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December 26, 2023

U.S. Environmental Protection Agency
Office of External Civil Rights
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Washington, D.C. 20460

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Delivered via Email

Re: Amended Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

Office of External Civil Rights:

Attached is an Amended Complaint brought pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d and associated implementing regulations at 40 C.F.R. Part 7 on behalf of the Mobile Environmental Justice Action Coalition, GASP, Africatown Clean Healthy Educated Safe and Sustainable Community, and the Mobile Chapter of the NAACP. This Amended Complaint alleges disparate impact, discriminatory treatment and racially disparate impacts created by the Alabama Department of Environmental Management ("ADEM") in its November 2022 issuance of Clean Air Act Title V Renewal Permits for five (5) facilities located

in Mobile, Alabama. The Amended Complaint also alleges discriminatory treatment and racially disparate impacts in ADEM's pattern and practice of permitting and other Clean Air Act activities for sources located in and near the City of Mobile's Africatown Planning Area and other predominantly Black communities in Mobile County, Alabama.

Sincerely,

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AMENDED TITLE VI COMPLAINT

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I. Introduction

This is an Amended Complaint to the U.S. Environmental Protection Agency (“EPA” or “Agency”), Office of External Civil Rights Compliance (“OECR”) brought pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (“Title VI”) and EPA’s implementing regulations at 40 C.F.R. Part 7 on behalf of the Mobile Environmental Justice Action Coalition (“MEJAC”), GASP, Africatown Clean Healthy Educated Safe and Sustainable Community (“C.H.E.S.S.”), and the Mobile Chapter of the NAACP (collectively, “Complainants”). This Amended Complaint alleges discrimination by the Alabama Department of Environmental Management (“ADEM” or “Department”) in its November 2022 issuance of Title V Renewal Permits (collectively, “Permits”) to the following five (5) sources located in Mobile, Alabama:¹

- Plains Marketing LP (Mobile County, AL), Permit No. 503-3013 (“Plains Marketing”)
- Alabama Bulk Terminal (Mobile County, AL), Permit No. 503-3035 (“AL Bulk Terminal”)
- Kimberly-Clark Corporation (Mobile County, AL), Permit No. 503-2012 (“Kimberly-Clark”)
- Epic Alabama Maritime Assets, LLC – Alabama Shipyard LLC (Mobile County, AL), Permit No. 503-6001 (“Alabama Shipyard”)
- UOP LLC (Mobile County, AL), Permit No. 503-8010 (“UOP”)²

These Permits authorize the sources to emit various pollutants during their operations that EPA has determined can be harmful to human health and the environment. ADEM is responsible for permitting emissions of air pollutants in the

¹ While ADEM appears to use the terms Title V Permit and Major Source Operating Permit, or MSOP, interchangeably or together, this Complaint will consistently use the phrase “Title V Permit(s)” or “Permit(s)” to denote ADEM permits issued to fulfill the requirements of Title V of the Clean Air Act and 40 CFR Part 70. See ADEM’s Air Permitting website, referencing the Title V Major Source Operating Permit Program and renewal MSOPs, *available at* <https://adem.alabama.gov/programs/air/permitting.cnt>.

² Note that ADEM issued the UOP Permit at issue as a “Minor Modification” to the Title V renewal permit ADEM previously issued on February 2, 2021. This “Minor Modification” attempted to address objections raised in the EPA’s April 27, 2022 Title V Objection Order, which responded to a Title V petition to object to the UOP renewal permit filed by GASP, which granted a number of objections and required additional permitting action by ADEM. *In the Matter of UOP LLC, UOP Mobile Plant*, Pet. No. IV-2021-6, Order Granting in Part and Denying in Part a Petition for Objection to Permit (April 27, 2022) (“UOP Order”), *available at* https://www.epa.gov/system/files/documents/2022-05/UOP%20Order_4-27-22.pdf.

Mobile County. These Permits and other record documents that ADEM compiled in issuing them are attached to this Amended Complaint.^{3,4}

As explained below, ADEM's issuance of these five Permits within a one-week period in November 2022 and without meaningful consideration of the disparate impact of these sources' emissions on the surrounding communities in Mobile, including the predominantly Black neighborhood of Africatown (hereinafter, collectively referred to as the "Impacted Communities"), and their pattern and practice of taking such actions in CAA permitting and related activities affecting the Impacted Communities, resulted in discriminatory impacts and treatment in violation of Title VI of the Civil Rights Act of 1964. Complainants filed their original Complaint raising these issues on May 8, 2023 ("May 2023 Complaint"), which OECR rejected without prejudice on July 18, 2023 awaiting the outcome of the EPA Administrator's consideration of similar Title VI compliance issues raised by Complainants in a Clean Air Act ("CAA") Title V Petition that was pending with the Agency at that time.⁵ Complainants had filed the Title V Petition with EPA on January 9, 2023, alleging various ways in which ADEM's Permits did not comply with the applicable CAA requirements.⁶ The EPA Administrator issued an Order

³ See Attach. A, at 255 (AL Bulk Terminal), 498 (Alabama Shipyard), 676 (Kimberly-Clark), 924 (Plains Marketing), and 1052 (UOP).

⁴ Five PDF attachments accompany this Complaint. The first three were included in the Title V Petitions submitted to EPA to address ADEM's compliance with the CAA in issuing these Permits, as described below. Due to the overlap of the permitting information provided in those attachments, they are relied upon, attached, and cited.

- Attachment A includes all permitting documents provided in the "Public Files" for each Permit on EPA Region 4's Alabama Proposed Title V Permit Database ("Region 4 AL Permit Database"), available at <https://www.epa.gov/caa-permitting/alabama-proposed-title-v-permits>. The Attachments are generally provided in groups corresponding to each Permit, which include screenshots of the Public Files list, Draft Permit, Draft Statement of Basis ("SOB") available at public comment, Petitioners' Public Comments, Proposed Permit, Revised SOB, Response to Comments ("RTC"), and Final Permit.
- Attachment B includes all of the documents referenced in the January 3rd Petition that are not generally available.
- Attachment C includes additional documents added in the January 9th Petition that are not generally available.
- Attachment D includes the January 9th Title V Petition, the EPA Administrator's September 18th Order in response to that Petition, and other documents referenced in this Complaint that were not included in the above Attachments.

These Attachments generally include a Table of Contents (and relevant Bookmarks in the PDF) listing the documents and an overall page number for easy reference, and are *available at* <https://drive.google.com/drive/folders/1zviIuwILR8BwXC2hY5ccheCjC0NcrdkX?usp=sharing>.

⁵ See Attach. D, at 848 (May 2023 Complaint and 156 (OECR July 18, 2023, Response).

⁶ Attach. D, at 2, *In the Matter of Clean Air Act Final Title V Permits Issued to Plains Marketing LP, Alabama Bulk Terminal, Kimberly-Clark Corporation, Epic Alabama Maritime Assets, LLC – Alabama Shipyard LLC, and UOP LLC*, Issued by the Alabama Department of Environmental Management, *available at* <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>. ("Title V Petition"). As noted on page 1 of that Petition, given the time and resource constraints

responding to the CAA Title V Petition on September 18, 2023 that did not resolve the Title VI compliance issues contained within it.⁷ Accordingly, Complainants are filing this Amended Complaint consistent with ORC's June 2023 rejection without prejudice, raising the same claims as contained in our original May 2023 Complaint, while also providing relevant background on the Administrator's September 2023 CAA Title V Order and additional information demonstrating the discriminatory treatment and impact resulting from ADEM's actions regarding these five permits and the Department's overall CAA permitting and related activities.

A. Clean Air Act Title V Operating Permits

Under Title V of the CAA, all major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with Title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable state plan to implement the CAA. A Title V operating permit generally does not impose new substantive control requirements on sources, but the CAA does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with the CAA and other with requirements.⁸ As EPA recently explained in objecting to a Title V permit issued by ADEM:

One purpose of the title V program is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.⁹

Petitioners (Greater-Birmingham Alliance to Stop Pollution, Mobile Environmental Action Coalition, Clean Healthy Educated Safe Sustainable Africatown, and Mobile Alabama NAACP Unit #5044) faced in preparing objections for all five Permits, Petitioners submitted a petition on January 3, 2023, the relevant statutory deadline, to address objections to the Plains Marketing and AL Bulk Terminal Permits, and reserved discussion of objections for the Kimberly-Clark, Alabama Shipyard, and UOP Permits for a petition to be filed on Monday, January 9, 2022, the statutory filing deadline for filing objections to those Permits. Petitioners made only very limited changes in the January 9th Petition to add those specific arguments reserved in the Petition filed on January 3, 2023, but the January 9th Petition is the complete Title V Petition that contains all objections for all five Permits and is thus the Petition cited to in this Compliant.

⁷ See Attach. D, at 177-178.

⁸ 57 Fed. Reg. 32250, 32251 (July 21, 1992); see CAA § 504(c), 42 U.S.C. § 7661c(c).

⁹ UOP Order, at 2.

For example, Complainants' comments on ADEM's Title V permits in and near Africatown and Mobile County raised issues regarding substantive permit defects that once corrected would decrease air emissions and improve air quality in the Impacted Communities.

Issuing Title V permits, either initially or during the renewals that occur approximately every five (5) years, is a multi-step process.¹⁰ First, after receiving and reviewing a permit application for a particular source, permitting authorities (such as ADEM) issue a draft permit for public notice and comment, usually with supporting information in a statement of basis ("SOB").¹¹ Following the public comment period, the permitting authority makes any changes necessary to the permit and then must provide the proposed permit to EPA for a 45-day review (along with the SOB and any response to comments ("RTC")), and the EPA may object to a proposed permit it determines does not comply with CAA applicable requirements.¹² If EPA does not object to the permit during that period, the permitting authority may issue the final permit, and other parties (such as Complainants) can – within 60 days of the expiration of the EPA's 45-day review period – file a petition to the EPA Administrator to object to a permit that does not comply with the CAA.¹³ EPA considers the claims in these Title V petitions and "shall grant or deny such petition...[and] issue an objection...if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements" of the CAA and relevant state implementation plans.¹⁴ If EPA issues an objection, either during its 45-day review period or in response to a petition to object, the CAA specifies that the permitting authority has 90 days to submit a revised permit addressing the objection or the EPA Administrator will issue or deny the Title V permit at issue.¹⁵ EPA's review period and the deadline for a party to petition the Administrator to object to a permit are in the CAA and thus cannot be extended.

¹⁰ The EPA Regional Offices conduct periodic "Title V program evaluations on the permitting authorities in the region. The purpose of the program evaluation is to identify good practices implemented by the state/local agency, areas needing improvement within the state/local program, and ways in which EPA can improve its own oversight role." *See e.g.* EPA Title V Program Evaluation for Alabama DEM Conducted December 2019, *available at* <https://www.epa.gov/caa-permitting/title-v-permitting-program-evaluations-alabama>. In light of the racially disparate impacts and the disparate/discriminatory treatment of ADEM's permit issuance of the five Permits, and the pattern and practice of additional discriminatory treatment, EPA must conduct additional and more rigorous oversight throughout its regional and headquarters programs.

¹¹ 40 C.F.R. § 70.7(h).

¹² CAA § 505(a) and (b), 42 U.S.C. § 7661d(a) and (b), and 40 C.F.R. § 70.8(a) and (c).

¹³ CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

¹⁴ *Id.* Note that while the CAA requires EPA to respond to these petitions within 60 days, these petitions often raise numerous complex issues, and EPA usually takes more than 60 days to issue its response. *See, generally*, EPA Title V Petition Database, *available at* <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

¹⁵ CAA § 505(c), 42 U.S.C. § 7661d(c).

Additionally, the Title V operating permit program is based on fees collected from the sources subject to the program. Each permitting authority collects fees from sources required to obtain operating permits.¹⁶ These fees must be sufficient to fund all reasonable permit program costs.¹⁷ ADEM's emission fee rate for 2022 emissions was \$90.00 per ton of pollutant emitted, which was a reduction from the prior year. ADEM invoiced fees for each of the owners/operators that hold the five Permits based on the plant-wide total emissions as follows:

- Plains Marketing, 39.19 tons, \$3,527.10¹⁸
- AL Bulk Terminal, 182.55 tons, 16,402.50¹⁹
- Kimberly-Clark, 417.30 tons, \$37,564.20²⁰
- Alabama Shipyard, 112.07 tons, \$10,086.30²¹
- UOP, (fee invoice not available in ADEM's eFile)²²

ADEM charged \$95/ton for 2021 emissions, which was a charge to include a particular on-line permitting and communication platform it is developing. Demonstrating ADEM's authority to modify the emission fees.

II. Parties

The MEJAC, GASP, C.H.E.S.S., and the Mobile Chapter of the NAACP bring this Amended Complaint against ADEM for violations of Title VI of the Civil Rights Act and related EPA implementing regulations in issuing the Title V Permits to the five sources at issue (AL Bulk Terminal, Alabama Shipyard, Kimberly-Clark, Plains Marketing and UOP) and, in so doing, failing to comply with or acknowledge its anti-discrimination obligations under 40 C.F.R. Part 7 as recipients of federal funding.

A. Complainants

MEJAC is a nonprofit organization formed in 2013 by residents of Africatown, Alabama (an extraordinarily historic and predominately Black area in

¹⁶ See EPA, Title V Operating Permits, Permit Fees, *available at* <https://www.epa.gov/title-v-operating-permits/permit-fees>.

¹⁷ *Id.*

¹⁸ ADEM Fee Invoice for Plains Marketing (Sept. 25, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105198695&dbid=0>.

¹⁹ ADEM Fee Invoice for Kimberly-Clark (Sept. 25, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105198737&dbid=0>.

²⁰ ADEM Fee Invoice for AL Bulk Terminal (Sept. 25, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105198680&dbid=0>.

²¹ ADEM Fee Invoice for Alabama Shipyard (Sept. 25, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105242319&dbid=0>.

²² As of December 24, 2023, ADEM's 2023 Fee Invoice for UOP is not in eFile. ADEM's Title V AEERS Report (2022), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105156489&dbid=0>.

Mobile County) in partnership with regional stakeholders and advocates. MEJAC's mission is to engage and organize with others in Mobile, Alabama's most threatened communities in order to defend the inalienable rights to clean air, water, soil, health, and safety; to promote environmental justice; and to take direct action when the government fails to do so, ensuring community self-determination, including environmental justice.

GASP is a nonprofit organization with a mission to enhance the health and well-being of Alabamians by reducing air pollution, advancing environmental justice, and promoting climate solutions through education, advocacy, and collaboration. That mission includes actively engaging impacted communities on air pollution issues, reviewing air pollution permits, and addressing concerns related to air quality, including environmental justice issues. GASP advocates for more robust public participation and community involvement in matters that affect community members.

C.H.E.S.S. is a community-based organization in historic Africatown located in Mobile, Alabama, is dedicated to preserving the Africatown community and achieving environmental justice.

The NAACP is the nation's largest and oldest civil rights organization. The mission of the NAACP is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. The Mobile NAACP has been working actively with Africatown residents and stakeholders since 2015 to address a variety of community challenges including environmental concerns, public participation opportunities, and law enforcement accountability.

B. Recipients

The Alabama Department of Environmental Management (ADEM) was created under Title 22 of the Code of Alabama 1975. ADEM is authorized by state statute to implement and enforce various state environmental laws, including Water Pollution Control, Chapter 22, Solid Waste, Chapter 27, and Hazardous Wastes Management, Chapter 30. ADEM administers the state's CAA Title V, Part 70 Operating Permit Program under the Alabama Air Pollution Control Act, Chapter 28 of Title 22 of the Code of Alabama, and implementing regulations promulgated by the Alabama Environmental Management Commission. Alabama's state statute and regulations set forth ADEM's powers and duties, which include evaluation of applications for permits for regulated air contaminant sources, and issuance of permits for sources which meet state and federal requirements. EPA approved ADEM the authority to implement and enforce Title V of the CAA in the

State of Alabama.²³ Within ADEM, the Air Division is responsible for implementing and enforcing the Alabama Air Pollution Control Act and the CAA within the State of Alabama and the County of Mobile. ADEM is a recipient of federal funds from EPA, as explained in more detail below.

III. Jurisdiction

EPA has jurisdiction over this Amended Complaint because it meets all the factors required for OECR to investigate a Title VI complaint.²⁴ This Amended Complaint is in writing, is filed with OECR by an authorized representative of the Complainants and describes the alleged discriminatory acts in Section VI.A. below. In addition, based on the facts set forth below, ADEM is a program that receives Federal funding, the Amended Complaint is timely filed, and the Amended Complaint otherwise meets EPA's prudential factors to assert jurisdiction over the Amended Complaint.

A. Program

ADEM is a program or activity that receives federal funding and is, therefore, subject to EPA's Title VI regulations in 40 C.F.R. Part 7. According to the Civil Rights Act and EPA Title VI regulations, "[p]rogram or activity...mean[s] all of the operations of...a department, agency, special purpose district, or other instrumentality of a State or of a local government...any part of which is extended Federal financial assistance."²⁵ If a state or local governmental department receives *any* federal funding, all of that department's operations are covered by Title VI.²⁶ ADEM and the Air Division process and issue air pollution control and Title V permits under the CAA and Alabama Air Pollution Control Act, are programs and activities of a state government department that receive Federal financial assistance, and are, therefore, programs or activities as those terms are defined in 40 C.F.R. § 7.25. Correspondingly, ADEM and Air Division are subject to the requirements of Title VI and related regulations.

B. Federal Funding

ADEM receives federal funding as defined by EPA's Title VI implementing regulations. EPA's regulations define "[r]ecipient" as "any State or its political

²³ See Appendix A to 40 C.F.R. Part 70. (ADEM received final full approval effective November 28, 2001.).

²⁴ 40 C.F.R. § 7.120; *see also* Case Resolution Manual (January 2021) ("Case Resolution Manual"), U.S. EPA External Civil Rights Compliance Office, at 5-10, *available at* https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.

²⁵ 42 U.S. Code § 2000d-4a, 40 C.F.R. § 7.25.

²⁶ *Ass'n. of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-5 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (*en banc*).

subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient . . .”²⁷

ADEM, a state agency, has received more than \$447 million in grants from EPA between 2021 and 2023.²⁸ It is immaterial that much of the funding that ADEM receives from EPA is unrelated to air pollution control permitting or air quality. By accepting any EPA funding, ADEM takes on an affirmative nondiscrimination obligation that extends to all of its programs and actions.²⁹ For example, ADEM received “Performance Partnership Grants” that totaled more than \$41 million in 2022 and 2023;³⁰ and \$500,000 in 2021 for the “Gulf of Mexico Program.” Additionally, ADEM receives funding specifically used to operate the Air Division and to implement and enforce the CAA and the Alabama Air Pollution Control Act within the State and the County of Mobile. For example, EPA will largely fund a special PM₁₀ NAAQS monitoring study in Mobile County for a period of three years.³¹ Based on these various federal funding sources – and the Governor’s ongoing recommendations for Federal Grants for ADEM’s various programs³² – it is indisputable that ADEM, including the Air Division, is a recipient of federal funds and is subject to Title VI of the Civil Rights Act and EPA’s regulations at 40 C.F.R. Part 7 – a fact confirmed by the EPA Administrator.³³

C. Timeliness

This Amended Complaint is timely filed because it is a timely update to the original May 2023 Complaint, which was also timely filed. The May 2023 Complaint

²⁷ 40 C.F.R. § 7.25.

²⁸ See generally USASpending.gov, available at: https://files.usaspending.gov/generated_downloads/PrimeAwardSummariesAndSubawards_2023-05-03_H16M53S04284082.zip (“USASpending”).

²⁹ 42 U.S. Code § 2000d–4a, 40 C.F.R. § 7.25.

³⁰ See USASpending. Performance Partnership Grants received from EPA in 2022 and 2023 include: \$13,555,163 (awarded on Feb. 16, 2023), \$13,216,905 (awarded on Oct. 14, 2022), \$13,586,864 (awarded on Feb. 18, 2022), and \$13,523,604 (awarded on Aug. 30, 2022).

³¹ Attach. D, at 98, Letter from Ronald W. Gore, Chief, Air Division, ADEM, to Sidni Elise Smith, Staff Attorney, Michael Hansen, Executive Director, GASP, Response to Comments on the Addendum to ADEM’s 2022/23 Ambient Air Monitoring Plan (April 4, 2023); see also, EPA’s award of \$200,000 in 2001 for a State Environmental Justice Cooperative Agreement Program Grant, *supra* n.28.

³² Governor Kay Ivey, *State of Alabama Executive Budget, Fiscal Year 2021*, at 99-101 (Department of Environmental Management detailed budget shows federal grants received in 2019, federal grants budgeted in 2020, and federal grants requested in 2021), available at https://budget.alabama.gov/executive_budget_document/; see also, Governor Kay Ivey, *State of Alabama Executive Budget, Fiscal Year 2022*, at 117-119, available at https://budget.alabama.gov/executive_budget_document/.

³³ Attach. D at 180. (“As a recipient of EPA financial assistance, ADEM’s activities and programs, including its issuance of title V permits, are subject to the requirements of title VI and EPA’s title VI regulations.”)

addressed the discriminatory effects of ADEM's issuance of five Title V Permits in November 2022 and was filed within 180 days of those Permits' issuance. EPA Title VI regulations require complaints to be filed within 180 days of the last act of alleged discrimination.³⁴ ADEM issued these Permits on November 4, 2022 (AL Bulk Terminal, Plains Marketing), November 8, 2022 (UOP), and November 9, 2022 (Alabama Shipyard, Kimberly-Clark).³⁵ Not only could EPA have objected to these Permits at any time during their 45 day review period, but ADEM could have revised these Permits to address their disparate impact on the communities surrounding these sources and resubmitted them to EPA at any time prior to finalizing them. Thus, the May 2023 Complaint alleging discriminatory acts in the issuance of these five Permits was timely, as it is being filed on May 8, 2023, which is 180 days from the issuance of the last of these final Permits on November 9, 2022.

