

September 23, 2019

Registered Mail

Return Receipt Requested

Hon. Mark Saliba, Mayor
City of Dothan
P.O. Box 2128
Dothan, AL 36302

**Re: Notice of Violation and Intent to File Suit under the Resource Conservation
and Recovery Act**

Dear Mayor Saliba:

Pursuant to the Resource Conservation and Recovery Act (RCRA) § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), and 40 C.F.R. Part 254, you are hereby notified that after the expiration of 60 days following service of this notice, the Environmental Defense Alliance, David F. Del Vecchio, Peggy R. Del Vecchio, Michael Del Vecchio, Kara Del Vecchio, William P. Novack, and Tara Novack (hereinafter, “Complainants”) may file suit against the City of Dothan in the United States District Court for the continuing violation of 40 C.F.R. § 258.12(a) (Wetlands). The complainants may also file suit against the City of Dothan in the future for violation of the Resource Conservation and Recovery Act (RCRA) § 4005(a), 42 U.S.C. § 6945(a) (Open Dumping).

Continuing Violation of 40 C.F.R. § 258.12(a)

In 1976, Congress enacted the Resource Conservation and Recovery Act of 1976. Pub. L. 94-580, 90 Stat. 2815 (1976). RCRA § 4004(a), 42 U.S.C. § 6944(a), directed the U.S. Environmental Protection Agency (“USEPA”) to promulgate regulations containing criteria for determining which facilities shall be classified as “sanitary landfills” and which shall be classified as “open dumps.” USEPA promulgated the required regulations on September 13, 1979. 44 Fed. Reg. 53460 (Sep. 13, 1979). In 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984. Pub. L. 98-616, 98 Stat. 3221 (1984). These amendments added Section 4010 to RCRA. RCRA § 4010, 42 U.S.C. § 6949a. RCRA § 4010(c), 42 U.S.C. § 6949a(c), directed USEPA to revise the criteria promulgated under RCRA § 4004(a), 42 U.S.C. §

6944(a), for facilities that may receive hazardous household wastes or hazardous wastes from small quantity generators as “necessary to protect human health and the environment.” USEPA promulgated the required regulations on October 9, 1991. 56 Fed. Reg. 50978 (Oct. 9, 1991) (now codified at 40 C.F.R. Part 258). Therein, USEPA identifies those facilities as “municipal solid waste landfill units.” See 40 C.F.R. §§ 258.1(b) (applicability of Part 258 to municipal solid waste management units) and 258.2 (definition of municipal solid waste management unit).

Among the revised criteria promulgated for municipal solid waste landfill units is 40 C.F.R. § 258.12(a) which provides as follows:

New MSWLF units and lateral expansions shall not be located in wetlands, unless the owner or operator can make the following demonstrations to the Director of an approved State:

(1) Where applicable under section 404 of the Clean Water Act or applicable State wetlands laws, the presumption that practicable alternative to the proposed landfill is available which does not involve wetlands is clearly rebutted;

(2) The construction and operation of the MSWLF unit will not:

(i) Cause or contribute to violations of any applicable State water quality standard,

(ii) Violate any applicable toxic effluent standard or prohibition under Section 307 of the Clean Water Act,

(iii) Jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of a critical habitat, protected under the Endangered Species Act of 1973, and

(iv) Violate any requirement under the Marine Protection, Research, and Sanctuaries Act of 1972 for the protection of a marine sanctuary;

(3) The MSWLF unit will not cause or contribute to significant degradation of wetlands. The owner or operator must demonstrate the integrity of the MSWLF unit and its ability to protect ecological resources by addressing the following factors:

(i) Erosion, stability, and migration potential of native wetland soils, muds and deposits used to support the MSWLF unit;

(ii) Erosion, stability, and migration potential of dredged and fill materials used to support the MSWLF unit;

(iii) The volume and chemical nature of the waste managed in the MSWLF unit;

- (iv) Impacts on fish, wildlife, and other aquatic resources and their habitat from release of the solid waste;
 - (v) The potential effects of catastrophic release of waste to the wetland and the resulting impacts on the environment; and
 - (vi) Any additional factors, as necessary, to demonstrate that ecological resources in the wetland are sufficiently protected.
- (4) To the extent required under section 404 of the Clean Water Act or applicable State wetlands laws, steps have been taken to attempt to achieve no net loss of wetlands (as defined by acreage and function) by first avoiding impacts to wetlands to the maximum extent practicable as required by paragraph (a)(1) of this section, then minimizing unavoidable impacts to the maximum extent practicable, and finally offsetting remaining unavoidable wetland impacts through all appropriate and practicable compensatory mitigation actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands); and
- (5) Sufficient information is available to make a reasonable determination with respect to these demonstrations.

