

October 4, 2012

Return Receipt Requested

Certified Mail No. 7008 1300 0001 2360 3190

Mr. Rafael DeLeon, Director
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Ave N.W.
Washington, D.C. 20460

Re: **EPA File No. 01R-12-R4**
Dismissal Without Prejudice of Administrative Complaints
Request for Reconsideration

Dear Mr. DeLeon:

I am in receipt of your letter dated September 26, 2012 dismissing without prejudice the Title VI administrative complaints filed on behalf of forty-eight individuals on January 6, 2012 and February 21, 2012 against the Alabama Department of Environmental Management (ADEM) regarding that agency's permitting of the Arrowhead Landfill in Perry County, Alabama. This letter is written to request reconsideration of your decision.

I. Background

The Office of Civil Rights (OCR) dismissed the complaints on the ground that litigation concerning the operations of the Arrowhead Landfill is pending. Your letter indicates that OCR decided to dismiss the Title VI administrative complaints because "certain residents of Perry County" filed a civil action "against Phill-Con Services, LLC, the operator of the Arrowhead Landfill" seeking to enforce an emission standard or limitation under the Clean Air Act and a standard or requirement under the Solid Waste Disposal Act;¹ and a civil action "against Phill-Con and Phillips & Jordan, Inc." seeking "a permanent injunction that the landfill cease[] operating in such a manner as to cause certain impacts." See Abrahams et al. v. Phill-Con Services, LLC et al., No. 10-0326-WS-N (S.D. Ala. filed June 25, 2010); Abrahams et al. v. Phill-Con Services, LLC, et al., Adv. Proc. No. 10-00075 (Bankr. S.D. Ala. amended Sept. 7, 2011).²

¹ The original complaint in this civil action includes two claims that seek abatement of objectionable odors.

² The original and amended complaints in this civil action include twelve claims seeking payment of money damages and injunctive relief prohibiting (1) the recirculation of leachate (to reduce odors); (2) the use of coal ash or any other non-cohesive, permeable material as daily cover (to reduce odors); (3) the generation of noxious odors; (4) the operation of heavy machinery, trucks and rail yard between 7 p.m. and 7 a.m. (to reduce disturbing noise); and (5)

Specifically, OCR states that “[i]n 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.” This general practice of abstention is not articulated in 40 C.F.R. Part 7 or in the Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (EPA, Feb. 5, 1998).

On June 27, 2000, EPA published Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits. 65 Fed. Reg. 39667 (2000). This draft guidance has never been finalized. This draft guidance provides *inter alia*:

3. Ongoing Permit Appeals or Litigation

OCR will generally dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court. The outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct. In such cases, OCR believes that it should await the results of the permit appeal or litigation. As a result, such complaints will generally be closed, but OCR expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation, rather than conduct a simultaneous investigation on the basis of facts that may change due to the outcome of the administrative appeal or litigation.

* * *

b. Litigation: If the complainant seeks to pursue a Title VI complaint with OCR on issues that are the subject of ongoing Federal or state court litigation, the complaint should be re-filed within a reasonable time period, generally no more than 60 calendar days after the conclusion of the litigation. However, 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.

the creation of waste piles higher than fifty feet above grade. In addition, this civil action seeks injunctive relief mandating (1) the paving of haul roads (to reduce dust); (2) truck cleaning (to reduce dust); and (3) permanent cover on waste pile side slopes (to reduce odor and dust).

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. OCR may look for guidance to judicial principles and other provisions of law on how prior court decisions may affect OCR's determination of whether to investigate a complaint.

65 Fed. Reg. at 39673.

II. OCR's application of the abstention policy articulated in the draft guidance is not appropriate in the present circumstances.

EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits indicates that it is not binding and that "EPA may decide . . . to act at variance with the guidance, based on its analysis of the specific facts presented." 65 Fed. Reg. at 39669. There are a number of reasons why the abstention policy should not be applied in the present circumstances and why the decision to dismiss the administrative complaints should be vacated.

A. Nine complainants are not parties to the pending litigation.

Among the complainants included in the Title VI administrative complaints filed with OCR are Robert J. Johnson, Rosa M. Johnson, Rev. Mark Johnston, Rev. J. Thompson Brown, John Wathen, Ellis B. Long, Mary Leila Schaeffer, Carlene James, and Esther Calhoun. None of these individuals are parties to the litigation in Abrahams et al. v. Phill-Con Services, LLC et al., No. 10-0326-WS-N (S. D. Ala.) and Abrahams et al. v. Phill-Con Services, LLC, et al., Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). *Compare* January 3, 2012 Title VI administrative complaint and February 16, 2012 Title VI administrative complaint *with* June 25, 2010 Complaint in Abrahams et al. v. Phill-Con Services, LLC et al., No. 10-0326-WS-N (S. D. Ala.) and September 7, 2012 Amended Complaint in Abrahams et al. v. Phill-Con Services, LLC, et al., Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). These complainants have no right to participate in the above-referenced litigation and will not be bound by any judgment, adjudication of facts, or settlement that may result from such litigation. These complainants are entitled to have the merits of their Title VI administrative complaint considered without regard to any litigation initiated by others. Accordingly, as to them, the OCR dismissal should be vacated.