Thereafter, OECR's July 2023 rejection without prejudice of the original May 2023 Complaint informed Complainants that "a complaint may be re-filed with OECR within 60 days of the resolution of the Title V Petition proceeding" per the Case Resolution Manual.³⁶ While the EPA Administrator signed the Order that resolved the related CAA Title V Petition on September 18, 2023, EPA Region 4 did not inform Complainants of that Order until early October and the official Federal Register notice of the Title V Petition Order did not publish until October 24, 2023.³⁷ OECR informed Complainants' representatives that the 60-day refiling period would be determined using the Federal Register notice publication date and calculated the refiling deadline as December 26, 2023 in light of the intervening holiday weekend.³⁸ Thus, this Amended Complaint is timely, as it is being filed on or before December 26, 2023.

Moreover, OECR has ongoing authority to review recipients' programs and activities for Title VI compliance, such as ADEM's air permitting program.³⁹ This Amended Complaint alleges systemic discriminatory actions in ADEM's issuance of these five Permits, but information provided below also makes clear that ADEM has a demonstrated a pattern and practice that fails to comply with its Title VI obligations in the issuance of Title V Permits and related CAA actions.⁴⁰ ADEM's standard operating procedure for submitting permits to EPA has become its regular pattern and practice and takes away the public participation rights of all the

³⁴ 40 C.F.R. § 7.120(b)(2) and Case Resolution Manual at 8 (stating that OECR "will accept as timely those allegations that have been filed within 180 calendar days of the date of the last act of alleged discrimination").

³⁵ See Attach. A, at 255 (AL Bulk Terminal), 498 (Alabama Shipyard), 676 (Kimberly-Clark), 924 (Plains Marketing), and 1052 (UOP).

³⁶ See Attach. D, at 157.

³⁷ 88 Fed. Reg. 73,017 (Oct. 24, 2023).

³⁸ See Attach. D, at 228-230.

³⁹ 40 C.F.R. § 7.115(a).

⁴⁰ Complainants have submitted comments on other title V permits, which are discussed below.

residents in the Impacted Communities.⁴¹ ADEM's practices have the effect of defeating accomplishment of the public participation objectives of the CAA's programs with respect to individuals of a particular color. These practices must be eliminated because they are not necessary to the program.⁴² Accordingly, this Amended Complaint is also timely because ADEM's discriminatory acts in Title V permitting, and related CAA actions are ongoing or within OECR's investigatory authorities.

D. Other Prudential Factors

This Amended Complaint satisfies the other prudential considerations of EPA's Title VI implementing regulations and the Case Resolution Manual. EPA has subject matter jurisdiction over this Amended Complaint because it alleges disparate impacts and treatment in ADEM's Title V permitting that violate Title VI of the Civil Rights Act of 1964. The Amended Complaint's allegations regarding the racially disparate impacts and treatment resulting from ADEM's final issuance of these Permits in a one-week period and without meaningful consideration of the impact of the emissions authorized by them on the Impacted Communities have not been alleged in other proceedings. While Complainants were also the Petitioners that filed a CAA Title V Petition to Object to the EPA Administrator on January 8, 2023,⁴³ that Title V Petition focuses on consideration of ADEM's compliance with the CAA, Alabama's corresponding air controls plans, and EPA Title V regulations in issuing these Permits,⁴⁴ and the EPA Administrator's Order responding to that Petition did not find any violation of those CAA-related requirements with regard to any alleged racially disparate impacts of ADEM's final issuance of these Permits.⁴⁵ This Amended Complaint addresses ADEM's compliance with Title VI of the Civil Rights Act and requests specific relief to address the disparate discriminatory impacts and treatment that can only be granted through OECR's action on this Amended Complaint. Accordingly, Complainants respectfully request EPA to

⁴¹ See e.g., *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (class action alleging pattern or practice of racial profiling by law enforcement agency in violation of Title VI and the Fourth and Fourteenth Amendments), cited in DOJ Title VI Legal Manual, Section VI, at 24, *available at* <https://www.justice.gov/crt/fcs/T6manual>. ("DOJ Title VI Manual").

⁴² Memorandum on the use of the Disparate Impact Standard in Administrative Regulations Under Title VI, from the Assistant Attorney General to heads of Departments and Agencies that Provide Federal Financial Assistance (July 14, 1994), *available at* <https://www.justice.gov/archives/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations>, cited in DOJ Title VI Manual, Section VII, at 5.

⁴³ Attach. D, at 2, Title V Petition.

⁴⁴ See Clean Air Act § 505(b), 42 U.S.C. § 7661d(b), and 40 C.F.R. § 70.8(d) (limiting EPA Title V petition objections to issuance of permits that do not comply with the application requirements of the Clean Air Act); see also 40 C.F.R. § 70.2 (defining applicable requirement by reference to specific requirements of the Clean Air Act and not including any other statutes, such as the Civil Rights Act).

⁴⁵ See Attach. D, at 180 and summary provided in Section IV.C., *infra*.

investigate this Amended Complaint and take affirmative steps to remedy ADEMs noncompliance with Title VI, including the specific relief requested below.

IV. Factual Background

A. History of the Impacted Communities

1. Historical Discussion of Africatown's Origins and Significance

A group of West Africans arrived in Mobile on the Clotilda – the last documented slave ship to reach the United States – and ultimately settled in the area now known as Africatown.

In July 1860, the Clotilda sailed secretly into Mobile Bay with 110 men, women, and children hailing from Yoruba, Atakora, Nupe and Dendi. Most of the group had been captured in present day Benin. The international slave trade had been made illegal in the United States in 1808. Fearing they would be caught; the captain and his financier transferred the trafficked Africans to a riverboat and burned and sunk the Clotilda in the Mobile River at Twelve Mile Island in the Mobile Bay Delta.

After their arrival to the Mobile area about twenty-five enslaved Clotilda shipmates were sold upriver. Timothy Meaher, who had arranged and financed the illegal expedition, and his family kept sixty of the enslaved shipmates. After the end of the Civil War, many Clotilda shipmates who had been trafficked and formerly enslaved on a plantation in Clarke County joined their fellow newly emancipated West Africans in present-day Africatown. Unable to afford passage back to Africa and unaware of efforts that may have afforded them passage to Liberia, they remained in unincorporated Mobile County and founded African Town, the first town established and controlled by formerly enslaved African-born people in the United States.

Working in local shipyards and mills, including those of their former enslavers, they saved money to buy land including some from their former enslavers. African Town originally included a 50-acre community in the Plateau area and a smaller one, Lewis Quarters, which consisted of seven acres over a mile to the west of the larger settlement. Lewis Quarters was named after one of its founders, Charlie Lewis. The settlers appointed Peter Lee as their chief and established a governmental system based on African law.

The residents of African Town built the first school for the children of freedmen in the area. In 1872 they built Old Landmark Baptist Church, which is now Union Missionary Baptist Church. While the community retained much of

their West African culture, construction of the church signaled the conversion to Christianity by many of the Africans. They were a tight-knit community known for sharing and helping one another but reportedly had tense relations with both whites and African Americans and so largely kept to themselves.

Kossola "Cudjo" Lewis, who was a teenager when he was trafficked aboard the *Clotilda*, is one of the most renowned of Africatown's original settlers, and his story is by far the most documented first person account of the Trans-Atlantic Slave journey that so many millions were forced to make before him. He rang the bell at Old Landmark Baptist Church, worked as a shingle maker and shared the story of the *Clotilda* Africans with journalists, writers and historians. Having died in 1935 at the age of ninety-four, Lewis is one of the last known African-born enslaved people in the United States and the only one to have been captured on film. He, along with dozens of other *Clotilda* shipmates, are interred at Africatown's Historic Plateau Cemetery, which is within the National Register of Historic Places' Africatown Historic District.⁴⁶

2. A Summary of Africatown's Marginalization within Mobile since its Founding

For having been proximate to sites of some of the earliest contacts between Native American societies and European conquistadors as early as 1500, the Mobile area's Native American population suffered tremendously from imported diseases and direct warfare. Hernando de Soto's expedition in 1540 saw his forces destroy the Native American village of Mauvila, also spelled Maubila, from which the name Mobile was later derived.

Two centuries later, Mobile was founded as the capital of colonial French Louisiana in 1702 and remained a part of New France for over 60 years. During 1720, when France warred with Spain, Mobile was on the battlefield, so the capital moved west to Biloxi. In 1763, Britain took control of the colony following their victory in the Seven Years' War. During the American Revolutionary War, the Spanish captured Mobile and retained it by the terms of the Treaty of Paris in 1783.

Mobile first became a part of the United States in 1813, when it was captured by American forces and added to the Mississippi Territory, then later re-zoned into the Alabama Territory in August 1817. Finally on December 14, 1819, Mobile became part of the new 22nd state, Alabama, one of the earlier states of the U.S. Forty-one years later, Alabama left the Union and joined the Confederate States of

⁴⁶ See e.g., "Encyclopedia of Alabama," Somerset Publishers, Inc., St. Clair Shores, MI (1998); Diouf, "Dreams of Africa in Alabama;" see also Robertson, "The Slave Ship *Clotilda* and the Making of AfricaTown, USA: Spirit of Our Ancestors" ("Robertson"); see also Tabor, Nick, *Africatown: America's last slave ship and the community it created*, 125-143. New York: St. Partin's Press (2023). ("Tabor").

America in 1861. It returned in 1865 after the American Civil War.

The first enslaved Africans were trafficked into Mobile in 1704, a practice which continued until 1860 with the then-illegal Clotilda expedition.⁴⁷ According to the 1860 census, 1,785 slave owners in Mobile County held 11,376 people in bondage, about one-quarter of the total county population of 41,130 people.⁴⁸

In the post-Reconstruction era, Africatown's unique history was suppressed locally by the implicit threat of violence against those who spoke of the Clotilda, since the trafficking of enslaved Africans was illegal at the time and mentioning the history was an accusation against the powerful Meaher family and their business associates of that crime.

In 1901, the Alabama legislature passed a new constitution in 1901 that disenfranchised most Black people and many poor whites; and the white Democratic-dominated legislature passed other discriminatory legislation. In 1902, the city government passed Mobile's first racial segregation ordinance, segregating the city streetcars. It legislated what had been informal practice, enforced by convention, as was common in the Jim Crow period.⁴⁹

This was also around the time during which two Kossola "Cudjo" Lewis' children were murdered under very suspicious circumstances with no accountability in 1902 and 1905. Additionally, three of the six documented Mobile-area Jim Crow-era lynchings happened within Africatown's Lewis Quarters and Happy Hill neighborhoods, specifically the lynchings of Will Thompson (1906), Richard Robinson (1906), and More Dorsett (1907).⁵⁰

In 1911, the Mobile city government switched from Single Member Districts to the At Large system that dominated Mobile politics until the 1980 *Bolden v. Mobile* case was decided.⁵¹

The African Town area, also known during the period by outsiders as "Plateau", was reported to be one of the largest Black settlements in the country with around 1,500 residents. Mobile expanded in the Jim Crow era but never annexed any parts of Africatown until much later.⁵²

⁴⁷ See e.g., "Encyclopedia of Alabama," Somerset Publishers, Inc., St. Clair Shores, MI (1998); see also Thomason, Michael, ed., "Mobile: the New History of Alabama's First City." Tuscaloosa, AL: University of Alabama Press. ISBN 0-8173-1065-7 (2001).

⁴⁸ University of Virginia census records.

⁴⁹ Thomason at 154–169.

⁵⁰ Tabor at 125-143.

⁵¹ See e.g., Thomason.

⁵² See e.g., Tabor.

Isiah J. Whitley arrived in Plateau Africatown in 1910 and worked with the remaining Clotilda shipmates and their descendants and neighbors and brought the community school, which the Clotilda shipmates had established to educate their children in 1880, into the Mobile County school system from the Plateau Normal and Industrial Institute to the Mobile County Training School in 1910.⁵³ His efforts led to the school's ability to secure monetary aid from the state of Alabama. Whitley served as the principal there from 1910 until his death in 1923. The school was a critical source of trained teachers for Black schools throughout the region for generations since its founding until it was downgraded to a middle school in the early 1970s during desegregation.⁵⁴

By 1926, four railways had been established through Africatown including today's Terminal Railway, CSX, Norfolk Southern, and CN rail lines.^{55, 56}

In 1927, the Cochrane Bridge opened in Africatown. Taking almost a year to complete construction, the Cochrane Bridge featured five separate bridge spans and featured a vertical lift bridge to allow traffic to continue traveling north and south along the Mobile River. It was sited in the Africatown part of the region, three miles north of the present day Bankhead Tunnel "so as to cause no hindrance or delay to the movement of ships in the harbor." The bridge was the first road connecting the Mobile region directly with points further east and was an integral part of the historic Old Spanish Trail transcontinental east-west corridor, portions of which eventually became Interstate 10. It was the only direct road east from Mobile to Baldwin County until the Bankhead Tunnel opened on February 20, 1941, downtown. It is known today as simply the Africatown Bridge.⁵⁷

⁵³ Anna Thornton, "Mobile County Training School, Class of 1921," *Mobile Bay Magazine*, (April 27, 2022), <https://mobilebaymag.com/mobile-county-training-school-class-of-1921/>.

⁵⁴ See e.g., Tabor.

⁵⁵ See e.g., Tabor; see also James H. Lemly, "The Gulf, Mobile and Ohio: A Dynamic History of the Tigrett Road," Ch. XII, (1940); see also Art Richardson, "Gulf, Mobile & Ohio Railroad Significant Dates and Events," GM&O Historical Society (Aug. 10, 1972); see also "History | Who We Are | About CN," Canadian National Railway Company, (July 1, 1999); see also Marie Bankhead Owen, "The Story of Alabama: A History of the State," 150, New York, New York: Lewis Historical Publishing Co. (1949); *id.* at 151; see also William H. Jones, "Rail Merger Set," *The Washington Post*, (March 25, 1982); see also Dr. Maury Klein, "History of the Louisville & Nashville Railroad," 137 New York, New York: The Macmillan Company (1972); see also Kincaid Herr, "The Louisville and Nashville Railroad 1850-1963," 60, Lexington, Kentucky: The University Press of Kentucky (1964); see also "History & Evolution – CSX.com" CSX Corporation, ch. 6-7, (March 11, 2018); see also John Glennon and Agnes Anderson, "Early History of the Alabama State Docks: 1915-1938. Mobile, Alabama: The Alabama State Docks," 2, Folder: Ala State Docks thru 1949, Vertical File, Local History and Genealogy Library, Mobile Public Library.

⁵⁶ Dade, Thompson & Co. Printers, "Proceedings of the Fourth Annual Meeting of the Stockholders of the Mobile and Ohio Railroad Company. Mobile, Alabama: The Mobile and Ohio Railroad Company," 14-15 (1852).

⁵⁷ Angela Levins, "How to get to the other side? Vintage photos document storied past of Mobile's tunnels and roadways," (June 19, 2015), *available at*

Then, on September 23, 1929, International Paper opened its kraft paper mill in Africatown. International Paper's Mobile kraft paper mill in Africatown would grow to be "the most important paper manufacturing center in the South" after dramatic expansions in the 1940s and 50s to its Paper and Chemical Divisions at the site. Longtime Africatown residents have reported frequent raining of ash on the Impacted Community so heavy and toxic that it corroded cars, decimated the community's fruit and nut groves, stained clothing, and ate away at and caved-in the roofs upon which it collected. The company's wastewater discharges into Hog Bayou are remembered by some in the Impacted Community for creating times where a strata of rainbow colors were visibly suspended in the water column and others when copious amounts of chemical foam floated on the water's surface.⁵⁸

During this period, neither the City of Mobile to its south nor the City of Prichard to its west offered municipal services to the area of unincorporated Mobile County known widely as Plateau and Magazine Point. It was not until the early 1960s that Plateau, Magazine Point, and present-day Happy Hills and Lewis Quarters neighborhoods of present-day Africatown were annexed by the City of Mobile. Indoor plumbing, sewage systems, municipal drinking water, fire hydrants, and paved roads were not afforded to Africatown residents until the late 1960s.

On January 12, 1960, the City of Mobile annexed Africatown. By the mid-50s Mobile industrialists recognized that the waterfront access perceived at the time as necessary to expand the city's port-related activities could be annexed into other nearby cities if the City of Mobile did not work to annex the vast swaths of wetland areas to its north and other points further west and south. The push eventually more than tripled the size of the city. To promote the effort, the City Commission of Mobile created the Plateau's Citizens' Committee in the mid-1950s, which then began petitioning the City of Mobile for annexation in exchange for water and sewer services. In letters to City Commissioners, Solomon Bradley, Sr., Chair of the group, complained that Mobile was poised to annex the Magazine Point neighborhood, which would hedge Plateau off from both the cities of Prichard and Mobile. Plateau residents, he noted, were paying fire insurance but had no fire hydrants to use. He also noted that "hundreds of children" at Mobile County Training School were having to drink "pump water, which is really unfit to drink." It is not inconceivable that the well water the neighborhoods depended upon had by that time become

https://www.al.com/news/mobile/index.ssf/2015/06/how_to_get_to_the_other_side_v.html; *see also* John Glennon and Agnes Anderson, "Early History of the Alabama State Docks: 1915-1938," 4.

⁵⁸ Chantilly, Virginia, "The History Factory, Generations of pride: A Centennial History of International Paper: The International Paper Company," 192 (1998); *see also* "Mobile Is Selected As Site For \$20,000,000 Paper Mill," The Mobile Register, 16-A (March 5, 1955).

contaminated by the industrial activities and the accumulation of raw sewage in and around the community.⁵⁹

Between 1960 through 1971, Africatown's first petrochemical tank farm expanded dramatically. Above ground chemical storage tanks have been sporadic features of the Mobile Riverfront in Africatown since the Naval Stores era (1890-1960) of lumber product processing in the community, but starting in 1960 seventeen new above ground oil storage tanks with a combined capacity of over 72 million gallons, more than six times the volume of the Exxon Valdez spill's lowest release estimates, were constructed on the Mobile River shoreline of Magazine Point. After passing through many operational hands, this one tank farm (there are more than nine near the Impacted Community) is now owned and operated by a subsidiary of the middle-market transporter Plains All American called Plains Marketing LP. Despite scientifically well documented risks to public health like birth defects and cancers brought to the public's attention, Africatown residents report having to deal with noxious oil fumes routinely both in the open air and in their homes.⁶⁰

In 1963, three African-American students brought a case against the Mobile County School Board for being denied admission to Murphy High School. This was nearly a decade after the United States Supreme Court had ruled in *Brown v. Board of Education*, 347 U.S. 483 (1954) that segregation of public schools was unconstitutional. The federal district court ordered that the three students be admitted to Murphy for the 1964 school year, leading to the desegregation of Mobile County's school system.⁶¹

The first Civil Rights march in Mobile occurred after the assassination of Martin Luther King Jr in 1968. That march was led by a descendant of the Clotilda shipmates Kuppolee "Pollee" and Rose Allen named Dr. Jerry Houston Pogue who was a Field Staff Coordinator for the Southern Christian Leadership Conference in

⁵⁹ City of Mobile City Clerk. "A Resolution To Extend The Corporate Limits Of The City Of Mobile, Alabama," (Jan. 12, 1960) (Record Group 6: Records of the Board of Commissioners of the City of Mobile, 1911-1985, Section 7: Annexation 1911-1984, Box 2, Mobile Municipal Archives, Mobile, Alabama); *see also* George R. Irvine, Letter to Solomon Bradley, Sr., (Jan. 20, 1955) (Record Group 6: Records of the Board of Commissioners of the City of Mobile, 1911-1985, Section 7: Annexation 1911-1984, Box 2, Mobile Municipal Archives, Mobile, Alabama); *see also* Solomon Bradley Sr. Letter to Joseph N. Langham [sic], 2 (Sept. 20, 1954) (Record Group 6: Records of the Board of Commissioners of the City of Mobile, 1911-1985, Section 7: Annexation 1911-1984, Box 2, Mobile Municipal Archives, Mobile, Alabama)

⁶⁰ Corey Holmes, "Statement of Basis," Facility No. 503-3013, Chemical Branch, Air Division, Alabama Department of Environmental Management, 1 (Oct. 29, 2015); *see also* W. Wertelecki, M.D., "Mobile, Alabama – Promotion of Petrochemical Industries; Pregnancies – Birth Defects – Cancer – Public Health" No Petro-Chemical Storage Tanks on our West Bank: A Compendium of Citizen Concerns. Mobile, Alabama, 37-38 (March 15, 2015), *available at* <https://mejac.files.wordpress.com/2015/06/petro-compendium.pdf>.

⁶¹ *See e.g.*, Thomason.

Atlanta, Georgia at the time and became a founding member of Neighborhood Organized Workers (NOW). Dr. Pogue led Mobile's MLK Memorial March every year from 1968 until 2016.

People the world over have heard of Martin Luther King Jr., the dogs and water hoses of Birmingham, and the Bloody Sunday events of Selma. Few, however, have heard of John LeFlore, Joseph Langan, or Albert Foley, or of the bombing of LeFlore's home in 1967 that destroyed his home or the protests over segregated seating in Mobile.⁶²

Civil rights activist John L. LeFlore was born in Mobile in 1903. In 1925, he reorganized the city's insolvent NAACP Branch and inaugurated a fifty-year career of service to African Americans in Mobile. LeFlore recruited Vivian Malone to desegregate the University of Alabama, Birdie Mae Davis to desegregate the city's schools, and Wiley Bolden to change the city's form of government. He died of a heart attack in 1976. Joseph Langan (1912-2004) was a lawyer, state representative, state senator, and city commissioner in Mobile from 1953 to 1969. In 1957 Langan ran against the leader of Ku Klux Klan, for a city commission position and at that time he was a racial progressive. Father Albert Sidney "Steve" Foley (1912-1990), a Jesuit priest and sociology professor at Spring Hill College, worked closely with John LeFlore and Joseph Langan in their efforts to bring about peaceful change in race relations in Mobile.