The Hazardous and Solid Waste Amendments of 1984 also amended Section 4005 of RCRA by adding a new paragraph (c). RCRA § 4005(c)(1)(B), 42 U.S.C. § 6945(c)(1)(B), requires that each State shall adopt and implement a permit program or other system of prior approval and conditions, to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste from small quantity generators will comply with the revised criteria required by RCRA § 4010(c), 42 U.S.C. § 6949a(c). RCRA § 4005(c)(1)(C), 42 U.S.C. § 6945(c)(1)(C), requires that USEPA determine whether each State has developed an adequate permit program. See 40 C.F.R. Part 239.

On March 2, 1994, the USEPA determined that the State of Alabama's permit program for regulating municipal solid waste landfill units is adequate, except for the absence of financial assurance requirements, pursuant to RCRA § 4005(c)(1)(C), 42 U.S.C. § 6945(c)(1)(C). 59 Fed. Reg. 9979 (Mar. 2, 1994).¹ The Alabama permit program regulating municipal solid waste landfill units provides that “[l]andfill units including buffer zones shall not be permissible in wetlands . . .” Ala. Admin. Code r. 335-13-4-.01(2)(c). This prohibition, originally adopted in

¹ On December 15, 2017, the USEPA determined that the State of Alabama's municipal solid waste landfill financial assurance program is adequate pursuant to RCRA § 4005(c)(1)(C), 42 U.S.C. § 6945(c)(1)(C). 82 Fed. Reg. 59601 (Dec. 15, 2017).

1988, is more stringent than 40 C.F.R. § 258.12(a) because it does not permit any exception to the prohibition against locating municipal solid waste landfill units in wetlands.² A more stringent State requirement, such as Ala. Admin. Code r. 335-13-4-.01(2)(c), is not one which has become effective pursuant to RCRA and is not enforceable in a citizen suit under RCRA §7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). See e.g., Ashoff v. City of Ukiah, 130 F.3d 409, 413 (9th Cir. 1997) (“state standards more stringent than the federal minimum criteria do not become effective pursuant to RCRA. Thus, RCRA does not authorize citizen suits based on such standards.”); Cameron v. Peach County, No. 5:02-CV-41-1, 2004 U.S. Dist. LEXIS 30974, at *63-64, 2004 WL 5520003, at *__ (M.D. Ga. June 28, 2004) (“elements of state programs ‘which are not specifically provided for in the revised criteria as alternative standards or which are not within the scope of discretion afforded by [RCRA’s] Subtitle D federal revised criteria have no effect pursuant to federal law,’ and are not enforceable in federal court.”); 63 Fed. Reg. 57026, 57032 (Oct. 23, 1998) (“elements of a state permit program which are not specifically provided for in the revised criteria as alternative standards or which are not within the scope of discretion afforded by the Subtitle D federal revised criteria have no effect pursuant to federal law, and, therefore, are not enforceable in federal court under RCRA sections 4005(a) or 7002(a)(1)(A)”).

However, where state standards are not enforceable under the citizen suit provision of RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), because they exceed the federal criteria, the federal criteria may be enforced under the citizen suit provision. See e.g., Ashoff v. City of Ukiah, 130 F.3d at 412 (where a state has adopted a more stringent standard, the federal standard “survives” and may be enforced in a citizen suit); Cameron v. Peach County, 2004 U.S. Dist. LEXIS 30974, at *64 n. 10, 2004 WL 5520003, at *__ n. 10 (“because the federal and state criteria are intended to operate concurrently, a citizen could still enforce the less stringent revised federal criteria”); 63 Fed. Reg. at 57032 (even in a state which has more stringent requirements, a citizen could still enforce the less stringent federal minimum requirement). Accordingly, 40

² States may adopt and enforce requirements that are more stringent than those required under 40 C.F.R. Part 258. See e.g., 40 C.F.R. § 239.2(a)(1) (“Nothing in this part precludes a state from adopting or enforcing requirements that are more stringent or more extensive than those required under this part or from operating a permit program or other system of prior approval and conditions with more stringent requirements or a broader scope of coverage than that required under this part.”); 63 Fed. Reg. 57026, 57032 (Oct. 23, 1998) (“[T]he Agency believes that states are free to establish more stringent requirements for facilities receiving hazardous household waste and CESQG waste.”); 61 Fed. Reg. 2584, 2596 (Jan. 26, 1996) (“Where 40 CFR Part 258 has a performance standard (e.g., Subpart B Location Restrictions), the State/Tribe may use any performance standard that is at least as stringent as the Federal performance standard.”).

