disease vectors and prevent the breeding or accumulation of disease vectors.

Ala. Admin. Code r. 335-13-4-.22(1)(a)1. provides that a minimum of six inches of compacted earth or other alternative cover material shall be added at the conclusion of each day's operation to control disease vectors. Ala. Admin. Code r. 335-13-4-.22(2)(d) provides that "[m]easures shall be taken to prevent the breeding or accumulation of disease vectors." Proposed Permit No. 35-06 (Nov. 23, 2018) includes no conditions respecting the control of disease vectors and the prevention of breeding or accumulation of disease vectors except the daily cover requirement.

Proposed Permit No. 35-06 (Nov. 23, 2018) includes the same daily cover requirement as in previous permits. These daily cover requirements have failed to control disease vectors and failed to prevent the breeding or accumulation of disease vectors. Accordingly, Proposed Permit No. 35-06 (Nov. 23, 2018) does not ensure the control of disease vectors as required by Ala. Admin. Code r. 335-13-4-.22(1)(a)1. or the prevention of the breeding or accumulation of disease vectors as required by Ala. Admin. Code r. 335-13-4-.22(2)(d).

7. The proposed permit will have the effect of disproportionately subjecting persons to adverse impacts on the basis of their race.

Proposed Permit No. 35-06 (Nov. 23, 2018) will have the effect of disproportionately subjecting Blacks to odors and disease vectors, as well as other harms, in violation of 40 C.F.R. § 7.35(b).

The center point of the new 20.6 acre expanded municipal solid waste disposal area is located at approximately Latitude 31.235623, Longitude -85.350889. The population within one-mile of that center point is 89% Black. This compares to 33.7% Black in the City of Dothan and 26.8% Black in the State of Alabama.

It does not appear that the Department has the statutory authority to consider such disproportionate impacts on the basis of race. Holmes v. Ala. Dep't of Env'tl. Mgmt., EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, *30-31, 1998 WL 75094, *11 (Ala. Dept. Env'tl. Mgmt. Feb. 17, 1998) ("The governing statutes and regulations do not confer on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit"); East Central Ala. Alliance for Quality Living v. Ala. Dep't of Env'tl. Mgmt., EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6, *28, 2003 WL 1957880, *11 (Ala. Dept. Env'tl. Mgmt. Mar. 13, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit"), aff'd, No. CV-2003-000356.00 (Lee County Cir. Ct. Nov. 20, 2003), aff'd without opinion, 915 So. 2d 1186 (Ala. Civ. App. 2004). However, if the Department contends that it has such authority, the Department should make modifications to the proposed permit that will eliminate the odor and disease vector impacts on Blacks living near the City of Dothan Sanitary Landfill.

- 8. Comments included in the transcripts dated June 6, 2013 and June 29, 2017 (submitted herewith) are incorporated herein by reference.**
- 9. Request for public hearing.**

On behalf of my clients, I request that the Department schedule a public hearing on the proposed permit at which I and they can elaborate more on these and other permit deficiencies.

Sincerely,



David A. Ludder
Attorney for Bobby Lewis, David Del Vecchio,
Peggy Del Vecchio, Michael Del Vecchio, Michael
LeBleu, Charles Childree, and Vicki Ammons