All throughout the Civil Rights Era, local grassroots organizations exerted influence on city politics. NOW and the Non-Partisan Voters' League initiated several important legal suits, including the desegregation suit for Mobile's public schools—one of the longest-running cases of its kind. The league also sponsored the case *Bolden v. Mobile*, 446 U.S. 55 (1980), which held that the At-Large election of municipal government representation was inherently discriminatory to marginalized populations. The suit resulted in the first female and African American commissioners in the City of Mobile's long history. In 2005, Samuel Jones was elected as Mobile's first African American mayor.⁶³

In 2013, William S. "Sandy" Stimpson was elected as Mobile's mayor. He is currently serving a third term. Stimpson's family is ingrained in Africatown industrial business affairs, though he has claimed divestment of family business interests.

⁶² University of South Alabama, The Doy Leale McCall Rare Book and Manuscript Library, *The Civil Rights Movement in Mobile*, available at <https://www.southalabama.edu/libraries/mccallarchives/civil.html>.

⁶³ Encyclopedia of Alabama, Mobile, available at <https://encyclopediaofalabama.org/article/mobile/>.

3. Africatown and the Impacted Communities Today

According to many residents, the 163 years of struggle and inequality continues to plague Africatown and the other Impacted Communities. Indeed, the Academy Award short-listed Netflix documentary “Descendant”⁶⁴ tells two stories of Africatown: the story about the survivors of last documented slave ship to arrive illegally in the United States as part of the Trans-Atlantic Slave Trade who built the community of Africatown, and a contemporary story about how many of the descendants of those individuals who still live there face the contours of injustice that linger far past that devastating historical moment.⁶⁵ Residents and descendants explain that environmental racism from the industrial and polluting businesses that operate in and around the Impacted Communities affects their health and quality of life and how urgently the twin injustices of having their history silenced by their ancestors’ enslavers and dealing with the polluting business of their enslavers’ descendants and business partners.⁶⁶

The residents are “suffering under a cloud of noise, fumes and dust.”⁶⁷ One resident shared that he “used to get up in the morning and sit on the porch with my coffee. Don’t do it. Because of the dust.”⁶⁸ He hears the sounds of machinery day and night and must deal with the dust and smell that is often so horrific they have to shelter in place. Another resident – whose ancestors were aboard the *Clotilda* and whose grandparents built the home on Chin Street where she and her three children used to live until they recently moved – expressed serious concerns that not enough is being done about air quality. She voiced her frustration in this way, “Get out and come stand out here in this air . . . I’ve done everything that a mother could do to try to make a better environment for my children. But if the city is not going to do it now, what else can I do besides move?”⁶⁹

The dust and pollution cause serious damage, at a cost to the residents. Yet another resident explained, “Our people built this place, and they’re tearing it up. Destroying it. For the sake of money,” he said. “The sand and dust has messed up the AC units in my house, so I have a window unit. I also messed up my unit in the

⁶⁴ Dilillo, John, “New Doc Gives Voice to the Descendants of the Last Known Ship to Smuggle Stolen Africans to the US,” Netflix (Sept. 29, 2022); *available at* <https://www.netflix.com/tudum/articles/descendant-documentary-trailer>.

⁶⁵ Attach D. at, 716-732, *Descendant*: this powerful new Netflix documentary explores the discovery of the last American slave ship (Nov. 27, 2022), *available at* <https://www.stylist.co.uk/entertainment/descendant-netflix-documentary-margaret-brown-interview-2/711030>. (“*Descendant*”).

⁶⁶ Attach D. at, 707, WKRG, ‘Help us, we need help’: Africatown neighbors and advocates begging for relief from ‘environmental racism’ (Feb. 24, 2022), *available at* <https://www.wkrg.com/mobile-county/help-us-we-need-help-africatown-neighbors-and-advocates-begging-for-relief-from-environmental-racism/>.

⁶⁷ *Id.*

⁶⁸ *Id.* at 708.

⁶⁹ *Id.* at 709.

vehicle...[and] it's also turning my paint on my vehicles.”⁷⁰ Residents further voice concerns about the violations that occur at night, and despite making complaints for more than 20 years, the noise, odors, dust and air pollution continues. Residents are despondent and doubtful they will ever get a good night's sleep or breathe fresh air. As one resident puts it:⁷¹

“I feel like I'm running a race. But, it looks like it keeps moving further and further away,” he said. “I just sit up, get my coffee and pray in the morning. Hopefully somebody will hear our prayer. Help us, we need help. That's what we're asking for. Just a little help. That's all.”

The struggle for clean air in the neighborhoods is real, and yet the power of the human spirit is seen in their individual and collective resistance, resilience and survival.⁷² Evidence of the strength of the community is seen in recent opening of the Africatown Heritage House whose exhibit chronicles the journey and aftermath of the last known ship carrying enslaved people to America as part of the Trans-Atlantic Slave Trade, documenting the perseverance of people who created a new life in Africatown and the ancestors and community who honor them today.⁷³ One of the direct descendants of two people who endured the Clotilda journey explained on the opening of the Heritage House that he “wants people to understand the history of Clotilda and the current plight of those who live in Africatown, a community with 98% Black residents. Some 35% of its nearly 2,000 residents live below the poverty level.”⁷⁴ “We also want the world to learn about the Africatown community and for them to go and experience and see the blight, the food desert, the environmental injustices that the people and the residents of Africatown are currently experiencing,” Clotilda Descendants Association President Jeremy Ellis said. “It's important to allow them to tell their story and what they're experiencing today,” he said.⁷⁵ Indeed, “[t]he Clotilda is more than a slave ship: it unintentionally birthed a resilient and powerful Black community that developed a unique and influential fragment of American culture. The discovery of The Clotilda gave a deserved voice

⁷⁰ *Id.* at 710.

⁷¹ Attach. D. at, 711.

⁷² *Id.*

⁷³ Attach D. at, 712. Clotilda: The Exhibition' chronicles America's last known ship carrying enslaved people, (July 7, 2023), <https://thegrio.com/2023/07/07/clotilda-the-exhibition-chronicles-americas-last-known-ship-carrying-enslaved-people/>; *see also* <https://clotilda.com/>.

⁷⁴ *Id.* at 715.

⁷⁵ *Id.*

to this previously silenced story. Through “Clotilda: The Exhibition,” we are reminded that it was never about the ship: it was about the people.”⁷⁶

These resilient residents need EPA’s help. They did not choose to live in a community that is exposed to more pollution from the polluting facilities that decided to operate in their neighborhood, often with the explicit invitation of powerful local commercial interests and lobbies who until very recently never even mentioned the existence of the community to the multinational, multi-billion dollar, publicly traded corporations they recruited to the neighborhood. The residents need EPA’s swift and strong oversight to correct ADEM’s discriminatory CAA permitting practices, and by failing to assess the cumulative impacts of these air permitting decisions on the Impacted Communities. The voices of Impacted Community residents must be heard where the CAA and EPA’s regulations provide for public participation. EPA must step in loud and clear and put an end to ADEM’s pattern and practice of what is clearly “suspicious timing,”⁷⁷ which intentionally discriminates against these minority communities by restricting their ability to participate in all stages of the CAA’s public participation process. Most critically, ADEM’s practice severely restricts the Impacted Communities from challenging ADEM issued permits that fail to respond to their comments and meet the CAA requirements by filing petitions with EPA seeking objections to the permits. The residents of the Impacted Communities appeal to EPA to conduct an investigation under Title VI of the Civil Rights Act and provide the relief requested in this Complaint.

4. The Demographics of the Impacted Communities

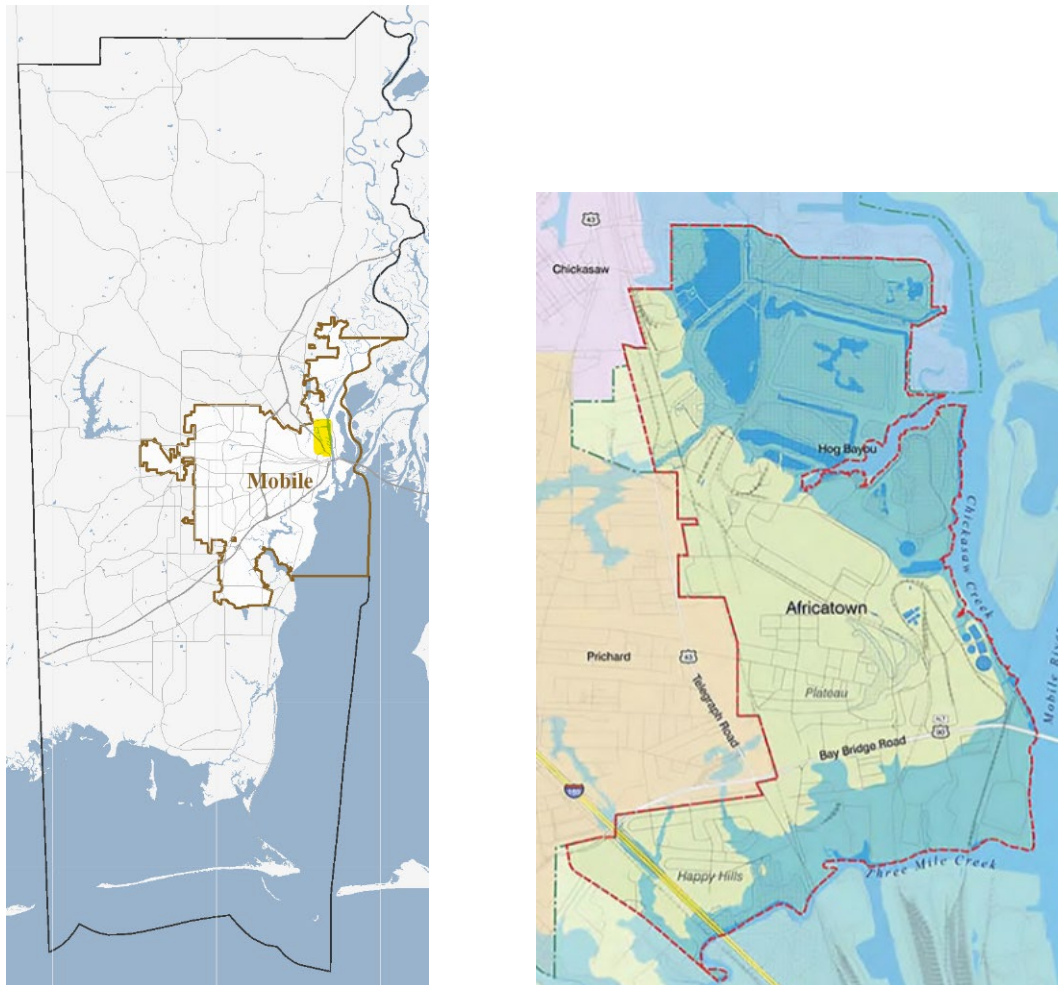
For the purposes of this Amended Complaint, the Impacted Communities are Africatown and other communities in the City of Mobile surrounding the facilities authorized by the five Permits. The boundaries of the City of Mobile within Mobile County as a whole are shown in the larger map below, with the general location of the City of Mobile’s Africatown Planning Area (the smaller map) noted in yellow,

⁷⁶ See <https://www.travelandleisure.com/clotilda-the-exhibition-mobile-alabama-8349503>.

⁷⁷ *Loyd v. Phillips Bros. Inc.*, 25 F.3d 518,522 (7th Cir. 1994), *accord Troupe v. May Dept. Store Co.*, 20 F.3d 734m 736 (7th Cir 1994).

though it should be noted that Africatown, as a community, is larger than the City of Mobile definitions and includes parts of the neighboring City of Prichard.

Figures 1 and 2. Maps of the Impacted Communities, Mobile and Africatown



The City of Mobile is home to almost 190,000 people, and according to information provided from EPA’s EJScreen database has a population that is majority minority, with 57% of residents identifying as people of color and 51% of residents identifying as Black.⁷⁸ And those numbers are dramatically higher in the City of Mobile’s Africatown Planning Area, which a cursory on-the-ground visit would indicate is virtually 100% Black, although the underlying Mobile County census tracks 12 and 38 upon which EPA’s EJScreen relies reporting 63% of the

⁷⁸ See Attach. D, at 104 and 108, EJScreen Report for Mobile, Alabama, and EJScreen ACS Summary Report for Mobile City, Alabama.

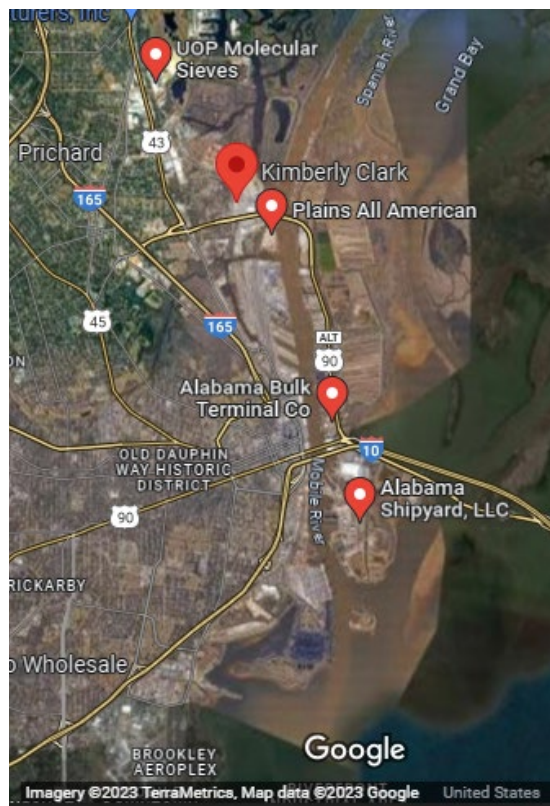
residents identifying as people of color and 58% identifying as Black due to data distortions with how census tracts have been drawn since 2000.⁷⁹

Either way you look at it, both the City of Mobile as a whole and the City of Mobile's Africatown Planning Area specifically are comprised of minority residents in a significantly higher than Mobile County as a whole, in which only 43% of residents identifying as people of color and 36% identify as Black. Moreover, the overall demographic index of the City of Mobile's Africatown Planning Area impacted by more than 40 stationary sources, is considered both low-income and minority. Africatown is among the most racially and economically disadvantaged in the state - all are in the top 15% of disadvantaged communities.

This concentrated racial demographic shift is even more when you look at the communities directly surrounding the five sources at issue, which are shown in the map below (note that Plains Marketing is identified as Plains All American, which is in the Africatown neighborhood). The Kimberly Clark and UOP facilities are also located in the Africatown neighborhood, while Plains Marketing and Alabama Shipyard are directly to the south.

⁷⁹ See Attach. D at, 111 and 115, EJScreen Report for Africatown, and EJScreen ACS Summary Report for Africatown.

Figure 3. Map of the Five Sources at Issue in this Amended Complaint



The EJSscreen information provided by ADEM during the permitting of these sources is summarized below and shows that the percent of community members within 3 miles of each facility identifying as people of color is greater than 69% at all sources, with the three sources closest to Africatown having a percentage of people of color of 83-87%:

Table 1. Summary of EJSscreen Demographic Information for the Five Sources

Facility	EJSscreen Radius	Demographic Index – % of Population and State Percentile		People of Color – % of Population and State Percentile	
AL Bulk Terminal ⁸⁰	3 Miles	63	85	69	84
Alabama Shipyard ⁸¹	3 Miles	63	86	74	85

⁸⁰ Attach. A at, 239-248 (ADEM's Final Statement of Basis).

⁸¹ Attach. A at, 381-383 (ADEM's Draft Statement of Basis).

Kimberly-Clark ⁸²	3 Miles	75	93	87	91
Plains Marketing ⁸³	3 Miles	75	93	88	91
UOP ⁸⁴	3 Miles	74	89	83	86

ADEM did not provide EJScreen ACS Summary Reports for any of these facilities, so we cannot examine the specific percentage of these community residents identifying as Black. However, based on the general demographics trends for Mobile and Africatown noted above, we would expect most people of color to identify as Black.

While not relevant to an inquiry under Title VI, which is only concerned with the discrimination on the basis of race, color or national origin, it is also important to note that the overall demographic index of the communities around these five sources, which considers both the low-income and minority make-up of a community.⁸⁵ As noted on the EJScreen summary above, these communities are among the most racially and economically disadvantaged in the state. All are in the top 15% of disadvantaged communities, with the communities around the three sources closest to Africatown being in the 89th to 93rd percentile.

5. The Health and Pollution Burdens Affecting the Impacted Communities and Adverse Impacts

ADEM's pattern and practice in its issuance of air permits has created health and pollution burdens that affect communities with which Complainants are directly partnered and on whose behalf Complainants advocate. These five facilities subject to this Complaint are located within what the Alabama Power Company calls the Alabama Gulf Coast Chemical Corridor – a sixty-mile stretch of land in Washington and Mobile Counties that is home to at least 28 industrial chemical facilities, as represented in the map to the left below.⁸⁶ And these chemical plants are just a fraction of the more than 300 permitted sources of air pollution in Mobile county, as identified through a Facility Registry Service (FRS) query, as shown in the map to the right below:⁸⁷

⁸² Attach. A, at 661-670 (ADEM's Revised Statement of Basis).

⁸³ Attach. A, at 904-913 (ADEM's Revised Statement of Basis).

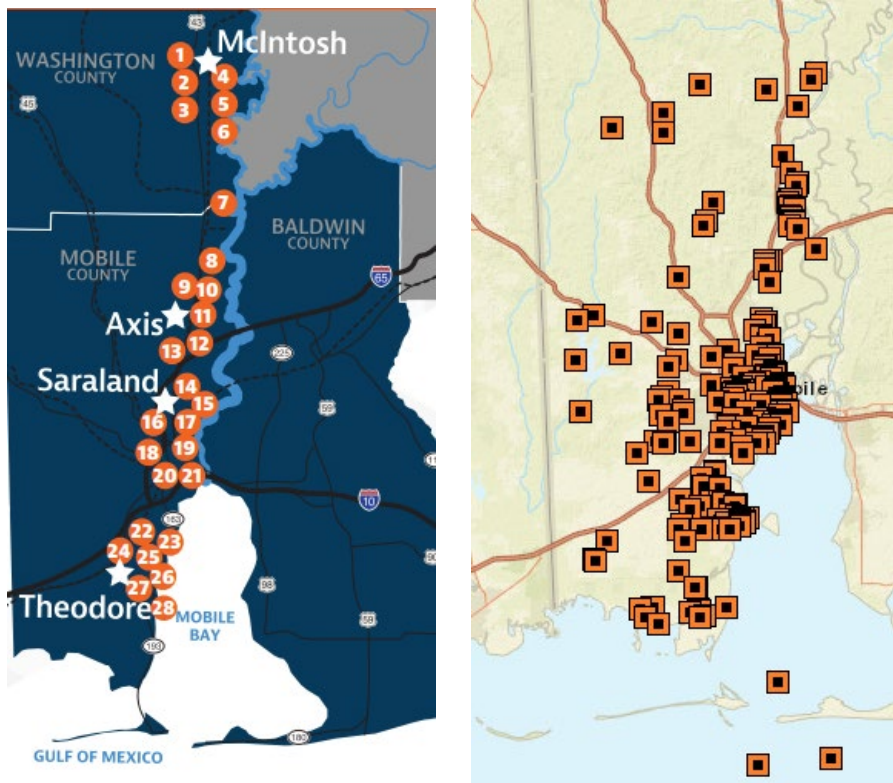
⁸⁴ Attach. D, at 126 (EJScreen Report at 3 Miles around UOP Facility). ADEM did not provide any EJ information with either the draft or final UOP Permit.

⁸⁵ See EJScreen Map Descriptions, *available at* <https://www.epa.gov/ejscreen/ejscreen-map-descriptions>.

⁸⁶ Chemicals: Catalyst for Growth, *available at* https://mobilechamber.com/wp-content/uploads/2019/06/2019_MAST_Brochure_MARCH28_in-order.pdf

⁸⁷ Attach. D, at 137, using a query of major source, minor sources, and synthetic minor sources in Mobile County in the FRS database, *available at* <https://www.epa.gov/frs/frs-query>.