B. Operations at the Landfill will not be impacted by the pending litigation.

When the complaints in Abrahams et al. v. Phill-Con Services, LLC et al., No. 10-0326-WS-N (S.D. Ala.) and Abrahams et al. v. Phill-Con Services, LLC, et al., Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.) were initially filed in June of 2010, Phill-Con Services, LLC and Phillips & Jordan, Inc. exercised operational control over certain activities at the Arrowhead

Landfill.³ Since then however, circumstances have changed. Phill-Con Services, LLC and Phillips & Jordan, Inc. have terminated their activities at the Arrowhead Landfill. The Landfill is now owned by Green Group Holdings, LLC⁴ and permitted/operated by Perry County Associates, LLC,⁵ neither of which are parties to the pending litigation. Thus, Phill-Con Services, LLC and Phillips & Jordan, Inc. are in no position to implement any of the injunctive relief requested in the pending litigation. Accordingly, the pending litigation will not alter operations at the Landfill or abate the continuing impacts suffered by the complainants. Moreover, the pending litigation will not adjudicate whether ADEM has violated Title VI.

C. Complainants' Title VI complaints are directed against ADEM, not the Landfill operators.

The complainants' Title VI administrative complaints filed with OCR are directed against the actions of ADEM in reissuing Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC on September 27, 2011 and modifying the permit on February 3, 2012. These complaints seek to enforce ADEM's obligation under Title VI. ADEM presently lacks authority to require the Arrowhead Landfill to alter its operations to eliminate adverse impacts suffered by complainants. The administrative process under 40 C.F.R. Part 7 cannot require that the Arrowhead Landfill alter its operations; it can only seek "voluntary" alterations and termination of federal financial assistance to ADEM. Thus, the Title VI administrative complaints address the actions of ADEM in permitting the Landfill while the pending litigation addresses the actions of the former Landfill operators.

D. Abstention will allow the disparate impacts of ADEM's actions to continue unabated.

The pending federal court litigation against Phill-Con Services, LLC and Phillips & Jordan, Inc. will not address abatement of the impacts of Landfill operations. These impacts have now

³ These activities were primarily related to the disposal of 4.025 million tons of coal ash from the December 2008 TVA spill in Kingston, Tennessee. The last load of coal ash was processed on December 4, 2010. See TVA Kingston Plant Fly Ash Disposal at Arrowhead Landfill, <http://www.pandj.com/markets/project-detail.aspx?jn=420910> (accessed October 3, 2012). The landfill cells where coal ash was deposited were closed on July 27, 2011. See Construction Quality Assurance Report [for] Partial Closure Construction, Tract No. 1, Cell Nos. 2-5 by Brunell Lammons Engineering, Inc. (July 29, 2011).

⁴ See Letter from Perry County Associates, LLC to Alabama Department of Environmental Management dated January 4, 2012 ("Green Group Holdings, LLC, (GGH), has acquired both the ownership of the real estate where the subject landfill facility is located, as well as the equity of Perry County Associates, LLC (PCA), the permittee for the subject facility. This ownership change and the purchase of all the equity in PCA took place on December 21, 2011.").

⁵ See Summation of Comments Received and Response to Comments [on] Proposed Arrowhead Landfill Modification dated February 3, 2012 at 5 ("Perry County Associate, LLC has handled the daily operations of the landfill throughout the bankruptcy process. Green Group Holdings, LLC purchased all stock of Perry County Associates, LLC on December 21, 2011, and maintains ownership of the landfill facilities. Green Group Holdings, LLC will retain the permittee as Perry County Associates, LLC . . .").

continued for over three years. A decision by OCR to abstain from investigating the Title VI administrative complaints pending the outcome of pending litigation will only allow the disparate impacts of ADEM's actions to continue unabated that much longer. The complainants seek vindication of their civil rights from EPA, not prolonged suffering because of an inappropriate decision to abstain.

III. Conclusion

The normal reasons for the Office of Civil Rights to abstain from investigating the Title VI administrative complaints are not present in this case. The pending litigation will not result in abatement of the continuing adverse affects 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. The pending litigation will not adjudicate ADEM's non-compliance with Title VI. Accordingly, the decision by OCR to abstain from investigating the Title VI administrative complaints filed on January 6, 2012 and February 21, 2012 against the Alabama Department of Environmental Management should be vacated.

Sincerely,

A handwritten signature in cursive script that reads "David A. Ludder".

David A. Ludder
Attorney for Complainants