C.F.R. § 258.12(a) is a regulation, requirement or prohibition that has become effective pursuant to RCRA and may be enforced in a citizen suit under RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A).

On or about January 26, 2015, the City of Dothan completed submission of an application to the Alabama Department of Environmental Management (“ADEM”)³ for a modification of Solid Waste Disposal Facility Permit No. 35-06 to authorize a lateral expansion of a municipal solid waste landfill unit in a location containing 2.25 acres of wetlands. The application did not include all the demonstrations required by 40 C.F.R. §§ 258.12(a)(1) (a clear rebuttal of the presumption that a practicable alternative to the proposed landfill is available which does not involve wetlands) and 258.12(a)(3) (the integrity of the MSWLF unit and its ability to protect ecological resources).

40 C.F.R. § 258.3 requires that “[t]he owner or operator of a municipal solid waste landfill unit must comply with any other applicable Federal rules, laws, regulations, or other requirements.” Clean Water Act § 404(a), 33 U.S.C. §1344(a), and 33 C.F.R. Part 323, require that a person apply for and obtain a permit from the United States Army Corps of Engineers (“USACOE”) before filling wetlands. On or about April 10, 2015, the City of Dothan applied to the USACOE for a permit to fill 2.25 acres of wetlands with “sand-clay structural fill with liner” to “facilitate constructing an expansion of the current landfill” pursuant to Clean Water Act § 404(a), 33 U.S.C. §1344(a), and 33 C.F.R. Part 323.⁴ On November 9, 2015, USACOE granted Permit No. SAM-2014-00770-JSC to the City of Dothan authorizing the fill of 2.25 acres of wetlands to facilitate the expansion of the existing Dothan landfill.⁵ Permit No. SAM-

³ The Director of ADEM is “State Director” (i.e., the chief administrative officer of the lead state agency responsible for implementing the state permit program for 40 C.F.R. Part 257, Subpart B and 40 C.F.R. Part 258 regulated facilities). 40 C.F.R. § 258.2. ADEM is also the “State authority” (i.e., the agency established or designated under RCRA § 4007, 42 U.S.C. § 6947). RCRA § 1004(32), 42 U.S.C. § 6903(32).

⁴ The application submitted to the USACOE by the City of Dothan did not identify the application to ADEM for a modification of Solid Waste Disposal Facility Permit No. 35-06 as an authorization that had been applied for as required by 33 C.F.R. § 325.1(d).

⁵ The issuance of a wetlands fill permit by the USACOE under Clean Water Act § 404(a), 33 U.S.C. §1344(a), and 33 C.F.R. Part 323 does not relieve the landfill owner/operator of its obligation to comply with other laws, including the requirements of RCRA § 4004, 42 U.S.C. § 6944, and 40 C.F.R. § 258.12(a).

2014-00770-JSC contains no condition giving ADEM an opportunity to undertake its review of the City of Dothan's application for a modification of Solid Waste Disposal Facility Permit No. 35-06 without the City of Dothan biasing such review by making substantial resource commitments on the basis of the USCOE permit.⁶

Despite receiving public comments asserting that the proposed lateral expansion of a municipal solid waste landfill unit in an area containing wetlands violates Ala. Admin. Code r. 335-13-4-.01(2)(c), ADEM concluded that r. 335-13-4-.01(2)(c) has no application to the lateral expansion of the municipal solid waste landfill unit because "[u]pon completion of the mitigation credit process as required by the U.S. Army Corps of Engineers, the area in question at the proposed landfill site will no longer be considered a wetland." Accordingly, on January 8, 2016, ADEM modified Solid Waste Disposal Facility Permit No. 35-06 authorizing the lateral expansion of a municipal solid waste landfill unit in an area containing 2.25 acres of wetlands. However, on June 10, 2016, ADEM rescinded the January 8, 2016 modification of Solid Waste Disposal Facility Permit No. 35-06 authorizing the lateral expansion of a municipal solid waste landfill unit for reasons unrelated to the wetlands controversy.