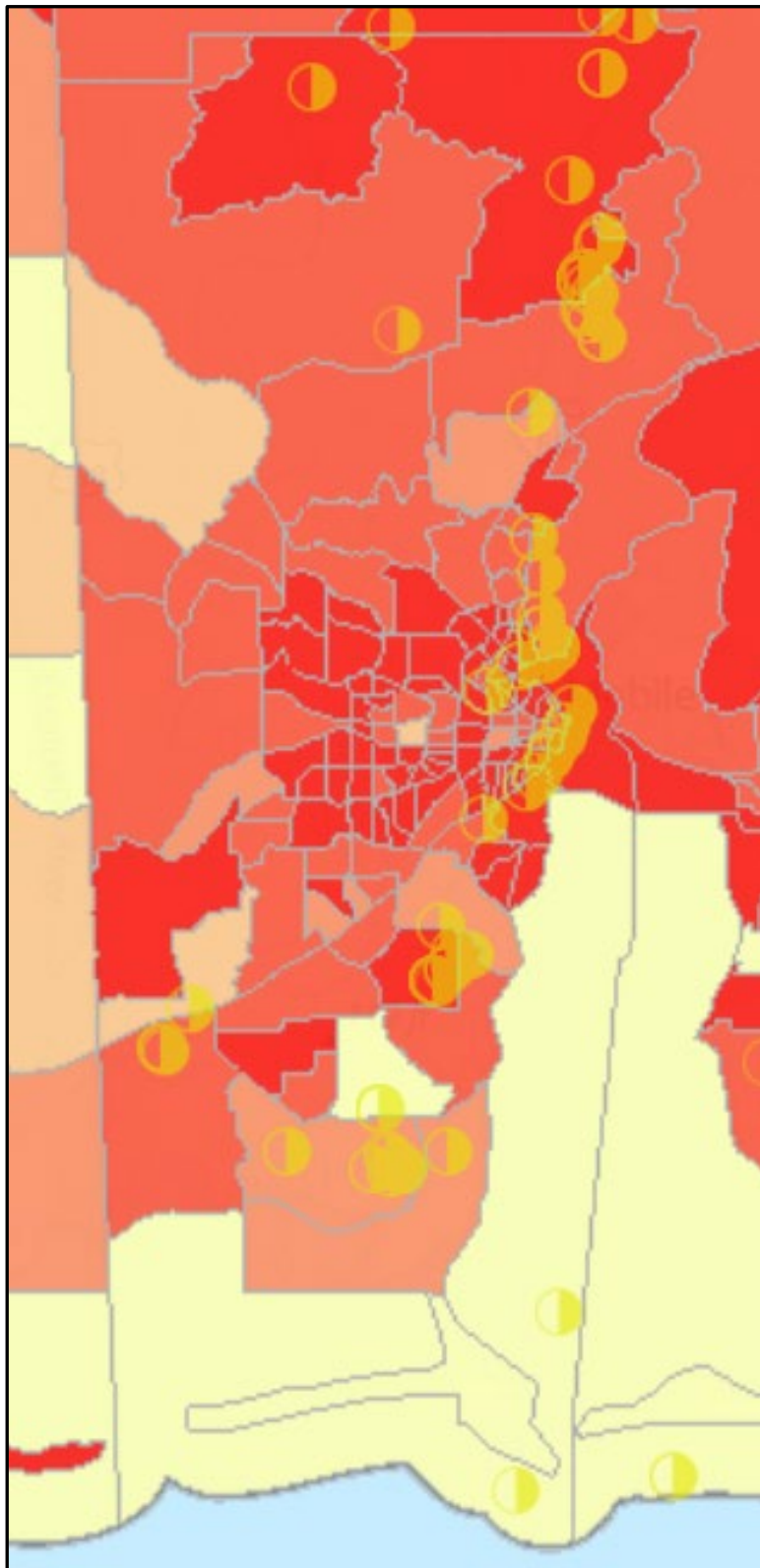
Figures 4 & 5. Industrial Chemical Facilities in Alabama's Gulf Coast Chemical Corridor and Air Emission Sources in the Mobile Area



Indeed, using EPA's EnviroAtlas and focusing on Mobile County and layering major air pollution sources under the CAA (shown in yellow) and the residents of color (gradations of red) shows that ADEM has primarily permitted the facilities in the areas of the County where the residents of color live.⁸⁸

⁸⁸ EPA EnviroAtlas, *available at* <https://www.epa.gov/enviroatlas/enviroatlas-interactive-map>.

Figure 6. The Major Sources and the Residents of Color in Mobile County



In a 2019 EPA study, Alabama ranked fifth out of all the states in most toxic substances released into the air, and Mobile County had the highest amount of reported toxic releases of all the counties in the state.⁸⁹ Furthermore, the Impacted Communities that surround these facilities are also impacted by the criteria pollutants emitted by them. Although the NAAQS set threshold ambient concentration limits for the criteria pollutants, permitting of sources that emit air pollutants play a key role in protecting public health, because air pollution from these sources can harm and potentially even kill members of the public.⁹⁰

It is well-established that poor communities and communities of color are disproportionately affected by air pollution; Black Americans in particular face a 54 percent higher health burden compared with the overall population of the United States.⁹¹ Not surprisingly, EPA's EJScreen Reports for these communities show that the cumulative health effects of the numerous sources emitting air pollution

⁸⁹ See *Alabama Ranks 5th for Industrial Toxic Releases in Air and Water*, (Mar. 24, 2019), <https://www.al.com/news/2019/03/alabama-ranks-5th-for-industrial-toxic-releases-in-air-and-water.html>.

⁹⁰ See, e.g., *Conservation Law Found. v. Pub. Serv. Co. of New Hampshire*, No. 11-CV-353-JL, at 3 (D.N.H. Sept. 27, 2012) (In Clean Air Act enforcement action against coal-fired power plant, in dismissing claims regarding NOx emissions increases, court finds that "NOx and SO2 emissions have significant adverse effects on public health. These emissions also contribute to the formation of secondary particulate matter that may cause decreased lung function, worsened respiratory infections, heart attacks, and the risk of early death."); *North Carolina v. EPA*, 531 F.3d 896, 903 (D.C.Cir.2008) ("NOx emissions contribute to the formation of fine particulate matter, also known as PM2.5, as well as ground-level ozone, a primary component of smog."); *Catawba Cnty. v. EPA*, 571 F.3d 20, 26 (D.C.Cir.2009) ("Elevated levels of fine particulate matter have been linked to 'adverse human health consequences such as premature death, lung and cardiovascular disease, and asthma.'"); *Ass'n of Irrigated Residents v. EPA*, 686 F.3d 668, 671 n. 1 (9th Cir.2012) ("And 'even at very low levels,' inhalation of ozone 'can cause serious health problems by damaging lung tissue and sensitizing lungs to other irritants.'"); *North Carolina v. TVA*, 593 F.Supp.2d 812, 822 (W.D.N.C. 2009) *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010) (In tort case against coal-fired power plants "Court finds that, at a minimum, there is an increased risk of incidences of premature mortality in the general public associated with PM2.5 exposure, even for levels at or below the NAAQS standard of 15 [u]g/m 3."); *Ohio Power Co. v. EPA*, 729 F.2d 1096, 1098 (6th Cir. 1984) (in challenge to Clean Air Act regulation of power plants 25 years ago, court holds "there is now no longer any doubt that high levels of pollution sustained for periods of days can kill. Those aged 45 and over with chronic diseases, particularly of the lungs or heart, seem to be predominantly affected. In addition to these acute episodes, pollutants can attain daily levels which have been shown to have serious consequences to city dwellers."); *Sierra Club v. TVA*, 592 F.Supp.2d 1357, 1371 (N.D. Al. 2009) (In Clean Air Act enforcement action against coal-fired power plant, court holds "there is no level of primary particulate matter concentration at which it can be determined that no adverse health effects occur."); *Catawba County v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009) ("A 'significant association' links elevated levels of PM2.5 with adverse human health consequences such as premature death, lung and cardiovascular disease, and asthma.").

⁹¹ *EPA Scientists Find Black Communities Disproportionately Hit by Pollution*, THE HILL (Feb. 23, 2018), available at <https://thehill.com/policy/energy-environment/375289-epa-scientists-find-emissions-greater-impact-low-income-communities#>.

within a close proximity of the Impacted Community lead them to exhibit health impact data amongst the highest in the state. Based on the EJScreen information provided below, residents of Africatown experience the highest air toxics cancer risk in the Alabama (99th percentile) and the United States (95-100th percentile), as well as extreme high levels of air respiratory hazards.⁹²

Moreover, in addition to the emissions from stationary sources, mobile source emissions also impact the community because the I-10/AL-90 Hazardous Cargo Bypass bisects the residential neighborhood at grade, vehicle pollution from semi-trucks hauling hazardous materials and petroleum products to the industrial plants and more than nine petroleum and chemical terminal facilities⁹³ located in and

⁹² See Attach. D at, 111, EJScreen Report for Africatown.

⁹³ The petroleum and chemical terminal facilities include:

- (1) **Hunt Refinery Company - Alabama Bulk Terminal**, Title V Permit No. 503-3035, 195 Cochrane Causeway, Mobile, AL 36602. See Letter from Ronald Gore, Chief, Air Division, ADEM to Scott Ehrlich, Director of Regulatory Affairs, Vertex Refining Alabama (Apr. 18, 2022), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104787105&dbid=0>. The terminal tank operations are connected to its refinery operations, Hunt Refinery, Title V Permit 417-0007, *see* Letter from Ronald Gore, Chief, Air Division, ADEM to Casey Frederick, Hunt Refining Company (Feb. 23, 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104481876&dbid=0&cr=1>.
- (2) **Vertex Refining Alabama LLC - Blakeley Island Terminal**, Title V Permit No. 503-0009, 1105 Cochrane Causeway, Mobile, AL 36602. The terminal is connected to its refinery in Saraland, AL via pipelines. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104787105&dbid=0>.
- (3) **BWC Alabama, Inc. – Blakeley**, Facility No. 503-0077, 1437 Cochrane Causeway, Mobile, AL 36603. See Air Permit Nos. X024-X026, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105074147&dbid=0>; *see also* Letter from Terry Duplantis, VP of HSEQ, BWC Terminals to Brian Sullins, ADEM (Mar. 3, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105074139&dbid=0> (regarding company transfer).
- (4) **BWC Alabama, LLC - Mobile**, Facility No. 504-4002, Cochrane Causeway, Mobile, AL 36602. See Facility No. 503-4002, Permit Nos. X002-X117, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=30017580&dbid=0>.
- (5) **BWC Alabama, LLC – Chickasaw**, Facility No. 503-0123 (unpermitted), 500 Viaduct Road, Chickasaw, AL 36611. See Facility No. 503-0123, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105074139&dbid=0> (Chickasaw Terminal - does not have an air permit), historical operational information in Letter from Andrew Danhof, Manager, Environmental and Regulatory, Zenith Energy to Rachel Kilpatrick, ADEM (Oct. 22, 2020), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104424343&dbid=0>.
- (6) **Apex Oil Company - World Point Terminal** (Center Point Terminal Blakeley Island), Facility No. 503-3021, 1257 Cochrane Causeway, Mobile, AL 36610. See Permit No. 503-3021, including SMOP (95 TPY) for tank truck loading rack, tanks, natural gas boiler with diesel reserve, and five unpermitted storage tanks; *see also*, inspection report for summary, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105049113&dbid=0>.
- (7) **Center Point Terminal Company, LLC - Chickasaw Terminal**, Facility No. 503-4007, 200 Viaduct Rd., Chickasaw, AL 36611. See Facility No. 503-4007, Permit Nos. X007-X013, SMOP (95 TYP); *see also* Permit X007 (at PDF 2) marine vessel loading operation with vapor destruction unit, Permit X008 for 3 tanks (at PDF 8), Permit X009 (at PDF 13) for marine vessel, truck and rail loading operations (south), Permit X010 (at PDF 17) for bulk storage operations including two tanks

adjacent to the Impacted Communities remain an additional exposure risk.⁹⁴ Furthermore, the plethora and increasing number of new heavy duty truck storage, parking, drayage, and port logistics warehouses and facilities in and near the Impacted Communities means air pollution in the Impacted Communities continues to worsen from the increased pollution from trucks and fugitive road emissions as goods are transported to-and-from the warehouses associated with the Port of Mobile. Five Class 1 railroads run through the City of Mobile, with four railways and operations in the City of Mobile's Africatown Planning Area. Moreover, at least one source in the Impacted Communities has failed to obtain any air quality permits, despite the likelihood of its frequent releasing of hazardous air pollutants, which have plagued adjacent neighbors for years. Finally, the Impacted Communities experience ongoing and unaddressed violations of various environmental federal statutes, including sources that routinely fail to control harmful dust and hazardous air pollutants that escape the facility property boundaries, adversely impacting the health of the Impacted Community. Together these air contaminants create a cumulative burden on the community that magnifies the adverse impacts of the air contaminants identified above.

(south), Permit X011 (at PDF 22) bulk liquid operations south including six tanks, Permit X012 (at PDF X012) bulk liquid operations south including 10 tanks, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29950549&dbid=0>.

(8) **Radcliff Economy Marine Services**, Facility No. 503-3007, 115 Cochran Causeway, Mobile, AL, 36602. ADEM characterizes this source as "minor". *See* Facility No. 503-3007 (115 Cochran Causeway, Mobile, AL 36602), permits for main and truck loading, Letter from Ronald Gore, Chief, Air Division, ADEM to Steve Gordon, President, Radcliff/Economy Marine Services (Feb. 2, 2011), *available at*

<http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29874102&dbid=0>; *see also* most recent inspection on March 31, 2023, which includes list of the tanks and storage operations, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105077793&dbid=0>.

⁹⁴ Union of Concerned Scientists, "Cars, Trucks, Buses and Air Pollution," (Updated July 19, 2018), *available at* <https://www.ucsusa.org/resources/cars-trucks-buses-and-air-pollution#:~:text=Cars%2C%20trucks%20and%20buses%20produce,vehicle%20operation%20and%20fuel%20production.&text=Primary%20pollution%20is%20emitted%20directly,between%20pollutants%20in%20the%20atmosphere>.

Table 2. EJScreen Report Excerpt for Africatown

Africatown					
Selected Variables	Value	State Avg.	%ile in State	USA Avg.	%ile in USA
Pollution and Sources					
Particulate Matter 2.5 ($\mu\text{g}/\text{m}^3$)	9.01	8.92	57	8.67	62
Ozone (ppb)	37.6	39	36	42.5	19
Diesel Particulate Matter* ($\mu\text{g}/\text{m}^3$)	0.436	0.223	90	0.294	80-90th
Air Toxics Cancer Risk* (lifetime risk per million)	40	35	99	28	95-100th
Air Toxics Respiratory HI*	0.55	0.47	95	0.36	95-100th
Traffic Proximity (daily traffic count/distance to road)	2100	290	97	760	91
Lead Paint (% Pre-1960 Housing)	0.65	0.17	94	0.27	82
Superfund Proximity (site count/km distance)	0.048	0.051	68	0.13	42
RMP Facility Proximity (facility count/km distance)	2.7	0.46	97	0.77	94
Hazardous Waste Proximity (facility count/km distance)	3.5	0.9	96	2.2	81
Underground Storage Tanks (count/km ²)	0.64	1.9	49	3.9	42
Wastewater Discharge (toxicity-weighted concentration/m distance)	1.5	0.36	97	12	94

And similar detrimental health impacts are seen in the communities directly surrounding these five sources.

Table 3. EJScreen Environmental Indicators for the Five Sources

Facility	Diesel Particulate Matter Alabama and U.S. Percentiles		Air toxics cancer risk Alabama and U.S. Percentiles		Air toxics respiratory hazards Alabama and U.S. Percentiles	
AL Bulk Terminal ⁹⁵	99 th	95-100 th	45 th	90-95 th	69 th	95-100 th
Alabama Shipyard ⁹⁶	99 th	90-95 th	74 th	80-90 th	92 nd	95-100 th
Kimberly-Clark ⁹⁷	81 st	60-70 th	99 th	95-100 th	93 rd	95-100 th
Plains Marketing ⁹⁸	97 th	90-95 th	88 th	90-95 th	93 rd	95-100 th
UOP ⁹⁹	93 rd	80-90 th	68 th	80-90 th	90 th	95-100 th

⁹⁵ Attach. A, at 239-248 (ADEM's Final Statement of Basis).

⁹⁶ Attach. A, at 381-383 (ADEM's Draft Statement of Basis).

⁹⁷ Attach. A, at 661-670 (ADEM's Revised Statement of Basis).

⁹⁸ Attach. A, at 904-913 (ADEM's Revised Statement of Basis).

⁹⁹ Attach. D, at 126 (EJScreen Report at 3 Miles around UOP Facility). ADEM did not provide any EJ information with either the draft or final UOP Permit.

The health impacts are exacerbated by the fact that the economically and racially disadvantaged status of the Impacted Communities surrounding these sources, as well as in Mobile and Africatown generally, predispose them to being excluded from environmental permitting decisions. Low incomes and residents of color, such as those in the Impacted Communities, are less likely to have access to computers and the internet.¹⁰⁰ These limitations make it challenging, if not impossible, for community members to stay on top of air permitting of sources near them that are only publicized through email and internet. Thus, every action that ADEM takes that is detrimental to the Impacted Communities' meaningful access to these permitting processes makes it difficult for them to hold the sources of pollution in their community accountable for the impacts of that pollution. Indeed, despite accepting federal funds and being advised by Complainants of their Title VI obligations, recipient ADEM has failed to ensure that the five Permits were issued in a way that limits these adverse impacts to the Impacted Communities.

It is clear that the Impacted Communities are disproportionately impacted by air pollutants as compared to higher income, non-minority residents living elsewhere in Alabama and the United States. To protect these communities, ADEM should be doing **more**, not **less** in terms of public participation and disparate and cumulative impact analysis. Unfortunately, less is exactly what ADEM has been doing in communities such as Africatown, as demonstrated in its pattern and practice of transmitting to EPA and then finalizing multiple permits at one time, limiting the ability of the Impacted Community to meaningfully engage in the permitting review and appeal process – in clear contravention of the letter and spirit of Title VI. EPA must step in and take swift action to address the discriminatory and disparate impacts of ADEM's permitting of these sources on the basis of race.

B. The Sources and Operating Permit Histories

The following are short descriptions of each of the five sources that received a Permit at issue in this Amended Complaint, as described in the revised Statement of Basis ("SOB") for each Permit provided in the Public Files on the EPA Region 4's Alabama Proposed Title V Permit Database ("Region 4 AL Permit Database").¹⁰¹

¹⁰⁰ See <https://aspe.hhs.gov/reports/low-income-internet-access>; see also <https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

¹⁰¹ Available at <https://www.epa.gov/caa-permitting/alabama-proposed-title-v-permits>. While the draft SOBs available during public comment on these Permits contained similar general descriptions of what these facilities do, the operational and permitting history summarized above for each facility was added to the Revised SOBs in response to Petitioners' public comments. See, e.g., bolded text in the Plains Marketing, AL Bulk Terminal, and Kimberly-Clark Revised SOBs, Attach. A at 889, 225, and 653, respectively, and UOP Updated SOB, Attach. A at 1001.

1. AL Bulk Terminal

AL Bulk Terminal is a “bulk liquid storage and transfer terminal for petroleum, organic, and inorganic products...[that] receives, stores, and distributes these products via barge, ship, and tank truck.” It was “originally constructed/began operations in 1958.” The initial Title V permit was issued on October 18, 2000, and this is the fourth renewal.¹⁰²

2. Alabama Shipyard

Alabama Shipyard is a shipyard in Mobile with emissions from various surface coating, priming, and blasting lines (as well as emergency generators). The original Title V permit was issued on April 23, 2002, and this is the fourth renewal.¹⁰³

3. Kimberly-Clark

Kimberly-Clark is a “tissue, towel, and napkin mill” what produces products “made from market pulp, recycled paper, and from other Kimberly-Clark mill's parent rolls.” It was “originally constructed/began operations in 1983.” The initial Title V permit was issued on January 1, 2004, and this is the third renewal.¹⁰⁴

4. Plains Marketing

Plains Marketing “operates a petroleum bulk storage and transfer terminal” that can receive crude oil, petroleum liquids, and ethanol via ships, barges, tank trucks, or pipeline. “The material is stored in one of the existing storage tanks and is loaded out by ships, barges, tank trucks, or pipeline.” The facility “was originally constructed/began operations in 1951.” The initial Title V permit was issued on November 17, 2000, and this is the fourth renewal.¹⁰⁵

5. UOP

UOP is “a chemical production plant that produces synthetic materials to be used as adsorbents and/or catalyst in various manufacturing applications.” It

¹⁰² Attach. A, at 225, AL Bulk Terminal Revised SOB.

¹⁰³ Attach. A, at 484, Alabama Shipyard Revised SOB. (The SOB does not provide any information on when the various emission producing activities at the Shipyard began.)

¹⁰⁴ Attach. A, at 653, Kimberly-Clark Revised SOB.

¹⁰⁵ Attach. A, at 889, Plains Marketing Revised SOB.

“was originally constructed/began operations in 1965.” The initial Title V permit was issued on August 15, 2003, and “this is the second renewal.”¹⁰⁶

ADEM issued draft permits with accompanying public comment periods for these five Permits at various points during an 18-month period from October 2020 and May 2022.¹⁰⁷ Complainants submitted comments, either alone or with other community groups within Alabama and other organizations supporting those groups, during the public comment period on drafts of each of these Permits as follows:

- Plains Marketing: 10/30/20 Comments from GASP, Deep South Center for Environmental Justice (“DSCEJ”), C.H.E.S.S., and MEJAC; 3/4/21 Comments from GASP, MEJAC, Mobile AL NAACP, and Sierra Club Mobile Bay Group¹⁰⁸
- AL Bulk Terminal: 10/28/21 Comment from C.H.E.S.S., DSCEJ, and GASP¹⁰⁹
- Kimberly-Clark: 4/23/21 Comments from GASP, MEJAC, C.H.E.S.S., and Mobile AL NAACP¹¹⁰
- Alabama Shipyard: 5/9/22 Comments from C.H.E.S.S., MEJAC, DSCEJ, GASP, Sierra Club AL Chapter Mobile Bay Group, and League of Women Voters of Alabama¹¹¹
- UOP: 10/24/20 Comments from GASP, MEJAC, C.H.E.S.S., and DSCEJ¹¹²

Even though ADEM had issued draft versions of these five Permits for public notice and comment over an 18-month period, the Department delivered the proposed versions of all five Permits, along with their responses to the public comments for each, to EPA for its required CAA Title V review during a one-week

¹⁰⁶ Attach. A, at 1001, UOP Revised SOB.

¹⁰⁷ The term “draft” refers to permits ADEM made available for public comment, “proposed” for permits submitted to EPA for review under CAA § 505 following public comment, and “final” for signed and effective permits ADEM issued at the conclusion of the EPA’s 45-day review period.

¹⁰⁸ Attach. A, at 774 and 790.

¹⁰⁹ Attach. A, at 99.

¹¹⁰ Attach. A, at 592.

¹¹¹ Attach. A, at 384.

