

Daily News

## Citing Lawsuit, EPA Dismisses Civil Rights Complaint Against Alabama

Posted: October 4, 2012

EPA is dismissing a controversial civil rights complaint it had agreed to investigate against the Alabama Department of Environmental Management (ADEM) over its permitting of a landfill to accept coal ash waste released from the massive Tennessee spill in 2008, charging that the issue is being addressed in pending litigation.

The agency's Office of Civil Rights (OCR) notified the petitioners -- 54 poor black residents of Perry County, AL -- in a [Sept. 26 letter](#) that it was dismissing the complaint, which was filed in January and was accepted for investigation in June. The petitioners' lawyer is now asking OCR to reconsider the dismissal.

OCR's June 14 acceptance of the complaint -- which alleges that the petitioners were adversely and disparately impacted by the transfer of Tennessee Valley Authority coal ash waste to their community -- was seen as [difficult for the office to resolve](#) because, while it was ADEM that issued the landfill permits at issue in the complaint, it was EPA Administrator Lisa Jackson who ultimately approved the plan to transfer the coal ash from relatively wealthy Kingston, TN, to Perry County.

ADEM in its response to OCR pushed back, noting it was [EPA that made the underlying decision](#) to transfer the ash, necessitating the need for a landfill expansion permit. "Indeed, the approval by EPA for this facility to accept the coal-ash waste contributed to the need for additional cells and the permit modification," the state said in a July 19 response.

Title VI prohibits discrimination by recipients of federal funds and allows private citizens to petition EPA and other agencies to remedy rights violations. A 2001 Supreme Court case set a high legal bar requiring private parties to show intentional discrimination in court, effectively leaving the Title VI administrative petition process as the only recourse for civil rights pursuits.

EPA was flooded with petitions seeking investigations, and OCR has been seeking to better address them after years of allowing a major backlog to accumulate. But OCR remains under pressure from environmentalists to side with a petitioner and issue a finding of discrimination, something it has never done.

Now OCR has dismissed the complaint, prompting petitioners to ask EPA to reconsider its decision.

In the Sept. 26 letter dismissing the complaint, OCR director Rafael DeLeon said, "In situations where the allegations raised in the complaints involve the same facts that are also the subject of

litigation in federal court, such that the result of those proceedings could affect the outcome of the Title VI investigation, it is OCR's general practice to dismiss without prejudice the administrative complaint, pending results of the litigation." The letter adds that the complaint can be refiled within 60 days after the litigation is complete.

But attorney David Ludder, representing the Perry County residents, asked OCR to reconsider the dismissal, writing, "The pending litigation will not result in abatement of the continuing adverse effects from the Arrowhead Landfill. Nine complainants are not parties to the pending litigation and will not be bound by any judgment, findings or settlement in that litigation." Also the case "will not adjudicate ADEM's non-compliance with Title VI. Accordingly, the decision by OCR to abstain from investigating" the Title VI complaints "should be vacated."

### **Bid For Permanent Injunction**

The lawsuit, *Abrahams et al. v. Phill-Con Services, LLC et al.*, which was filed in 2010 in U.S. District Court for the Southern District of Alabama against the landfill's operator, asserts claims such as negligence, wantonness, nuisance and trespass resulting from construction and operation of the landfill. Plaintiffs are seeking a permanent injunction to force the landfill to cease operating, OCR's response notes. The case was since transferred to U.S. Bankruptcy Court for the Southern District of Alabama, where it has not yet gone to trial.

EPA's letter says the bankruptcy court confirmed to the agency that it had the case in January, and it is unclear why OCR accepted the complaint for investigation in June. EPA said, "At the time the complaint was filed, EPA's Office of Civil Rights was not aware of the litigation."

The reconsideration letter argues that the complainants who are part of the Title VI petition and not the lawsuit "are entitled to have the merits of their Title VI administrative complaint considered." It also notes that the bankruptcy court proceedings will not have any impact on the operations at the landfill, which is now under new ownership.

"Accordingly, the pending litigation will not alter operations at the landfill or abate the continuing impacts suffered by complainants. Moreover, the pending litigation will not adjudicate whether ADEM has violated Title VI," the letter says.

Ludder expects a response from EPA on the reconsideration request in about a month.-- *Dawn Reeves* ([dreeves@iwnews.com](mailto:dreeves@iwnews.com))