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## Citing EPA Approval, Alabama Fights 'Rights' Inquiry Into Coal Ash Disposal

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Alabama is pushing back on an EPA Office of Civil Rights (OCR) investigation into the state's permit to expand a landfill to accept coal ash waste following the 2008 Tennessee Valley Authority (TVA) spill, saying EPA authorized the disposal that some Alabama residents claim violates the rights of disadvantaged communities near the landfill.

The push-back comes as a former top EPA equity official says the agency's Civil Rights Act enforcement will likely fail without congressional action to provide a private right for citizens to sue to enforce the law, which Congress has long failed to approve.

In a July 19 response to EPA's investigation -- recently obtained by *Inside EPA* -- the Alabama Department of Environmental Management (ADEM) notes the permit "is consistent with" EPA Region IV's approval for the landfill to accept Comprehensive Environmental Response, Compensation and Liability Act waste from the ash spill. "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 reply says. *The letter is available on InsideEPA.com. (Doc ID: 2410138)*

African-American residents living in environmental justice communities near the landfill filed a petition with EPA claiming the permit to expand the landfill discriminated against them and asked OCR to investigate it under Title VI of the Civil Rights Act. The law generally prohibits recipients of federal funds from engaging in discriminatory behavior. The complaint asks the agency to withhold funding from ADEM as a penalty for the department's alleged discrimination against the equity communities.

OCR's decision to accept the complaint was seen as controversial given that EPA Administrator Lisa Jackson approved the decision to permit the disposal of the TVA coal ash at the Arrowhead Landfill, despite protests at the time of the approval that the poor black residents there would be harmed by the waste (*Inside EPA*, June 22).

ADEM says it is "confident that the renewal and modification of the Arrowhead permit was conducted in full adherence to all applicable state and federal solid waste requirements and thus is protective of all citizens."

One informed source calls ADEM's response to OCR "terse, dry and to the point. ADEM isn't amused, and doesn't seem to think kindly about OCR accepting the complaint without checking the facts."

Nearby African-American residents complain that the coal ash waste being brought from TVA to Alabama is causing a disproportionate adverse impact. But the civil rights complaint filed with the agency does not mention the coal ash disposal, instead only addressing the permit allowing the landfill that accepted the waste to expand.

EPA Region IV said when the TVA cleanup plan was pending that preventing risk to vulnerable populations would be a key factor. Prior to finalizing the TVA plan to transfer the ash to Alabama, the agency vowed to "ensure the facility is operating in compliance with solid waste regulations and that potential risks to the community, especially any vulnerable populations, are addressed," an EPA Region IV spokeswoman said in June 2009.

Complaints about the landfill include offensive odors, emissions of fugitive dust, tracking of dirt and other solids onto a roadway, increased noise, increased flies, increased birds and decreased property values. The rights complaint notes those impacts "have fallen and continue to fall disparately upon members of the African-American race." It asks EPA to require ADEM to "implement a less discriminatory alternative" and to halt funding for the state.

The informed source says OCR's investigation is "a challenge to EPA to live up to its Title VI environmental justice rhetoric." EPA's Jackson has made promoting environmental justice in decisionmaking a top priority, and also vowed to clear a years-old backlog of rights complaints and to overhaul the agency's rights office.

"The complaint followed EPA's environmental civil rights pronouncements very closely. ADEM's reply is simply that ADEM followed all applicable environmental law and that EPA approved and participated in the action. If ADEM did anything wrong, which it didn't, EPA is complicit. Does OCR know what it is doing?" the source asks.

The source adds, "The juxtaposition of EPA's Title VI environmental justice rhetoric and pronouncements embodied in the complaint with legal reality in ADEM's reply could not be . . . more direct." The source predicts that the rights complaint is another investigation that the agency will have to "squirm out of" and "further provoke" environmentalists "or press forward and risk losing its Title VI environmental justice fiction in litigation."

Under Title VI implementing rules, EPA has 180 days from July 19 to issue preliminary findings or recommendations to ADEM, which has 50 days to respond. OCR then must make a formal determination about what steps it will require of ADEM, and ADEM has 10 days to implement them or risk losing funding.

**Meanwhile, the former chief of EPA's Office of Environmental Justice says Jackson's efforts** to improve Title VI enforcement are unlikely to succeed unless Congress provides a private right to sue under the rights law.

Barry Hill -- now a visiting scholar at the Environmental Law Institute (ELI) and also a senior counsel for EPA's Office of International & Tribal Affairs -- writes in ELI's September/October *Environmental Forum* publication, "The lack of a private right of action for enforcing [Title VI] is troublesome, since it forces community-based organizations to rely entirely on EPA's enforcement of its regulation. . . . Consequently, community-based environmental justice organizations have had to focus their energies and limited resources on filing administrative complaints with EPA instead of bringing Title VI claims in federal court. If Congress does not amend the act, community-based organizations will not be able to have their environmental and public health concerns addressed."

Hill suggests that only legislative action will help EPA succeed in long-pending yet long-stalled efforts to improve its Title VI petition process. The agency has never issued a finding of discrimination and only once has reached a draft finding of "disparate impact" that it then revoked in a controversial settlement last year.

While Hill does not address the steep hurdles to passing the bill he is calling for -- the last time a bill was introduced to provide a private right of action to enforce the law was in 2006 by Sen. Robert Menendez (D-NJ) -- he does suggest in the ELI article that the *status quo* will continue. "In the meantime, unless and until Congress acts, communities will continue to file administrative complaints, regardless of the limitations of the act," he writes.

At the same time, OCR's acceptance of the Alabama complaint and other contentious petitions -- including one challenging a minor source permit for a biomass energy facility in Florida -- means the agency has "boxed itself in" by accepting petitions for investigation where it is unlikely to make such a finding, observers say (*Inside EPA*, July 27).

In conducting a jurisdictional review to determine whether to investigate a complaint, OCR only looks at whether the petition targets an agency that received funding from EPA. But in order to find that an agency acted in a discriminatory manner, OCR must show not only that an at-risk community suffered a disparate impact but that the discrimination was intentional, following a 2001 Supreme Court ruling, *Alexander v. Sandoval*.

The agency has been hesitant to issue a finding of discrimination since then, over concerns that such a finding would not stand up in court since intent is almost impossible to prove, and allowed a large backlog of Title VI petitions to accumulate. Administrator Jackson has vowed to reduce the backlog, improve Title VI and take other steps to have environmental justice considered throughout all agency decisionmaking.

But OCR's efforts so far to reduce the petition backlog have only further enraged environmentalists. For example, the office last summer entered into a settlement with a California agency that revoked the first-time previously undisclosed draft disparate impact finding regarding a complaint that Hispanic schoolchildren faced excessive exposure to methyl bromide.

On Aug. 30, OCR rejected another long-pending California complaint alleging that hazardous waste facilities near Kettleman City were disproportionately harming nearby Latino residents. In response to the latest decision, environmentalists called directly on President Obama "to actually protect us, instead of allowing this discrimination to continue" (*Inside EPA*, Sept. 7). -- Dawn Reeves