¹¹² Attach. A, at 1075. Because ADEM issued the UOP Permit at issue in this Complaint as a “Minor Modification” to the Title V renewal permit ADEM previously issued on February 2, 2021, *see* n.2, *supra*, ADEM did not conduct any public comment period for the “Minor Modification” of that Permit it finalized in November 2023. *See* Attach. B, at 2 (blank box denoting the public comment period dates for the UOP Permit).

period in September 2022.^{113, 114} Since EPA did not issue an objection to any of these five Permits pursuant to CAA § 505(b)(1) during its 45-day review period, ADEM was authorized to issue the final Permits, which it did on November 4, 2022 (AL Bulk Terminal, Plains Marketing), November 8, 2022 (UOP), and November 9, 2022 (Alabama Shipyard, Kimberly-Clark).¹¹⁵

In addition, because EPA had not objected to these Permits, any parties wishing to petition the EPA Administrator to object to these Permits to address any noncompliance with the CAA was required to do by early January 2023, under the deadlines set forth in CAA § 505(b)(2).¹¹⁶ Complainants were the Petitioners that filed a Title V Petition with EPA on January 9, 2023, alleging various ways in which ADEM's Permits did not comply with numerous applicable requirements of the CAA, as discussed below.¹¹⁷

It should also be noted that prior to filing the original May 2023 Complaint, in order to resolve these issues outside the Title VI process (and the CAA's Title V petition process), Complainant GASP¹¹⁸ requested that ADEM withdraw the Permits submitted to EPA in mid-September 2022, which included the five Permits at issue here, and re-submit them to EPA in a phased manner in order to facilitate meaningful public participation in the permitting process by Petitioners, other organizations in Alabama, and their members.¹¹⁹ GASP requested that ADEM respond to this request within 5 business days, given the pending petition deadlines, but ADEM neither acknowledged receipt of nor responded to GASP's letter.¹²⁰

¹¹³ See Clean Air Act § 505(b), 42 U.S.C. § 7661d(b).

¹¹⁴ Based on information provided on the Region 4 AL Permit Database, it appears that ADEM transmitted the Plains Marketing and AL Bulk Terminal permits to EPA on September 15, 2022, and the Kimberly-Clark, Alabama Shipyard, and UOP permits to EPA one-week later on September 22, 2022. See Attach. B, at 2, Screenshot from Region 4 Proposed Title V Permit Database (noting that EPA's 45-Day Review period ended for the first four permits on October 30, 2022, and for the second four permits on November 6, 2022).

¹¹⁵ See Attach. A, at 255 (AL Bulk Terminal), 498 (Alabama Shipyard), 676 (Kimberly-Clark), 924 (Plains Marketing), and 1052 (UOP).

¹¹⁶ The 60-day petition deadline for the first four permits ended on January 2, 2023, a Federal Holiday, so the deadline moves to January 3, 2023. (Confirmed via a December 22, 2022, email exchange with Cheryl Vetter, Group Leader, Operating Permits Group, EPA Headquarters.) Likewise, January 8, 2022, is a Sunday, moving the appropriate deadline to Monday, January 9, 2023.

¹¹⁷ See generally Attach. D, at 2.

¹¹⁸ Complainant MEJAC is an organization member of GASP.

¹¹⁹ See Attach. B, at 7, GASP Withdrawal Request Letter.

¹²⁰ ADEM's silence was in spite of at least 11 ADEM employees knowing about GASP's letter. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105134577&dbid=0> (which shows the letter was sent to the following ADEM employees: Thornhill, James W; Brown, Larry; Carr, Doug; Elliott, Marilyn; LeFleur, Lance R; Sibley, Shawn S; Sims, Samantha; Cole, Lisa B; Ailor, Chris E; Brock, Hal; Dubay, Stephanie; and Bissey, Steven.)

C. Clean Air Act Title V Petition and Related Administrator's Order

The CAA Title V Petition filed on January 9, 2023, alleged numerous ways in which ADEM's Permits did not comply with applicable requirements of the CAA and Title V regulations, including failure to comply with various procedural requirements for issuing title V permits and the inadequacy of specific emission limits and monitoring, recordkeeping, and reporting requirements contained in these Permits. As relevant to OECR's rejection without prejudice of the original May 2023 Complaint, the Title V Petition also argued that ADEM's issuance of these five Permits failed to comply with Title V's public participation requirements and the prohibition against disparate impacts under Title VI of the Civil Rights Act of 1964.¹²¹ The Title V Petition argued that in issuing these Permits violated CAA requirements because:

- (1) ADEM failed to provide adequate responses to specific comments regarding the impact of the emissions authorized by these Permits on the environmental justice ("EJ") communities that surrounded the permitted facilities.¹²² The Petition noted that ADEM provided essentially the same, short, non-specific response to the extensive EJ comments submitted for each Permit, without engaging in any additional community outreach or responding to any of the comments raising concerns about the specific emission impacts borne by citizens in Mobile County or the specific EJ communities surrounding these facilities; and
- (2) ADEM hindered meaningful public participation by protected groups in violation of Title VI by issuing these Permits – all of which involved significant comments from Complainants and the racial minority communities they represent – during a one-week period.¹²³ The Petition noted that those comments raised concerns with these sources' disproportionate burden on nearby residents of color and provided direct evidence of those communities' interests in ADEM actions on these Permits. The Title V Petition argued that ADEM's decision to issue the Permits within a one-week period caused a disparate impact on those communities by hindering their ability to meaningfully participate in the next stages of the permitting process, especially in light of the intervening holiday periods.

¹²¹ Attach. D, at 29-41.

¹²² *Id.* at 31-35.

¹²³ *Id.* at 36-40.

The EPA Administrator responded to the Title V Petition with a September 18, 2023 Order granting in part and denying in part the issues raised in the Petition.¹²⁴ Specifically, the Administrator's Order directed ADEM to address deficiencies in certain emission limits and/or monitoring, recordkeeping, and reporting requirements for the Kimberly-Clark, Alabama Shipyard, and AL Bulk Terminal Permits, but denied all other claims raised in the Title V Petition, including the public-participation related environmental justice and Title VI claims summarized above.¹²⁵ With regard to the Petition's claims that ADEM failed to provide adequate responses to comments regarding the impact of the emissions authorized by these Permits on the surrounding EJ communities, EPA noted that requirement to respond to "significant comments" under the relevant Title V regulations applied to comments that related to federal applicable requirements under the CAA and EPA's Title V regulations in Part 70, and noted that the Petition did not demonstrate that "ADEM failed to respond to any specific EJ-related comments that concerned whether the permit complies with all federal applicable requirements and requirements under part 70."¹²⁶ While the Order "encourages ADEM to thoughtfully consider and respond to such comments in the future," it did not require ADEM to address comments regarding the impact of permitted emissions on EJ communities, historically disadvantaged racial groups, communities of color, and/or other marginalized populations.¹²⁷ Likewise, with regard to the Petition's claims the EPA should object to these Permits because ADEM violated Title VI in issuing them, EPA noted that "allegations regarding title VI of the Civil Rights Act of 1964 do not allege, much less demonstrate, that ADEM's actions violated any of the procedural or public participation requirements of the CAA or its implementing regulations."¹²⁸ However, EPA noted "a permitting authority's compliance with the requirements of the CAA does not necessarily mean that it is complying with federal civil rights laws" and encouraged ADEM "to assess its obligations under civil rights laws and policies."¹²⁹ In fact, the EPA Administrator specifically stated that Complainants could file a complaint under Title VI of the Civil Rights Act of 1964 to address "relevant issues related to issuance of these permits" while noting that ADEM is a recipient of EPA financial assistance and its issuance of title V permits "are subject to the requirements of title VI and EPA's title VI regulations."¹³⁰

¹²⁴ See Attach. D, at 159.

¹²⁵ See generally *id.* at 194-5 (AL Bulk Terminal claim), 201-2 (Kimberly-Clark claim), 209-213 (Alabama Shipyard claims).

¹²⁶ See Attach. D, at 179.

¹²⁷ *Id.*

¹²⁸ *Id.* at 180.

¹²⁹ *Id.*

¹³⁰ *Id.*

D. ADEM's Practice of Issuing These Five Permits Over the One-Week Period Significantly Impacted the Number of Issues Complainants Could Raise in Their CAA Title V Petition

ADEM's practice of issuing the five renewal Permits over a one-week period significantly restricts the ability of Complainants and other members of the Impacted Communities to meaningfully participate in the CAA permitting process, limiting the ability to address potentially harmful and unlawful emissions from these sources that occur in the Impacted Communities.¹³¹ As previously explained, after considering public comments, ADEM sends its proposed final permit to EPA for review. If EPA does not object to a title V permit during its 45-day review period, the permitting authority (such as ADEM) may issue the final permit, and any party who commented on the permit during the state permitting process (such as Complainants here) can – within 60 days of the expiration of the EPA's 45-day review period – file a petition to the EPA Administrator to object to a permit that does not comply with the CAA.¹³² EPA's review period and the deadline for a party to petition the Administrator to object to a permit are in the CAA and thus cannot be extended.

For each of the five renewal Permits, members of the Impacted Communities or their representatives submitted numerous comments raising concerns regarding the Permits' compliance with the requirements of the CAA and related state and federal law and the potentially harmful and unlawful emissions from these sources that they authorized in the Impacted Communities. ADEM's practice of delivering all five Permits to EPA during a one-week period in September and then finalizing them during a one-week period in November 2023 meant that the Impacted Communities could not fully exercise their right to raise all of the allegedly inadequate aspects of the Permits in that Title V petition within that 60-day period due to the time and resource constraints. Small non-profit organizations such as Complainants – as well as the general public in the Impacted Communities – have limited resources to address the myriad air and other environmental issues that occur within the Impacted Communities (and for GASP, throughout the state). Those resources were even more limited in this instance, where the 60-day petition window extended from early November to early January and thus encompassed multiple holiday periods. In light of these constraints, Complainants filed one Title V Petition that focused on three main issues that were raised in comments on all five Permits:

- ADEM's failure to comply with Title V procedural requirements to issue these Permits;

¹³¹ 65 Fed. Reg. 39650, 39677 (June 27, 2000) (renewal permits are included in the types of permit actions that can form the basis of EPA initiating a Title VI investigation of a recipient's permitting program).

¹³² CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

- ADEM's failure to comply with Title V public participation requirements and Title VI of the Civil Rights Act of 1964; and
- ADEM's failure to comply with substantive requirements of the CAA regarding the adequacy of certain permit limits and related monitoring, recordkeeping, and reporting requirements.

Focusing on these key consistent issues meant that Complainants could not address other issues raised in the dozens of pages of comments submitted to ADEM on the five Permits, including concerns regarding potentially unauthorized and illegally permitted pollution from these facilities that occur in or near the Impacted Communities. For example, below are a few (but not all) of the potential CAA permitting issues in the Permits that Complainants raised in public comments but could not raise in their Title V petition due to ADEM's practice of issuing these five Permits as a group:

(1) Plains Marketing: Failure to include necessary background permitting information in ADEM's e-file, a faulty NSPS applicability determination, and inadequate fugitive dust provisions.

(2) AL Bulk Terminal: Additional permitting requirements that became applicable when Hunt Refining Company purchased the Terminal and failure to include GHG permit provisions.

(3) Kimberley-Clark: Inadequate compliance certification requirements, inadequate fugitive dust provisions, and the unlawful issuance to the source of a permit shield against certain enforcement actions.

(4) Alabama Shipyard: The lack of enforceable work practices to limit emissions, the failure to address applicable requirements for odor and fugitive emissions, and an inadequate NESHAP compliance plan.

(5) UOP: Because the UOP Permit was a permit revision in response EPA granting a previous Title V petition to object, ADEM issued it without another notice and comment period, and thus Complainants could not file comments raising any other issues with regard to this source.

Accordingly, ADEM's practice of issuing these five Permits during a one-week period significantly limited the number the issues Complainants could raise in the Title V petition opportunity provided under the CAA, negatively impacting their full participation in the CAA permitting process and leaving unaddressed potentially unlawful pollution in the Impacted Communities.

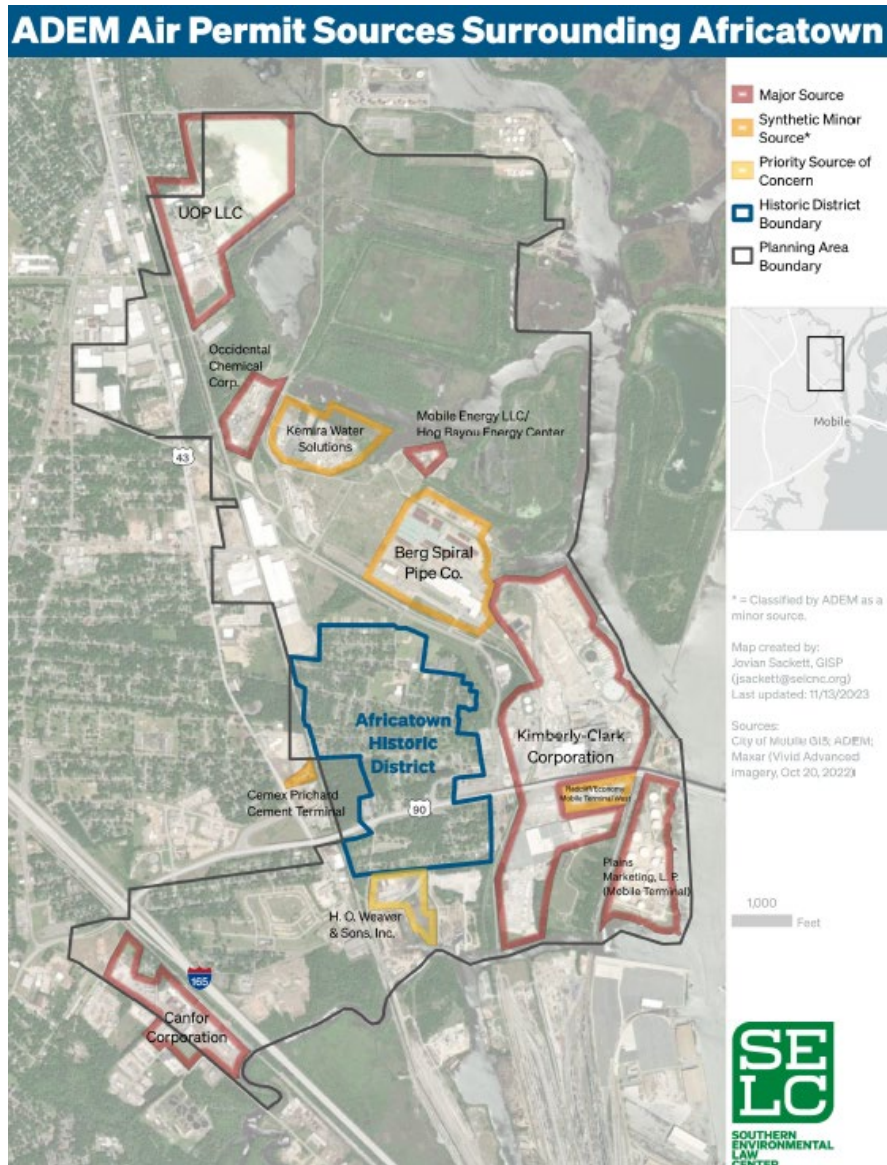
E. The Five Facilities are Located in and close to the City of Mobile's Africatown Planning Area and Emit Significant Levels of Air Pollution, Which Impact the Health, Environment, and Quality of Life of the Impacted Communities

1. Locations of and Emissions from the Five Facilities

As seen in the below figure, three facilities are in the Africatown Planning District and surround the Africatown Historic District: Plains Marketing; Kimberly Clark; and UOP. As shown in Figure 3 above, the other two facilities – Alabama Shipyard and AL Bulk Terminal – are immediately south of Africatown.¹³³ The figure below illustrates just how concentrated stationary sources of air pollution, including concerning hazardous air pollutants, are in and immediately around the City of Mobile's Africatown Planning Area. This includes six major sources that require Title V permits under the CAA, four synthetic minor sources, and the H.O. Weaver & Sons, Inc. asphalt plant, a priority source of concern for the Africatown community.

¹³³ Because these two facilities are close to the Impacted Community geographically, and the prevailing winds are in the direction of the Africatown neighborhood, air pollution from these facilities is of significant concern to the Impacted Community, which is why they submitted comments to ADEM on the renewal permits.

Figure 7. ADEM Air Permit Sources Surrounding Africatown



Each of the five facilities addressed by the Title V Permits at issue here is a “major source” of air pollution, which means that they have the potential to emit criteria and hazardous air pollutants at significant levels. The Title V Permits must contain methods for monitoring, keeping records and reporting the air pollutant emissions. For the most part, ADEM fails to require that the facilities accurately monitor emissions, which is a comment Complainants make in many of the comments submitted on ADEM’s proposed permits.¹³⁴ For example, ADEM generally allows facilities to use generic equations to estimate emissions, both for purposes of estimating emissions for a construction permit as well as reporting

¹³⁴ See e.g., Attach. A, at 398-401; see also Attach. A, at 105-109.

emissions under the Title V operating permit. These generic equations are called AP-42 emission factors.¹³⁵ The emission factors are generic equations and the ADEM-issued permits do not require that the facility conduct emission testing or provide other information to demonstrate that the generic, country-wide emission factors apply to the Alabama-based facility. ADEM's practices of using emission factors in these ways means the assumptions that go into establishing the permit and the methods used for reporting emissions are inaccurate. Furthermore, ADEM's permits do not generally require the facilities to report information about the air pollution emissions from the facility to ADEM. Thus, the Impacted Communities do not know the amount of actual air pollution emitted from the facilities. Because EPA has not yet required ADEM to collect accurate emission information for its facilities, the emission information in EPA's emission inventory databases are also grossly inaccurate. Moreover, ADEM's permits do not include all sources of emissions. This inaccurate and incomplete emission data is all the information that the public and Complainants have available to them at this time. Therefore, that is what is presented below.

The below information is a summary of the emissions from each of the facilities, demonstrating individually and cumulatively these facilities' emissions are significant.

¹³⁵ EPA, AP-42: Compilation of Emissions Factors, *available at* <https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors>.

2. Plains Marketing: Emissions

Plains Marketing reported the following emissions in its Title V Renewal permit application.¹³⁶

Table 4. Summary of Facility-Wide Potential Emissions at Plains Marketing¹³⁷

Source	VOC	NO _x	CO	PM ₁₀	SO ₂	CO ₂ e ¹	Single HAP Emissions ²	Total HAP Emissions
	(tpy)							
Tanks	61.02	--	--	--	--	--	0.39	1.90
Marine Loading	239.27	--	--	--	--	--	3.94	11.26
Truck Loading	131.61	--	--	--	--	--	1.84	5.26
Fugitives	1.01	--	--	--	--	--	0.01	0.04
Engines	4.61	55.90	12.11	3.93	3.67	2,086.45	3.63E-03	0.08
Totals	437.52	55.90	12.11	3.93	3.67	2086.45	6.19	18.55

1. Carbon dioxide equivalent (CO₂e) emissions. Represents the sum of carbon dioxide (CO₂), nitrous oxide (N₂O), and methane (CH₄) emissions adjusted by each pollutant's global warming potential. None of the other six regulated GHG pollutants [i.e., hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)] are emitted from the affected emission units.

2. Xylenes are the single greatest facility HAP.

¹³⁶ Plains Marketing Title V Renewal Permit Application (April 2020), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104384597&dbid=0>. (although characterized by the Company as “potential” emissions, these emissions may take into consideration the permit requirements, and are thus not “potential” emissions as one generally considers that term under the CAA. Under the CAA potential emissions are generally understood to mean emissions from the facility without controls.)

¹³⁷ Plains Marketing Title V Renewal Permit Application, at PDF 14 (April 2020), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104384597&dbid=0>.

3. AL Bulk Terminal: Emissions

Potential facility-wide annual emissions reported by AL Bulk Terminal in its Title V permit application are seen below.¹³⁸

Table 5. Potential Facility-Wide Annual Emissions at AL Bulk Terminal¹³⁹

Regulated pollutant	Potential Emissions* (tons/year)
PM/PM ₁₀	5.19 / 3.44
SO ₂	150.56
NO _x	37.97
CO	18.51
VOC	1,896
Total HAPs	19.76
2,2,4 - Trimethylpentane	0.18
Benzene	1.49
Cumene	0.27
Ethylbenzene	0.86
Formaldehyde	0.09
Hexane	9.18
Naphthalene	0.17
Toluene	3.41
Xylene	4.11

¹³⁸ AL Bulk Terminal Title V Application, (March 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104507562&dbid=0>.

¹³⁹ AL Bulk Terminal Title V Application, at PDF 25 (March 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104507562&dbid=0>.

4. Kimberly-Clark: Emissions

Table 6. Summary of Facility-Wide Potential Emissions at Kimberly-Clark¹⁴⁰

Pollutant	Potential Emissions	Title V Major Source Threshold	Above Title V Major Source Threshold?
SO ₂	8.07	100	No
NO _x	107.42	100	Yes
CO	140.47	100	Yes
Filterable PM	207.58	100	Yes
Total PM ₁₀	168.56	100	Yes
Total PM _{2.5}	145.83	100	Yes
VOC	169.76	100	Yes
Ammonia	89.66	N/A	N/A
Combined HAP	9.69	25	No
Largest HAP (Hexane)	2.01	10	No
CO ₂ e	473,666	N/A	N/A

5. Alabama Shipyard: Emissions

The Alabama Shipyard's permit application does not contain an overall summary of emission facility-wide, and instead contains the below tables that contain the emission limits for the 12 emitting units.¹⁴¹

Figure 8. Facility-Wide Emission Limits by Unit at Alabama Shipyard

Table 4-1: Indoor Surface Coating Unit Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU001	Indoor Surface Coating unit	VOHAP	340 to 780 grams per liter
		VOC	95 tons in any 12 month period for this line
		VOC	245 tons in any 12 month period for facility

Table 5-1: Indoor Blasting Unit Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU002	Indoor Blasting Unit	PM	E=3.59 (P ^{0.85})
		Opacity	20% by 6 min. average

Table 6-1: Indoor Surface Coating Line Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU003	Indoor Surface Coating Line	VOHAP	340 to 780 grams per liter
		VOC	95 tons in any 12 month period for this line
		VOC	245 tons in any 12 month period for facility

¹⁴⁰ Kimberly-Clark Permit Application, at PDF 14 (Nov. 2020), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104468086&dbid=0>.