On or about March 23, 2017, the City of Dothan again completed submission of an application to ADEM for a modification of Solid Waste Disposal Facility Permit No. 35-06 to authorize a lateral expansion of a municipal solid waste landfill unit in a location containing 2.25 acres of wetlands. Once again, the application did not include all the demonstrations required by 40 C.F.R. §§ 258.12(a)(1) (a clear rebuttal of the presumption that a practicable alternative to the proposed landfill is available which does not involve wetlands) and 258.12(a)(3) (the integrity of the MSWLF unit and its ability to protect ecological resources).

On October 10, 2017, the City of Dothan commenced wetland fill operations to facilitate the expansion of the municipal solid waste landfill unit.

On November 1, 2017, ADEM modified Solid Waste Disposal Facility Permit No. 35-06 authorizing the lateral expansion of a municipal solid waste landfill unit in a location containing 2.25 acres of wetlands.

⁶ Pursuant to 33 C.F.R. § 325.2(d)(4), USACOE "[p]ermits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the [USCOE] permit."

On December 5, 2017, the City of Dothan completed wetland fill operations to facilitate the expansion of the municipal solid waste landfill unit.

On April 24, 2018, ADEM “rescinded” the November 1, 2017 modification of Solid Waste Disposal Facility Permit No. 35-06 authorizing the lateral expansion of a municipal solid waste landfill unit for reasons unrelated to the wetlands controversy.

On or about July 18, 2018, the City of Dothan completed submission of an application to ADEM for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 to authorize a lateral expansion of a municipal solid waste landfill unit. The application did not include all the demonstrations required by 40 C.F.R. §§ 258.12(a)(1) (a clear rebuttal of the presumption that a practicable alternative to the proposed landfill is available which does not involve wetlands) and 258.12(a)(3) (the integrity of the MSWLF unit and its ability to protect ecological resources). Despite receiving public comments asserting that the proposed lateral expansion of a municipal solid waste landfill unit violates Ala. Admin. Code r. 335-13-4-.01(2)(c), ADEM concluded that r. 335-13-4-.01(2)(c) has no application to the lateral expansion of the municipal solid waste landfill unit because “there are no longer wetlands in the proposed expansion disposal or buffer area . . .” Accordingly, on May 6, 2019, ADEM renewed and modified Solid Waste Disposal Facility Permit No. 35-06 authorizing the lateral expansion of a municipal solid waste landfill unit.

The City of Dothan continues to construct a lateral expansion of a municipal solid waste landfill unit in the location of the now-filled wetlands.

The City of Dothan failed to make all the demonstrations required by 40 C.F.R. § 258.12(a) (1) and (3) to ADEM prior to commencing construction of a lateral expansion of a municipal solid waste landfill unit in wetlands. The City of Dothan has violated, and continues to violate, 40 C.F.R. § 258.12(a) by locating a lateral expansion of a municipal solid waste landfill unit in wetlands.

Future Violation of Prohibition against Open Dumping

RCRA § 4005(a), 42 U.S.C. § 6945(a), provides that “any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited . . .” An “open dump” is defined as any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria

promulgated under RCRA § 4004(a), 42 U.S.C. § 6944(a), and which is not a facility for disposal of hazardous waste. RCRA § 1004(14), 42 U.S.C. § 6903(14) (emphasis added). Thus, the disposal of solid waste in a facility that does not meet the criteria promulgated in 40 C.F.R. Part 258 is prohibited open dumping. E.g., Ashoff v. City of Ukiah, 130 F.3d at 411 n. 3; Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1012 (11th Cir. 2004).

RCRA § 4005(a), 42 U.S.C. § 6945(a), also provides that this prohibition “shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.” (Emphasis added). E.g., Parker v. Scrap Metal Processors, Inc., 386 F.3d at 1012; Ashoff v. City of Ukiah, 130 F.3d at 411 n. 3.

As discussed above, the lateral expansion of the municipal solid waste landfill unit by the City of Dothan is located in a wetland in violation of the minimum requirements of 40 C.F.R. § 258.12(a). Thus, the lateral expansion constitutes an “open dump.” Once the City of Dothan commences the disposal of solid waste in the lateral expansion of the municipal solid waste landfill unit, it will be engaged in open dumping in violation of RCRA § 4005(a), 42 U.S.C. § 6945(a). At that time, the complainants will serve a new Notice of Violation and Intent to File Suit under the Resource Conservation and Recovery Act on the City of Dothan and may file suit against the City if open dumping continues after 60 days.

The full name, address, and telephone number of each Complainant is attached hereto.

Sincerely,



David A. Ludder
Attorney for Complainants

cc: Hon. Andrew Wheeler, Administrator
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