¹⁴¹ Alabama Shipyard Permit Application, at PDF 13-32 (Sept. 2016), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=30004232&dbid=0>.

Table 7-1: Indoor Blasting Machine Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU004	Indoor Blasting Machine	PM	$E=3.59 (P^{0.62})$
		Opacity	20% by 6 min. average

Table 8-1: Shape Priming Line Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU005	Shape Priming Line	VOHAP	340 to 780 grams per liter
		VOC	95 tons in any 12 month period for this line
		VOC	245 tons in any 12 month period for facility

Table 9-1: Shape Blast Line Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU006	Shape Blast Line	PM	$E=3.59 (P^{0.62})$
		Opacity	20% by 6 min. average

Table 10-1: Open Air Surface Coating Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
EU007	Open Air Surface Coating	VOHAP	340 to 780 grams per liter
		VOC	95 tons in any 12 month period for this line
		VOC	245 tons in any 12 month period for facility

Table 12-1: Emergency Generator Criteria Pollutant Emission Rate

Emission Point	Description	Pollutant	Emission Limit
	Emergency generators: Pier H Generac Model F2CE9685A-E Serial Number 511712	NO _x ,	6.9 g/HP-hr.
		HC	1.0 /HP-hr.
	Security John Deer Model RES4092 Serial Number CD4039D297468	PM	0.40 g/HP-hr.
		CO	8.5 g/HP-hr.

6. UOP: Emissions

The UOP's Permit Application discloses the emission points that emit nickel, as well as the overall facility-wide emissions.

Figure 9. Summary of Nickel Emissions and Facility-Wide Potential Emissions at UOP¹⁴²

Emission Points with Process-Generated Nickel Compound Air Emissions

Emission Point	Type of Emission Control	Particulate Matter Removal Efficiency	Nickel Compound Emissions (Tons per Year)
EP-024	Baghouse	99.9%	0.170
EP-028	Wet Scrubber	99.1%	0.422
EP-048	N/A	N/A	0.405
EP-089	N/A	N/A	0.186
EP-122	Baghouse	99.9%	0.243
EP-125	Baghouse	99.99%	0.972
EP-126	Baghouse	99.9%	0.243
EP-131	Baghouse	99.9%	0.486
EP-132	Baghouse	99.9%	0.486
EP-133	Wet Scrubber	99.9%	0.006
EP-135	Baghouse	99.9%	0.016
TOTAL EMISSIONS (tons per year):			3.637
OVERALL REMOVAL EFFICIENCY:		≥95%	

¹⁴² UOP Permit Application, at PDF 8, 12 (April 2019), available at <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104321036&dbid=0>.

Regulated pollutant	Potential Emissions* (tons/year)	Major source? yes/no
Particulate Matter (PM)	176.93	Yes
Particulate Matter under 10 microns (PM10) ⁽¹⁾	150.93	Yes
Particulate Matter under 2.5 microns (PM2.5) ⁽¹⁾	95.68	No
Sulfur dioxide (SO2)	1.22	No
Nitrogen Oxides (NOx)	308.66	Yes
Carbon Monoxide (CO)	189.31	Yes
Volatile Organic compounds (VOC)	41.84	No
Lead	0.001	No
CO2e	208,186	Yes
Total Hazardous Air Pollutants (HAPs)	7.71	No
Nickel Compounds ⁽²⁾	3.65	No
Ammonia	66.82	N/A
Hexane	3.08	No
Methanol ⁽³⁾	0.49	No
All other HAPs from process or combustion have a total emission rate of less than 1000 lb/yr and are considered insignificant as defined in Rule 335-3-16-.01	< 0.1 each	No

*Potential emissions are either the maximum allowed by the regulations or by permit, or, if there is no regulatory limit, it is the emissions that occur from continuous operation at maximum capacity.

(1) Emissions of PM10 and PM2.5 are based on site developed factors, 84% of PM is PM10 and 50% of PM is PM2.5. The factors are based on averages from testing conducted on emission units EP-096 thru EP-099, EP-117, and EP-119 conducted at various times. The factors have been used for annual emission inventory submittals.

(2) Includes Nickel from combustion of natural gas (per AP-42 Chapter 1.4) and Nickel Compounds from process emissions.

(3) Includes Methanol from combustion of natural gas (per AP-42 Chapter 3.2) and Methanol from process emissions.

7. Health Impacts of the Criteria and HAP Pollutants

The pollutants emitted from the five sources include the CAA's criteria pollutants (such as particulate matter, volatile organic compounds, sulfur dioxide, and ozone precursors) and many recognized hazardous air pollutants (also referred to as air toxics). For example, according to EPA, potential impacts from just two of the criteria pollutants and the hazardous air pollutants include the following:

- Exposure to the types of particulate matter (PM) emissions contained in fugitive dust can result in “premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing.”¹⁴³

¹⁴³ See <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm>.

- Short-term exposures to sulfur dioxide (SO₂) can harm the human respiratory system and make breathing difficult. People with asthma, particularly children, are sensitive to these effects of SO₂.¹⁴⁴
- People exposed to hazardous air pollutants at sufficient concentrations and durations may have an increased chance of getting cancer or experiencing other serious health effects. These health effects can include damage to the immune system, as well as neurological, reproductive (*e.g.*, reduced fertility), developmental, respiratory and other health problems. In addition to exposure from breathing air toxics, some toxic air pollutants such as mercury can deposit onto soils or surface waters, where they are taken up by plants and ingested by animals and are eventually magnified up through the food chain. Like humans, animals may experience health problems if exposed to sufficient quantities of hazardous air pollutants over time.¹⁴⁵

Yet, in spite of the impacts and risks from the emissions emitted from the facilities in and near the Impacted Communities, ADEM has failed to consider the impacts on these facilities' permitted emissions on human health and environment and did not conduct the analysis of cumulative impact of these facilities' permitted emissions on the Communities.

V. Legal Background: Title VI of the Civil Rights Act and EPA's Implementing Regulations

Recipients of federal funding are prohibited from taking actions that have a discriminatory impact on or result in discriminatory treatment of minority populations. Title VI of the Civil Rights Act of 1964 states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving any Federal financial assistance.¹⁴⁶

EPA's implementing regulations further prohibit recipients of EPA funding from discriminating. Specifically, EPA's Title VI regulations provide that an EPA funding recipient:

...shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or

¹⁴⁴ See <https://www.epa.gov/so2-pollution/sulfur-dioxide-basics>

¹⁴⁵ See <https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants>.

¹⁴⁶ 42 U.S.C. § 2000d.

activity with respect to individuals of a particular race, color, national origin, or sex.¹⁴⁷

EPA's regulations make clear that discrimination on the basis of race is a violation of Title VI whether such discrimination is the purpose of the decision or its effect.¹⁴⁸

As a condition of receiving federal funding such as that described in Section III.B. above, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. These regulations proscribe discrimination on the basis of race, color or national origin by any program or agency receiving financial assistance from the EPA.¹⁴⁹ In other words, Title VI creates a contractual nondiscrimination obligation for recipients of Federal funding in exchange for that funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as that funding is provided.¹⁵⁰ As detailed above, ADEM, a state agency, is a recipient governed by these requirements.

In particular, a state agency accepting EPA funding may not issue permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.¹⁵¹ Although compliance with national ambient air quality standards ("NAAQS") and other emissions limits are an important baseline in avoiding such effects, EPA no longer presumes that permitting decisions issued in compliance with the NAAQS have not created adverse and disproportionate impacts on minority and low-income communities.¹⁵² State agencies that still rely on this presumption in their permitting process are exposing communities in their jurisdiction to potential disparate impacts because, as stated by EPA, "presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health."¹⁵³

The EPA has explained that an important way for a recipient agency to avoid issuing discriminatory permits is to ensure that impacted communities are allowed substantial involvement in the agency's decision-making process, particularly throughout the permitting decision-making process.¹⁵⁴ In addition, each recipient of

¹⁴⁷ 40 C.F.R. § 7.35(b).

¹⁴⁸ *Id.*

¹⁴⁹ 40 C.F.R. § 7.30.

¹⁵⁰ U.S. Environmental Protection Agency, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 Fed. Reg. 14,207, 14,209 (Mar. 21, 2006) ("Final Recipient Guidance").

¹⁵¹ Final Recipient Guidance, at 14,209.

¹⁵² Environmental Protection Agency, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental and Health-Based Thresholds*, at 4 (Jan. 24, 2013).

¹⁵³ *Id.*

¹⁵⁴ Final Recipient Guidance, at 14,211.

EPA funding must designate a Title VI compliance coordinator, shall “adopt grievance procedures that assure the prompt and fair resolution of complaints...”¹⁵⁵

These requirements are fully applicable to permit renewals, as well as the issuance of new permits. The EPA has explained that its Title VI regulations do not require a different review of permit renewals, even if environmental laws mandate different treatment for new permits.¹⁵⁶ As the EPA explained, the renewal, like a new permit, would be available to form the basis of an investigation and it improves the ability to consider adverse disparate impacts.¹⁵⁷ Moreover, this approach “assist[s] recipients in achieving an equitable distribution of their efforts to meet Title VI’s requirements.”¹⁵⁸ EPA has also explained that “[v]iolations of Title VI or EPA’s Title VI regulations can be based solely on...the procedural aspects of the permitting process,” and that “complaints often center around allegations of discrimination that may have been prevented, mitigated, or resolved if certain public involvement practices had been implemented by recipient agencies.”¹⁵⁹ Thus, a single action or inaction may give rise to both substantive and procedural violations of a recipient’s Title VI obligations, by, for example, creating disparate impacts that could have been prevented, mitigated, or resolved through procedural safeguards.

VI. ADEM’S Issuance of the Five Permits and Their Pattern and Practice of Permitting and related CAA Activities of Sources In and Near the Impacted Communities Violates Title VI of the Civil Rights Act and EPA’s Implementing Regulations

ADEM’s issuance of these five Permits within a one-week period in November 2022 and without meaningful consideration of the disparate impact of these sources’ emissions on the Impacted Communities, as well as the Department’s pattern and practice of taking such actions in CAA permitting and related activities affecting these Communities, resulted in discriminatory impacts on and discriminatory treatment of the Impacted Communities in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. ADEM has violated Title VI and 40 C.F.R. Part 7 in the issuance of these five Title V Permits by: (1) failing to comply with any of the EPA procedural safeguard regulations at 40 CFR Part 7 to prevent discrimination; and (2) failing to analyze the potential for disproportionate and disparate environmental and human health effects on nearby minority and low-income communities.

¹⁵⁵ 40 C.F.R. §§ 7.85 - 7.95.

¹⁵⁶ 65 Fed. Reg. 39,650, 39,697 (June 27, 2000).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Final Recipient Guidance, at 14,210.

Specifically, the Complaint presents three different Claims, all of which show that ADEM's practice of issuing the five Permits in the one-week was the result of racially discriminatory intent and/or treatment and violated Title VI of the Civil Rights Act. The Claims are as follows:

- ADEM's actions in issuing these five Permits resulted in *disparate impacts* on the Impacted Communities in violation of Title VI. (Section VI.A.)
- In the alternative, the timing of ADEM's issuance of the five Permits and its on-going pattern and practice of permitting and other CAA actions for sources in and near the Impacted Communities results in *discriminatory treatment* and *disparate impacts* in violation of Title VI. (Section VI.B.)
- In the alternative, the discriminatory treatment claims in Section VI.B. cause *disparate impacts* in violation of Title VI. (Section VI.C.)

A. Disparate Impacts of ADEM's Permit Issuance

One way to establish that a policy or practice violates EPA's Title VI regulations is to show that a policy or practice has a 'disparate impact' – an adverse effect that falls disproportionately on a racial group.¹⁶⁰ Here, "EPA must determine whether the recipient uses a facially neutral policy or practice that has a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin."¹⁶¹ To make such a showing, a complainant must (1) identify the policy or practice at issue; (2) establish adversity; (3) establish significant disparity; and (4) establish causation.¹⁶²

Once the showing of a 'disparate impact' is established, the agency must determine whether the recipient has articulated a 'substantial legitimate justification' for the policy or practice.¹⁶³ Generally, a recipient must establish that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission."¹⁶⁴ Even if there is a justification for the policy or practice, it may still constitute a violation if there are less discriminatory alternatives that would achieve the same purpose.¹⁶⁵ EPA is responsible for this inquiry, and "if such an alternative is available to the recipient, even if the recipient establishes a justification, the policy or practice will still violate disparate impact regulations."¹⁶⁶

¹⁶⁰ Civil Rights Compliance Toolkit, at 8.

¹⁶¹ Civil Rights Compliance Toolkit, at 8.

¹⁶² See Civil Rights Compliance Toolkit, at 8; see also DOJ Title VI Legal Manual, Section VII, at 6, available at <https://www.justice.gov/crt/fcs/T6manual>.

¹⁶³ See Civil Rights Compliance Toolkit, at 9; see also DOJ Title VI Manual, Section VII, at 9.

¹⁶⁴ Civil Rights Compliance Toolkit, at 9.

¹⁶⁵ Civil Rights Compliance Toolkit, at 10-11.

¹⁶⁶ Civil Rights Compliance Toolkit, at 10-11.

As discussed below, Complainants show that ADEM's issuance of five Permits in a one-week period constitute discriminatory acts that lead to disparate impacts to minority communities. Similarly, ADEM's failure to analyze the disparate effects on the Impacted Communities of the air pollution authorized by these Permits constitute discriminatory acts that lead to disparate impacts to minority communities. In addition, less discriminatory alternatives to ADEM's current practice and activities exist that would avoid the discrimination that results from ADEM's current unlawful permitting process.

1. Identifying the Practice at Issue: ADEM Refused to Consider the Disparate Impacts of Its Issuance in a One-Week Period of Five Permits with Significant Comments from and Disparate Emission Impacts on Minority Communities

Complainants challenge ADEM's issuance of the five Permits within a one-week period – that is the practice at issue. ADEM provided no justification for issuing the five Permits in this manner. Moreover, despite receiving numerous and significant comments from the Impacted Communities, ADEM failed to consider and account for the disparate impacts of issuing the Permits in the one-week period. ADEM also failed to consider and account for the disparate impacts of the individual permitting decisions. ADEM's decisions to issue these Permits as presented below and elsewhere in this Complaint have adverse, disparate impacts on the Impacted Communities in violation of Title VI.

Indeed, as discussed in more detail below ADEM's practice is to grant all permits that meet CAA's permitting requirements regardless of the environmental justice or civil rights impacts. ADEM may not now offer the following post hoc rationales that it:

- Provided public notice to those that have asked to be placed on its email list, thus there was public involvement and no violation of Title VI.
- Lacks the authority to deny or modify the Permits or take other steps to mitigate the five facilities' impact to comply with Title VI.
- Had no choice but to grant all the Permits because they each comply with its EPA-approved State Implementation Plan and State regulations, regardless of disparate impact.
- Lacks the resources to implement the programs and comply with Title VI.¹⁶⁷

¹⁶⁷ The CAA and EPA's implementing regulations require that the facilities covered by the program pay fees that are adequate for the agency to implement the program. Therefore, it would be unreasonable for ADEM to assert that it lacks the resources to address the concerns and the claims and requests for relief in this Complaint. If ADEM's current fee structure is inadequate to meet its legal obligations, then it must increase the fees, which as discussed in Section I.A., it did last year.

- Cannot resolve historical issues that resulted from its issuance of these five Permits and the hundreds of other permits in Mobile County.

Such assertions by ADEM would mean that it is ADEM's policy to not analyze or address adverse disparate impacts in connection with its air permitting decisions. Such a policy would be legally incorrect as it would result in policies or practices that – as demonstrated in this Complaint for these five facilities (as well as by ADEM's issuance of similar permits to other facilities) – that have an adverse, disparate impact on the Black communities in violation of Title VI.

Moreover, as noted by the EPA, ADEM's compliance with the CAA in issuing these five Permits does not necessarily mean that it is complying with Title VI.¹⁶⁸ EPA's Toolkit expressly states:

The fact that the area is designated as in attainment with the NAAQS and that the recent permitting record shows that emissions from the facility would not cause a violation of the NAAQS would be insufficient by themselves to find that no adverse impacts are occurring for purposes of Title VI and other federal civil rights laws. EPA's investigation would seek to ascertain the existence of such adverse impacts (*e.g.*, violations of the NAAQS) in an area regardless of the area's designation and the prior permitting record. As stated previously, compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws.¹⁶⁹

There is not adequate placement of ambient air monitors to support assertions that the areas where the Impacted Communities are located are in attainment with the NAAQS.¹⁷⁰ Moreover, there are no permitting records available that demonstrate the five facilities in this Complaint and the more than 40 other facilities in and near the Impacted Communities do not cause violations of the NAAQS. Moreover, it is important to recognize that many of these sources emit hazardous air pollutants, which are not covered by the NAAQS. There is considerable community concern about the “hot spots” of hazardous air pollution that these facilities create. These concerns are underscored by the fact that ADEM's permits fail to create enforceable limits and lack monitoring, recordkeeping and reporting of *actual* emissions. Therefore, while on first blush it may appear the permits create emission limits, because the terms and conditions in the permits generally fail to create enforceable limits, a meaningful and accurate evaluation of the cumulative impacts from the facilities should consider the true potential to emit *without* controls. Moreover, reliance on the emission inventory information ADEM uploads into EPA's inventory systems to evaluate disparate impacts on the Impacted Community would be misplaced. As discussed in this Complaint and in numerous comment letters to

¹⁶⁸ Attach. D, at 181.

¹⁶⁹ Civil Rights Compliance Toolkit, at PDF 16-17.

¹⁷⁰ Attach. D, at 231.

ADEM, the “methods” ADEM allows the facilities to use to estimate emissions for construction permits, and then monitor and report emissions once the facility is operating, generally fail to represent “actual” emissions. The facilities’ use of equations, which have not been demonstrated to be representative of the operations at the facility, means the emission inventory is a sham. It is no wonder the residents in the Impacted Communities experience the disparate impacts, as seen in the EJScreen reports and their stories.

Another area of concern to the residents is that ADEM’s enforcement activities fail to establish real deterrence for the facilities to comply with the permit and other requirements of the CAA. For example, a review of ADEM’s inspection reports in its eFile system finds that frequently inspections are conducted when the facility is not operating, which means the inspector cannot evaluate first-hand whether emission control systems are working. Additionally, the monetary penalties are too low to deter violators and are often *negotiated* between ADEM and the violator.

ADEM not only has a Title VI obligation to meaningfully involve people of color in the permitting process, but is required under EPA’s implementing regulations to also avoid, account for, and/or mitigate disparate impacts imposed on them.¹⁷¹ Therefore, any such assertions by ADEM that it lacks authority to address disparate impacts would fail to recognize these established Title VI principles and the legal requirements in EPA’s regulations.

Furthermore, EPA and the courts have made clear that State, local, and other recipients of federal financial assistance have an independent obligation to comply with federal civil rights laws with respect to all of their programs and activities, including environmental permitting program.¹⁷² Indeed, ADEM’s Title VI legal obligations exist in addition to the federal or state environmental laws governing the environmental permitting program.¹⁷³ EPA’s Title VI regulations call for an analysis of foreseeable harms and require recipients to analyze the adverse impacts of their permitting decisions regardless of compliance with other environmental laws.¹⁷⁴ Interpreting Title VI to have no requirements relevant to the issues raised in relation to actions that may comply with other federal laws, such as the CAA permitting in this Complaint, would mean interpreting Title VI in

¹⁷¹ See 40 C.F.R. § 7.30. Title VI prohibits the exclusion of individuals on the basis of race from participating in a program or activity receiving financial assistance, and prohibits recipients from subjecting individuals to discriminatory effects.

¹⁷² Draft Revised Investigation Guidance, 65 Fed. Reg. at 39,691; *see also S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 480-81, 490, opinion modified and supplemented, (D.N.J.), *rev’d on other grounds*, 274 F.3d 771 (3d Cir. 2001). (“S. Camden Citizens”).

¹⁷³ Draft Revised Investigation Guidance, 65 Fed. Reg. at 39,680.

¹⁷⁴ *S. Camden Citizens*, 145 F. Supp. 2d at 490, 495 (holding that there is a “severe defect” in a permitting process that relies exclusively on compliance with environmental regulations such as the NAAQS, without considering its obligations under Title VI.”).

a manner that eviscerates the Civil Rights Act purpose of preventing federal funding recipients from having racially discriminatory impacts.¹⁷⁵ The courts have made clear that “environmental justice is not merely a box to be checked” in a CAA permitting process and EPA has explained that a proper Title VI analysis includes a determination of affected populations, adverse health impacts, and less discriminatory alternatives.¹⁷⁶

ADEM’s practice of ignoring the disparate impacts on the Impacted Community resulting from its decision to issue these five Permits over a one-week period, as well as its issuance of each individual Permit, amounts to a rejection of Title VI that EPA must correct.

2. Establishing Adversity: ADEM’s Decisions to Permit these Five Facilities Within the One-Week Period Impacts the Historic Africatown Neighborhood and Neighboring Communities

“Most cases applying the Title VI disparate impact standard do not explicitly address adversity as a separate element” in establishing a lack of compliance with the Civil Rights Act; instead, the courts “frequently assume that the impacts alleged were sufficiently adverse, impliedly recognizing a wide range of harms.”¹⁷⁷ When evaluating allegations of harm and adversity, EPA considers environmental harms and adverse health effects as well as non-health harms such as depressed property values, nuisance odors, traffic congestion, and noise.¹⁷⁸ Indeed, Title VI allows agencies to consider whether these effects are occurring and, if so, whether they are sufficiently harmful to support a violation finding.¹⁷⁹

The public comments that Complainants submitted to ADEM during the permitting process for these five Permits clearly explained the adversity and

¹⁷⁵ *S. Camden Citizens*, 145 F. Supp. 2d at 477, 481; *see also* Draft Revised Investigation Guidance, 65 Fed. Reg. at 39,680.

¹⁷⁶ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020); *see also* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (“The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low-income populations.”); *see also* Megan Quinn EPA’s Carlton Waterhouse: Environmental justice means thinking beyond regulatory requirements, Waste Dive (May 12, 2022), *available at* <https://www.wastedive.com/news/environmentaljustice-waterhouse-epa-waste-recycling/624284/> (quoting Dr. Carlton Waterhouse “Environmental justice begins with understanding what impacts you’re having across all of your activities in the communities where you are located.”).

¹⁷⁷ DOJ Title VI Manual, Section VII, at 12 (“the expansive language of Title VI and its implementing regulations support this approach”).

¹⁷⁸ Civil Rights Compliance Toolkit, Chapter 1 FAQs, at 4; *see also* *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (“Coalition of Concerned Citizens”), cited in DOJ Title VI Legal Manual, Section VII, at 36.

¹⁷⁹ Civil Rights Compliance Toolkit, Chapter 1 FAQs, at 4.

significant racial disparity of ADEM's proposed issuance of the Permits. Comments submitted by Complainants during the public comment periods for these facilities (sometimes with other organizations) made clear that they were submitting comments as part of their mission to advance healthy air and environmental justice issues for the communities in Africatown, Mobile County, and throughout Alabama. Public comments for Kimberly-Clark noted that the commenting groups sought changes in the Permit to “better protect the health of residents – including those located in the environmental justice community adjacent to the Kimberly-Clark plant – and air quality in Mobile County.”¹⁸⁰ And a number of comments specifically mentioned the need to address the burden of these Permits on the residents of Africatown, noting that “Africatown residents remain disproportionately burdened by the toxic pollution” from these sources.¹⁸¹ Complainants' comments on the Plains Marketing Permit were styled as a “request” from the minority and low-income populations in the community surrounding the facility, as well as groups advocating on their behalf, that “ADEM place special focus and resources” on addressing the impacts on these communities in issuing air permits and noted that the “people that live in the area surrounding the [facility] have been disproportionately impacted for decades” by its emissions.¹⁸²

These Comments were clear that they were submitted on behalf of the Complainants' members, which include historically disadvantaged racial groups and communities of color, and thus they all raised issues regarding the civil rights and environmental justice (“EJ”) impacts of each of these sources on the nearby communities. For example, the comments on the Kimberly-Clark Permit noted that the community surrounding the facility contained a high percentage of minorities and people near the poverty line that would be disproportionately impacted by the emissions being permitted.¹⁸³ Likewise, the entire first section of Petitioners' March 4, 2021 Comments on the Plains Marketing Permit was devoted to the potential adverse impacts of the permit on the disproportionately impacted communities surrounding that facility.¹⁸⁴ In addition, all five comments raised the application of Title VI to ADEM's permitting action,¹⁸⁵ with some even going so far as to allege that such permit issuance would violate the civil rights of Black residents living near these sources.¹⁸⁶ Moreover, the EJScreen information presented in Section IV.A.4, clearly shows the cumulative impacts of the facilities' air emissions result in localized health effects.

¹⁸⁰ Attach. A, at 592 (Kimberly-Clark); *see also id.* at 1075 (UOP) (similar comments).

¹⁸¹ Attach. A, at 100 (AL Bulk Terminal); *id.* at 385 (Alabama Shipyard) (a number of commenting groups noting their purpose of addressing environmental issues in Africatown).

¹⁸² Attach. A, at 790, 792 (Plains Marketing).

¹⁸³ Attach. A, at 612 (Kimberly-Clark).

¹⁸⁴ Attach. A, at 791 (Plains Marketing).

¹⁸⁵ Attach. A, at 613 (Kimberly-Clark), 786-87 (Plains Marketing), and 1099 (UOP).

¹⁸⁶ Attach. A, at 108 (AL Bulk Terminal) and 390 (Alabama Shipyard).

Thus, ADEM knew that Complainants and the protected groups within the communities they represent were interested in ADEM's permitting actions for these sources. However, in spite of this knowledge, ADEM chose to transmit to EPA and then finalize all five of these Permits within a one-week period. ADEM's decision to finalize the five Permits created adversity. By finalizing these Permits in this grouped manner, it was difficult for these protected groups to assess each of those Permits to determine whether (a) the final Permits complied with all applicable requirements of the Act as required under CAA Title V and (b) ADEM had provided meaningful consideration of and responses to all the other significant issues raised in the comments, including their comments regarding racially disparate impacts and related EJ concerns. Such review is necessary to ensure that the final Permits complied with the Act and that ADEM's supporting analysis – including responses to all significant public comments – is adequate, as required by EPA's CAA rules.¹⁸⁷ The communities surrounding these sources and Complainants' other members are interested in the outcome of ADEM's permitting decisions and should have been provided adequate time to determine whether ADEM had addressed their concerns. Indeed, the Complainants and the protected groups within the communities impacted by the sources covered by these Permits found it impossible to evaluate ADEM's analyses and documents, the volume of materials was simply overwhelming.¹⁸⁸

ADEM's decision to deliver of all these Permits within one-week resulted in a disparate impact and adversity on the surrounding communities because it failed to provide these disadvantaged groups with adequate public participation in the permitting process. Specifically, this action limited the ability of these groups and the public at large to take the one remaining action provided by the CAA to address the pollution allowed by these Permits – filing a Title V petition to object with EPA. The CAA requires the EPA to consider the arguments raised in these petitions and if the Administrator determines the underlying permits are not in compliance with the air pollution and other requirements, to object and require the permitting authority, such as ADEM, to fix the problems.¹⁸⁹ Community groups have long relied on the Title V petition process to address deficiencies in permits failing to contain all the CAA requirements.¹⁹⁰ While Complainants were able to file a petition, that petition was limited in scope. The Complainants were unable to address all of the errors that ADEM had made in all of the permits issued in early November 2023 and instead had to focus on a more narrow petition – raising only three main objections to consistent problems in the five Permits issued in Mobile

¹⁸⁷ 42 U.S.C. § 7661c(a), 40 C.F.R. §§ 70.8(c)(3)(ii) and (a)(1).

¹⁸⁸ Moreover, as discussed elsewhere in this Complaint, the communities and non-profit groups representing them have limited resources, they do not have the ability to “staff up” to address ADEM's unreasonable business practice.

¹⁸⁹ See generally Clean Air Act § 505(b)-(c), 42 U.S.C. § 7661d(b)-(c); see *supra* section I.A.

¹⁹⁰ See generally EPA's Title V Petition Database, available at <https://www.epa.gov/title-v-operating-permits/title-v-petition-database> (containing hundreds of such petitions dating back to at least 1996).

County.¹⁹¹ Thus, the Complainants and the protected groups within the communities they represent were unable to raise all potential CAA-deficiencies in these five Permits to EPA, leading to sources operating under permits with inadequate emission limits, little to no air quality monitoring, ineffective compliance provisions that fail to meet the Act's requirements, and other terms necessary to address the adverse impact of these source's continuing pollution on the Impacted Communities.

Moreover, ADEM's final issuance of the five Permits failed to acknowledge, consider and explain to the public how its decision to issue all the Permits over the short period of time would address the obvious burden and adversity it created – the very real concerns regarding meaningful public participation and the Department's underlying Title VI obligations raised in Complainants' comments. Instead, consistent with its pattern and practice of ignoring its Title VI obligations, as explained more fully below, it did nothing to justify its decision and practice to the public. ADEM may try to assert that these harms could not be addressed in its decision to issue the five Title V Permits and that its issuance of permits complying with applicable air quality laws means that no harm would result to these communities. However, such reasoning is legally wrong and does not prevent Complainants from establishing adversity, both with respect to ADEM's issuance of the five Permits over the one-week period and its failure to consider the effects of the sources' emissions on the Impacted Community in so doing.

For these reasons, ADEM's actions have a disproportionate impact on the residents of color and other disproportionately burdened residents in the Africatown Planning Area and the City of Mobile generally, depriving them of meaningful access to participate ADEM's programs or activities, and thus amounts to discrimination on the basis of color in violation of Title VI.¹⁹² The consequences of ADEM's actions are especially problematic for the Impacted Communities that are impacted by cumulative emissions from the operation of the hundreds of sources, including the sources authorized by the five Permits at issue in this Amended Complaint.

EPA recently issued Title V permitting guidance that reiterated the Title VI obligation of permitting authorities such as ADEM, and noted that where a permitting authority's "decision is likely to have an adverse and disparate effect on the basis of race, color, national origin (including [limited English proficiency]), disability, sex, or age, then the program should consider broadly the availability of

¹⁹¹ See Attach. D, at 5.

¹⁹² See e.g., EPA Office of Gen. Counsel, Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions, at 6 (Aug. 2022) ("A recipient's compliance with the requirements of federal environmental laws with respect to permitting activities and decisions does not necessarily mean that the recipient is complying with civil rights laws"), available at <https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf> ("EPA FAQ").

less discriminatory alternatives.”¹⁹³ In this case there was a very simple alternative business practice that ADEM could have taken – issuing these five Permits in a staggered manner over a longer period of time (as ADEM had done when solicited public comment on the permits) so that Complainants, their members, and other members of protected classes would have time to review each Permit and decide whether additional action was needed to address the pollution it authorized.

We also note that this is not the first time ADEM has taken such prohibited actions in its permitting. On February 2, 2021, ADEM finalized four Title V permits on the same day, after having also transmitted them to EPA on the same day in December 2020, even though the public comment periods had occurred over a four month period (from July to October 2020) and each of the permits had significant public interest, including comments by one or more of the Complainants and the protected groups within the Impacted Communities they represent.¹⁹⁴ At that time, due to similar resource constraints, the GASP Complainant filed Title V objection petitions on only two of those permits, both of which were successful and resulted in the EPA Administrator issuing orders objecting to numerous deficiencies in both permits.¹⁹⁵ This February 2021 activity appears to be the first instance where ADEM finalized multiple permits with adverse comments from the same or similar commenters at one time.

Likewise, after conducting public comments for five additional permits over a fourteen month period (from March 2021 to May 2022) and receiving comments

¹⁹³ Attach. B at 16, EJ in Air Permitting – Principles for Addressing Environmental Justice Concerns in Air Permitting (Dec. 2022), at 4.

¹⁹⁴ Those included the 2021 UOP permit renewal and three permits for Alabama Power Company (APC) plants: APC Plant Barry (Permit No. 503-1001); APC Gaston Steam Electric Generating Plant (Permit No. 411-0005) and APC Greene County Steam Electric Generating Plant (Permit No. 405-0001). The ADEM Final Permits and Public Comments from one of more Complaints can be accessed at:

APC Plant Barry: Permit -https://mosaiceps.epa.gov/sites/default/files/FRU/A971001F_2_00.pdf;

Public Comment -

https://mosaiceps.epa.gov/sites/default/files/FRU/Gasp%20and%20Sierra%20Club%20FINAL%20Barry%20T5%202020%20Comments_0.pdf

APC Gaston Steam Electric Generating Plant: Permit -

https://mosaiceps.epa.gov/sites/default/files/FRU/AB70005F_2_00.pdf; Public Comments -

<https://mosaiceps.epa.gov/sites/default/files/FRU/GASP%20Comments%20Gaston%20T5%20Renewal.pdf>

APC Greene County Steam Electric Generating Plant: Permit -

https://mosaiceps.epa.gov/sites/default/files/FRU/A630001F_1_00.pdf; Public Comments -

https://mosaiceps.epa.gov/sites/default/files/FRU/GASP%20Comments%20Greene%20County%20T5%20Renewal_0.pdf

UOP: Permit - https://mosaiceps.epa.gov/sites/default/files/FRU/A978010F_2_00.pdf; Public Comments -

https://mosaiceps.epa.gov/sites/default/files/FRU/UOP_Public%20Comments.pdf

¹⁹⁵ See *UOP Order*; and *In the Matter of Alabama Power Company, Barry Generating Plant*, Petition No. IV-2021-5 (June 14, 2022).

from the Complainants raising concerns about the pollution impacts on the Impacted Communities they represent, ADEM similarly delivered all five permits to EPA for review in one day in August 2022 and then finalized them on September 20 and 21, 2022.¹⁹⁶ Unfortunately, although Complainants identified problems with ADEM's process in finalizing those five permits and deficiencies in the permit terms (some of which very similar to the issues identified in the Title V petition for these five Permits), they were unable to file any CAA Title V objection petitions to those permits due to ADEM's failure to notify commenters of the availability of its response to comment documents, staffing transitions, and other resource constraints. This was the second instance where ADEM finalized multiple permits with adverse comments at one time.

In sum, between December 2020 and November 2022, ADEM's business practice transmitted to EPA and then finalized the following three sets of CAA Title V Operating Permits in which Complainants and the historically disadvantaged community members they represent had submitted significant public comments, including ten in Mobile County:

- Four final permits on February 2, 2021 (two located in Mobile County)
- Five final permits on September 20 and 21, 2022 (three located in Mobile County)
- Eight final permits from November 4 to 9, 2022 (five located in Mobile County).

EPA must take action to ensure that ADEM halts its Title V permitting process of taking actions (*e.g.*, transmitting permits to EPA, proposing permits,

¹⁹⁶ Alabama Power Company – Theodore Cogeneration Plant (Permit No. 503-8073), Southern Power Company – EB Harris Generating Plant (Permit No. 201-0010), Southern Power Company – H. Allen Generating Plant (Permit No. 206-0036), Hog Bayou Energy Center (Permit No. 503-8066), and W&T Offshore, Inc. – Mary Ann Field Offshore Production Platform (Permit No. 503-0010). The ADEM Final Permits and Public Comments from one of more Complaints can be accessed at:

Theodore Cogeneration Plant: Permit

https://mosaiceps.epa.gov/sites/default/files/FRU/A978073F_03_00.pdf; Public Comment -

https://mosaiceps.epa.gov/sites/default/files/FRU/GASPCmmtLtrAPTheodore_03252021.pdf

Southern Power Company – H. Allen Generating Plant: Permit -

https://mosaiceps.epa.gov/sites/default/files/FRU/A810036F_3_00.pdf; Public Comment -

<https://mosaiceps.epa.gov/sites/default/files/FRU/SPC%20Franklin%20Public%20Comments.pdf>

Southern Power Company – EB Harris Generating Plant: Permit -

https://mosaiceps.epa.gov/sites/default/files/FRU/A010010F_3_00.pdf; Public Comment -

<https://mosaiceps.epa.gov/sites/default/files/FRU/SPC%20Harris%20Public%20Comments.pdf>

Hog Bayou Energy Center: Permit -

https://mosaiceps.epa.gov/sites/default/files/FRU/A978066F_03_00.pdf; Public Comment -

<https://mosaiceps.epa.gov/sites/default/files/FRU/Hog%20Bayou%20Public%20Comments.pdf>

W&T Offshore, Inc. – Mary Ann Field Offshore Production Platform Permit: Public

https://mosaiceps.epa.gov/sites/default/files/FRU/A970010F_4_00.pdf; Public Comments -

<https://mosaiceps.epa.gov/sites/default/files/FRU/W&T%20Mary%20Ann%20Public%20Comments.pdf>

finalizing permits) on multiple permits with significant public interest over a short period of time because this practice causes disparate impacts on the minority groups represented by Complainants. ADEM's clear pattern and practice of submitting to EPA and then finalizing more than one permit within a short time period – permits and facilities with significant comments and concerns from Complainants and other communities – harms those residents that live in the Impacted Communities. ADEM's decision to conduct business in this manner means that the Impacted Communities are not afforded the public participation opportunities provided under the CAA. ADEM's new business practice means that the Impacted Communities are not able to meaningfully engage in all the permit actions that impact their neighborhood. Notably, because ADEM's practice has happened on numerous occasions and has become more frequent throughout its actions that involve public participation opportunities of keen interest to the Impacted Communities,¹⁹⁷ it is not the mere occurrence of isolated, accidental or sporadic acts.¹⁹⁸

Therefore, EPA should grant this Amended Complaint and provide the relief requested, including a direction that ADEM release any subsequent permit actions with significant public comments from racially disadvantaged communities and the organizations that represent them in a *staggered manner* that allows those communities time to adequately consider those permits and ADEM's associated actions.¹⁹⁹

3. Establishing Disparity: ADEM's Issuance of the Five Title V Operating Permits Authorizes Continued Pollution that Disproportionately Affects the Communities with Residents of Color in Africatown and Mobile County

In general, to establish a disparate impact requires “a comparison between the proportion of persons in the protected class who are adversely affected by the challenged practice and the proportion of persons not in the protected class who are adversely affected.”²⁰⁰ If the challenged practice affects a significantly higher

¹⁹⁷ Elsewhere in this Complaint is information regarding ADEM's latest variations of this practice, which in addition to starting public comment periods on the same day, the Department also creates public comment periods that overlap with one another; *see also* 65 Fed. Reg. 39,682 (EPA explaining that it will consider the “frequency of the occurrence” in evaluating the demographic disparity measures and their results.)

¹⁹⁸ *See generally, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (“Arlington Heights”), cited in DOJ Title VI Legal Manual, Section V, at 4, 9-17.

¹⁹⁹ Spacing any issuance of revised or modified permits approximately six weeks apart would provide sufficient time for Complainants and other members of the public to review ADEM's actions.

²⁰⁰ Civil Rights Compliance Toolkit at PDF 22-23; *see also* DOJ Title VI Legal Manual, Section VII, at 15, (“A disparity analysis begins with two initial steps; First, the protected class of persons should be identified, then statistical evidence should be utilized to illustrate the disparity on the protected class”); *see also* Executive Order 12250, which charges DOJ with ensuring the “consistent and

proportion of protected class members than non-protected members, a disparity exist.²⁰¹

As explained elsewhere in this Complaint, the Impacted Communities have a disproportionate number of polluting sources and a neighborhood that is predominately comprised of residents of color. The EJSscreen information shows that significant health impacts are present (including those caused by air pollutants), which has been adversely impacted by the facilities' decisions to locate, construct, operate and emit air pollution that impacts and causes risks of future harms to the minority communities living nearby. In issuing the Permits, ADEM entirely avoided its Title VI obligations to ensure that its air permitting program in general, and the health impacts and risks caused by these five specific permitted sources do not have the effect of discriminating against minority communities as required by 40 C.F.R. §7.35(b). Accordingly, by issuing the Permits to these facilities, ADEM has caused a disparate impact to the minority communities living nearby. In so doing, ADEM has committed discriminatory acts in violation of Title VI. As presented below, Complainants raised these issues in their comments on behalf of their members on each of the five sources in various ways.

First, Complainants directly raised ADEM's Title's VI responsibility in the AL Bulk Terminal and Alabama Shipyard comments as follows:

Racial discrimination by a recipient of federal funds is prohibited by Title VI of the Civil Rights of 1964. Title VI of the Civil Rights Act of 1964 prohibits the use of federal funds by recipients that discriminate on the basis of race, color or national origin. As a recipient of federal funds for programs delegated to it by the EPA, ADEM has a legal duty to protect civil rights. However, with this proposed permit, ADEM takes a reprehensible step toward violating the civil rights of the Black residents.²⁰²

Complainants further indirectly identified ADEM's Title VI responsibilities by raising ADEM's Nondiscrimination Investigation Grievance Procedures²⁰³

effective implementation" of federal civil rights laws, and explicitly directs the Attorney General to "coordinate the implementation and enforcement by Executive agencies" of nondiscrimination provisions including Title VI. Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980); *see also* Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023) (directing the Attorney General to assess agency efforts to ensure compliance with civil rights laws in programs that potentially affect human health or the environment.).

²⁰¹ DOJ Title VI Legal Manual, Section VII, at 17, *citing Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576–77 (2d Cir. 2003).

²⁰² Attach. A, at 390, Alabama Shipyard (footnotes omitted); *see also* Attach. A at 108, AL Bulk Terminal (footnotes omitted).

²⁰³ Attach. A, at 1099, UOP Comments (n.113 (On June 5, 2018, Director of ADEM Lance Lefleur rescinded Memorandum 108, the "ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process. ADEM adopted an interim grievance procedure that was not

developed under Title VI in the comments submitted to ADEM on the Kimberly Clark,²⁰⁴ Plains Marketing,²⁰⁵ and UOP permits.²⁰⁶

Second, the Complainants specifically identified that ADEM needed to “consider the disparate and cumulative impacts of its permitting decision on people living near” the sources, when commenting on Kimberly-Clark,²⁰⁷ Plains Marketing,²⁰⁸ and UOP.²⁰⁹

Third, the Complainants’ comments also alleged racially disparate impacts on the communities. The comments on AL Bulk Terminal explained that the draft permit “would allow racially disparate pollution burdens on predominantly Black residents living near” this facility.²¹⁰ Furthermore, the comments on three Permits (Kimberly-Clark, Plains Marketing and UOP) all explained that:

Where residents who are minority populations have not had their health adequately protected by this permitting, a disparate impact exists that requires ADEM to consider the environmental justice impacts of the draft permit.²¹¹

Despite Complainants comments on the five draft Title V Permits alerting ADEM that the Department had failed to consider the disparate impacts to the disproportionately minority communities in its decisions to issue the Title V Permits in violation of Title VI, ADEM ignored the comments. Indeed, in response to these Title VI public comments on all five Permits, ADEM tersely summarized Complainants detailed comments and failed to cite to the specific pages in the comments that its response addressed. Thus, the only way the public could determine whether ADEM fulfilled its obligation to respond to all significant comments – including those on Title VI – was to review each of the comment letters and ADEM’s response to comments side by side to see if the RTC summaries capture each comment and responses address all issues raised within the comments. ADEM’s response to the comments raising the issues of ADEM’s Title VI

made publicly available and did not meet all the requirements of Title VI of the Civil Rights Act and 40 CFR parts 5 and 7. ECRCO accepted a complaint in July 2018 and over the summer advised ADEM on its deficiencies. ECRO issued a Resolution and Closure Letter for the complaint in November 2018 after ADEM adopted the current “Nondiscrimination Grievance Investigation Procedure,” still in effect today. *See* Dorka, Lilian S. External Civil Rights Compliance Office, Office of General Counsel *Re: Resolution and Closure of EPA Administrative Complaint No. 03R-18-R.*

²⁰⁴ Attach. A, at 613, Kimberly-Clark.

²⁰⁵ Attach. A, at 786-87, Plains Marketing.

²⁰⁶ Attach. A, at 1099, UOP.

²⁰⁷ Attach. A, at 612, Kimberly-Clark.

²⁰⁸ Attach. A, at 785, Plains Marketing.

²⁰⁹ Attach. A, at 1097, UOP.

²¹⁰ Attach. A, at 108, AL Bulk Terminal.

²¹¹ Attach. A, at 618, Kimberly-Clark; *see also* Attach. A at 788, Plains Marketing; *see also* Attach. A at 1101, UOP.

obligations and disparate racial impacts of the emissions authorized by these Permits was the same for each permit, simply asserting that:

The draft permit contains emission limits based on state and federal regulations that are protective of human health and the environment. And, the Department has a robust public engagement program (*See* <http://www.adem.alabama.gov/MoreInfo/pubs/ADEMCommunityEngagement.pdf>) that utilizes a number of tools, such as EPA's EJ Screen: Environmental Justice Screening and Mapping Tool, to ensure that local residents and stakeholders are provided a meaningful opportunity to participate in the permitting process.²¹²

This short, *pro forma* response simply fails to address the Title VI concerns described in the comments. In addition to the above statements, ADEM's response to comments document for the Alabama Shipyard permit added the following:

In addition, the draft permit was placed on the Department's website during the 30 day public notice process, and notice of the draft permit was mailed to those individuals who signed up to be notified on the Department's website. During the public notice period, a public hearing was not requested. An extension to the comment period was received and was granted by ADEM.

It should also be noted that Mobile County is in compliance with all National Ambient Air Quality Standards (NAAQS).²¹³

Finally, ADEM added statements regarding environmental justice in its response to comments for Plains Marketing and noted that it followed its environmental justice policy by providing public notice and a public hearing.²¹⁴

As discussed below, ADEM entirely failed to respond to any of the Complainants comments on Title VI raised in these permitting actions. First, ADEM ignored its obligation to analyze whether its activities, such as issuing the

²¹² See Attach. A, at 249-250, AL Bulk Terminal; *see also* Attach. A at 292 (Alabama Shipyard) 675, Kimberly-Clark; *see also* Attach. A at 914, Plains Marketing; *see also* Attach. A. at 1045 – 1046, UOP.

²¹³ As discussed elsewhere, of significant concern to the Impacted Communities is ADEM failure to site air quality ambient monitors in the Impacted Communities. The nearest ambient air monitoring station is the Chickasaw monitor and due to its location being far from the Impacted Communities it is not representative the ambient air quality in the Impacted Communities. Moreover, any area-wide air quality modeling analysis performed to show whether the area complies with the NAAQS would need to rely on ADEM's faulty and inaccurate emission inventories. Therefore, ADEM's assertion that Mobile County is in attainment for all the NAAQS is without merit, there is defensible, technical justification that has or could be provided to support the assertion. Furthermore, ADEM's responses fail to address concerns regarding hot spots created by hazardous air pollutant emissions.

²¹⁴ Attach. A, at 914, Plains Marketing ("The Department has an environmental justice policy in place. The Department followed this policy with respect to the local outreach performed for this permit and held both a public notice and a public hearing concerning the permit and the facility.")

Title V permits, have the effect of causing disparate impacts on minority communities that result in discrimination. Second, ADEM's conclusion that "draft permit contains emission limits based on state and federal regulations that are protective of human health..." is an abdication of its responsibilities as recipient of federal funding to prevent discrimination. Indeed, ADEM failed to analyze how it could prevent these disparities and what permit conditions or other requirements would lessen the impacts. In sum, ADEM's response to comments for all five Permits ignored its legal responsibilities under Title VI.

Additionally, analyses that rely exclusively on compliance "may not give sufficient consideration to other factors that could also adversely impact human health."²¹⁵ A thorough analysis should evaluate other appropriate factors, "including the existence of hot spots, cumulative impacts, the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold."²¹⁶ Because ADEM failed to take any considerations into account, none of these factors and considerations were addressed by ADEM in issuing these five Title V Permits. This

For example, ADEM response to comments on the Alabama Shipyard permit indicating that Mobile County is in compliance with all the NAAQS is misplaced because compliance with environmental health-based thresholds is not adequate to show that no adverse or disparate impacts on specific protected communities are present. Furthermore, there are only two air quality monitors in Mobile County, neither of which track the air quality conditions in the Impacted Communities. Given these facts, the high concentration of industry, high level of air emissions, lax permitting and enforcement by ADEM and EPA over the years, and other issues presented in this Amended Complaint, there are serious issues regarding adverse and disparate impacts to the communities adjacent to these sources that ADEM must address.

In each of these five Permits where ADEM refused to conduct a disparate impact analysis, public comment demonstrated that affected communities were exposed to cumulative impacts and contained sensitive populations, including the Impacted Communities. The presence of these factors in the Impacted Communities should have prompted ADEM to conduct some form of disparate impact analysis rather than ignore the comments, ignore its Title VI obligations, and respond with the same "do nothing" boilerplate response. Failure to engage in any investigation after being notified by the Impacted Communities – on these five different occasions – is an abdication of ADEM's nondiscrimination obligations under Title VI.

²¹⁵ 78 Fed. Reg. 4,742 (April 26, 2013).

²¹⁶ *Id.*

Moreover, the lack of evidence of engagement by ADEM's Title VI program, staff or management in Complainants' comments is a significant concern. Although EPA has previously found ADEM's Title VI program sufficient, Complainants suggest EPA should revisit those findings, as ADEM's repeated approach of totally ignoring Title VI comments in these five permits shows an apparent disconnect between ADEM's Air Division and ADEM's Nondiscrimination Coordinator – a pattern and practice that must be corrected. ADEM also ignored Complainants' Title VI comments on the other title V permits, as noted below, demonstrating that this pattern and practice extends beyond the five Permits at issue in this Amended Complaint. Indeed, ADEM's responses to comments generally conflate environmental justice (EJ) and Title VI and show a misunderstanding of its Title VI legal obligations. Environmental justice and Title VI have separate and distinct legal requirements and obligations that ADEM must understand and address.

Additionally, ADEM's responses indicate that it uses "EPA's EJ Screen: Environmental Justice Screening and Mapping Tool, to ensure that local residents and stakeholders are provided a meaningful opportunity to participate in the permitting process" – but that is all ADEM says. ADEM does not explain how providing EJScreen reports without any additional analysis ensures that surrounding communities have a meaningful opportunity to participate in the permitting process. Indeed, as discussed elsewhere in this Amended Complaint, ADEM's pattern and practice is to *merely attach* a report from EPA's EJ Screen to the end of the Title V Statement of Basis document. ADEM provides no further analysis of the actual information provided in those reports. Likewise, ADEM provides no evidence that it engaged in the types of "robust public engagement" and outreach provided for in the Department community engagement document cited in its comment response. There is no evidence that ADEM arranged public meetings with the surrounding communities to discuss these Permits and any concerns the community had regarding their continued operation.²¹⁷ ADEM simply provides no explanation of how these tools were used in their permitting process to address the EJ and Title VI issues raised in the comments.

Until EPA requires ADEM to engage in substantive implementation and enforcement of its Title VI regulations, including the relief requested in this Amended Complaint, ADEM will likely continue to issue Title V permits with disparate impacts without conducting any analysis of whether its programs and activities result in discrimination. Clearly, in issuing these five Permits, ADEM did not consider whether its decision would have a disproportionate impact on minority communities adversely impacted by the sources in violation of 40 C.F.R. §7.35(b)'s prohibition against administering its federally-funded program in a manner that causes disparate impacts to protected persons. By virtue of this failure to even consider whether disparate impacts were caused in issuing the five Permits, ADEM has engaged in discriminatory acts in violation of Title VI and EPA's implementing

²¹⁷ See Attach. B, at 35.

regulations. As explained below, the adverse and disparate impacts caused to the Impacted Communities by ADEM's issuance of the five Permits constitute discriminatory acts, which may have been prevented had ADEM complied with its Title VI obligations.

4. Establishing Causation: ADEM's Issuance of Each of the Five Permits During a One-Week Period and Its Refusal to Consider the Adverse Disparate Impacts of That Decision Harmed the Residents of Color in the Impacted Communities Already Overburdened with Air Pollution

Once a disparity is identified, it must then be causally linked to the recipient's challenged policy.²¹⁸ Typically, establishing causation requires "statistical evidence of a kind and degree sufficient to show that the practice in question has" injured members of a particular group due to their membership in a protected class.²¹⁹ The statistical disparities must be sufficiently significant that they "raise ... an inference of causation."²²⁰ Importantly, the causation element is not a fault-based inquiry; the sole question at this phase of the case should be whether the recipient's policy affects people of different races disproportionately. As explained below, Complainants demonstrate that evidence shows that ADEM's decisions (to issue all five Permits in a one-week period and issue each of the permits) has injured people of color in the Impacted Community on the basis of race.

a) ADEM's Decision to Issue All Five Permits Over the One-Week Period, as well as Issue Each of the Permits Authorizing Continued Pollution, Caused Adverse Disparate Impacts on the Residents of Color That Live Near these Facilities

As discussed above in Section IV.A.4, based on information from EPA's EJScreen tool, ADEM's decisions affect residents of color disproportionately. Each Permit authorizes pollution from a facility that is surrounded by a community disproportionately composed of residents of color, and Complainants filed public comments regarding concerns with the pollution authorized by each Permit. The challenges placed on Complainants to review all five Permits at the same time and

²¹⁸ Civil Rights Compliance Toolkit at PDF 8 (footnote omitted); *see also* DOJ Title VI Manual, Section VII, at 9; *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (complainants must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.").

²¹⁹ DOJ Title VI Manual, Section VII, at 27; *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (emphasis added) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).

²²⁰ DOJ Title VI Manual, Section VII, at 27-28. (Causation is established where the evidence establishes that the recipient's policy or practice operates in this manner, allowing agencies to be certain that a disparity is not caused by chance.)

file Title V Petitions with EPA all with the same due date, asking EPA to object to those Permits supports the fact that they did not have adequate time to evaluate all issues raised to ADEM during the public comment periods for the five Permits. Thus they were prohibited from raising many issues that could have decreased the numerous health disparities and further risks the Impacted Communities suffer. In addition, as noted above, the only two instances of ADEM issuing permits with significant public comment in such a grouped manner that Complainants have identified also occurred with facilities located near the Impacted Communities. Thus, ADEM's actions cause disparate, adverse harms to the communities that are supposed to be protected under the Civil Rights Act.

b) ADEM's Inaction and Failure to Consider the Adverse Disparate Impacts of its Decisions Caused the Residents of Color in the Impacted Communities to be Overburdened with Air Pollution

ADEM's refusal to comply with its Title VI obligations has resulted in a disproportionate number of air pollution facilities being permitted in and near Impacted Communities of color in Africatown and Mobile County. Had ADEM complied with its obligation to consider the disparate impact of its issuance of such permits, it could have lessened the burden on the minority Impacted Communities years ago.²²¹ ADEM's approval of hundreds of permits for industrial facilities in Mobile County has resulted in the proliferation of stationary sources of air pollution near the Impacted Communities as well as the disproportionate volume of air pollution emitted into communities of color. ADEM's practice of ignoring its Title VI obligations guarantees that the disparate adverse impacts of industrial pollution overburdening the Impacted Communities will continue. In particular, ADEM's decision to issue all five Permits during a one-week period and renew the Permits to the sources means its practices will continue to cause disparate, adverse harms and create risks to protected communities where the facilities decided to construct and operate, by authorizing on-going emissions from these facilities. Moreover, as discussed elsewhere, instead of staggering the expiration dates of the Permits, as had been done historically, ADEM issued three of the five Permits with the same expiration date. ADEM's arbitrary action to treat a subset of the Permits in this manner means that three Permits will all expire on the same schedule – and must be renewed – within a similar period in the future.²²² This creates yet another

²²¹ *S. Camden Citizens*, 145 F. Supp. 2d at 495 (“The EPA has acknowledged that because recipients are responsible for permitting, they are also responsible for considering the distribution of the facilities which they permit with respect to the classes protected by the Civil Rights Act of 1964. The [Title VI] regulations therefore support the conclusion that a recipient's permitting decisions are causally linked to the distribution of facilities as a matter of law”).

²²² See 42 U.S.C. § 7661a(b)(5)(B) (requiring title V permits with fixed terms of no more than five years, so a permitting may issue a term that is less than five years, which ADEM did for two of the Permits).

disparate impact on the Impacted Communities as they will be faced with reviewing and commenting on these permits at the same time.

B. Disparate Treatment in ADEM's Issuance of the Five Permits and Its Expansion of this Pattern and Practice to Other Permitting and CAA Actions of Interest to the Impacted Communities

Violations of Title VI and EPA's regulations also occur when there is 'disparate treatment' – treating individuals differently or otherwise knowingly causing them harm because of their race, color, or national origin, disability, age or sex.²²³ "Determining whether invidious discriminatory purpose was a motivating factor [in the adoption of a facially neutral policy] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."²²⁴ The Supreme Court has stated that the "important starting point" for assessing discriminatory purpose is the "impact of the official action" and "whether it bears more heavily on one race than another."²²⁵ As the Court has explained, the "impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."²²⁶ EPA will consider the "totality of the relevant facts" from direct, circumstantial, and statistical evidence to determine discriminatory intent, including evidence such as:

- The historical background of the events in issue,
- The sequence of events leading to the decision in issue,
- A departure from standard procedure,
- The foreseeability of the consequences of the action, and
- A history of discriminatory conduct.²²⁷

In addition to these types of evidence, DOJ acknowledges that the disparate effect of a recipient's policy or practice is sometimes so obvious or predictable that comparative statistics are simply unnecessary to draw the requisite connection between the policy and harm to a Title VI protected group,²²⁸ which is true with

²²³ Civil Rights Compliance Toolkit, at 3.

²²⁴ *Arlington Heights*, 429 U.S. at 266.

²²⁵ *Arlington Heights*, 429 U.S. at 266; *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 489 (1997) ("Reno").

²²⁶ *Reno* at 487.

²²⁷ Civil Rights Compliance Toolkit at 5, citing *Arlington Heights*, 429 U.S. at 266-68.

²²⁸ See e.g., DOJ Title VI Manual, Section VII, at 19, citing *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (finding national origin discrimination without reliance on statistical evidence because instruction takes place only in English and therefore "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority"), available at <https://www.justice.gov/crt/fcs/T6manual>. ("DOJ Title VI Manual"); see also *Mitchell v. Bd. of Trustees*, 599 F.2d 582, 585–86 (4th Cir. 1979) (upholding district court finding that "a policy that arguably would not renew the contract of any teacher who for any reason could not commit at contract renewal time to a full year's uninterrupted service, but that singled out pregnancy alone for compelled disclosure, would necessarily impact disproportionately upon women") ("Mitchell").

ADEM's practices regarding the Impacted Communities. For the four sub-claims below, information is provided that shows an intentionally discriminatory pattern or practice in ADEM's permitting and other CAA activities involving sources in and near the Impacted Communities. Included is evidence both before and after issuance of these five Permits.

1. Discriminatory Treatment Causing Disparate Impacts by ADEM in Issuing Five Permits in the One-Week Period

Much of the information provided above regarding the discriminatory impact of ADEM's action issuing these five Permits in a one-week period also provides evidence of discriminatory treatment. Despite the fact that such issuance may appear facially neutral, evidence of intentional discrimination in ADEM's action includes the following:

The historical background. As discussed in Section VI.A.1., understanding and appreciating the historical background in the City of Mobile generally and in relation to the Impacted Communities in particular, ADEM's business practice to issue the five Permits in one-week is a continuation of the disparate impacts and discriminatory treatment the Impacted Communities have been subject to for too many years. ADEM's issuance of these Permits is but one of the cumulative business practices demonstrating intentional discrimination.²²⁹

The first instance of one of ADEM's new business practices, as discussed above was on February 2, 2021, when ADEM finalized four Title V permits on the same day, after having also transmitted them to EPA on the same day in December 2020, even though the public comment periods had occurred over a four month period (from July to October 2020) and each of the permits had significant public interest, including comments by one or more of the Complainants and the protected groups within the Impacted Communities they represent.²³⁰ At that time, due to similar resource constraints, the GASP Complainant filed Title V objection petitions on only two of those permits. Both Title V objection petitions were successful and resulted in the EPA Administrator issuing orders objecting to numerous deficiencies in both permits.²³¹

The second occurrence was after ADEM conducted public comment periods for five permits over a fourteen month period (from March 2021 to May 2022) and received comments from the Complainants raising concerns about the pollution impacts on the Impacted Communities they represent. ADEM similarly delivered

²²⁹ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) ("N.C. State Conf. of NAACP").

²³⁰ See n.196, *supra*.

²³¹ See *UOP Order*; see also *In the Matter of Alabama Power Company, Barry Generating Plant*, Petition No. IV-2021-5 (June 14, 2022).

all five permits to EPA for review in one day in August 2022 and then finalized them on September 20 and 21, 2022.²³² In so doing, ADEM did not follow its normal practice of notifying commenters that the final permits were issued. Although Complainants identified deficiencies in the permit terms and problems with ADEM's permitting process, they were unable to file any CAA Title V objection petitions to those permits due to resource constraints and ADEM's failure to notify commenters of the final permit documents.

Table 7. Timeline of ADEM's Changed Business Practice

Number of Permits Finalized	Dates of ADEM Issuance	Area of the State Where the Facilities are Located
Four final permits	February 2, 2021	Two in Mobile County
Five final permits	September 20 and 21, 2022	Three located in Mobile County
Eight final permits	November 4 to 9, 2022	Five located in Mobile County
Total Permits = 17		Facilities in Mobile County = 10

Third, a review of the five-year permit renewal cycle historical information for the five Permits (initial title V permits and all renewals) shows that ADEM maintained the month and day it had established for the permit renewal cycles it has used since the start of the Title V program for Alabama Shipyard and UOP, however, it modified the permit renew cycles for Plains Marketing, AL Bulk Terminal and Kimberly-Clark. ADEM provided no basis for modifying these three renewal cycles in the permits or Statement of Basis documents. A summary of ADEM's actions are as follows:

- Plains Marketing, ADEM was late in renewing the Permit and did not keep the same issuance, renewal, and expiration dates, instead changing them to renew the permit on November 4, 2022, with an expiration date of **November 3, 2027**.²³³ The expiration dates in the

²³² See n.196, *supra*.

²³³ **Permit No. 503-3013, Plains Marketing**, the initial permit was issued on November 17, 2000, and expired on November 16, 2005. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29745681&dbid=0>. The permit was renewed on November 8, 2005, with an expiration date of November 16, 2010. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29745877&dbid=0>. The permit was renewed on July 19, 2011, and expired on November 16, 2015. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29879094&dbid=0>. The permit was renewed on April 13, 2016, and expired on November 16, 2020. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29993170&dbid=0>. (despite its later issuance date, ADEM did not keep the same five year interval). The permit was renewed on November 4, 2022, with an expiration date of November 3, 2027.

prior four permits had been November 16 in 2005, 2010, 2015, and 2020.²³⁴

- AL Bulk Terminal, ADEM's Permit renewal had the new issuance and effective date of November 4, 2022, however, rather than keep the October 17 expiration date, which ADEM had used on the three prior permit issuances for this facility, it changed the expiration date to **November 3, 2027**.²³⁵
- Kimberly-Clark, although the first three permits issued for this source expired on December 31, ADEM failed to adjust the issuance date for this Permit, instead it was issued and effective on November 9, 2022, with an expiration date of **November 8, 2027**.²³⁶
- Alabama Shipyard, ADEM issued the Permit on November 9, 2022, with an effective date of April 22, 2022, and expiration date of April 22, 2027.²³⁷ The April effective and expiration dates matched the earlier permit renewal cycle.

²³⁴ *Id.*

²³⁵ **Permit No. 503-3035, AL Bulk Terminal** (the initial permit was issued on October 3, 2005, with an effective date of October 18, 2005, and an expiration date of October 17, 2010.) *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29742136&dbid=0>. The issuance and effective date for the renewal was November 23, 2011, with an expiration date of October 17, 2016. *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29885857&dbid=0>. (despite its later issuance date, ADEM kept the same five year interval). The next issuance and effective date was on January 26, 2018, with an expiration date of October 17, 2021). *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=30016582&dbid=0>. (despite its later issuance date, ADEM kept the same five year interval). The next renewal had the new issuance and effective date of November 4, 2022, however, rather than keep the October 17th expiration dates, which ADEM had on the three prior issuances, it changed the expiration date to November 3, 2027. *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104928399&dbid=0>. Furthermore, ADEM staff completed and signed the final Statement of Basis on August 18, 2021, *see* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104924402&dbid=0>, which was more than two months before the final permit was signed by the Chief of ADEM's Air Division.

²³⁶ **Permit No. 503-2012, Kimberly-Clark**, the original permit was issued on January 1, 2004, and expired on December 31, 2008. (this information is from the SOB for the first renewal, the initial permit is not in eFile on doing a search of the permitting file). *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105172384&dbid=0>. The permit was renewed with an issuance and effective date of February 18, 2009, but the expiration date was adjusted to match the initial permit, December 31, 2013. *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29796886&dbid=0>. There is no permit in eFile under the permitting category file, although the *draft* Statement of Basis explains that it was issued on January 1, 2016, and expired on December 31, 2021 (the final SOB is not in eFile in the permitting file). *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105183878&dbid=0>. It was next issued and effective on November 9, 2022, with an expiration date of November 8, 2027. *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104931990&dbid=0>. (ADEM did not adjust the expiration date to match the renewal cycle schedule).

²³⁷ **Permit No. 503-6001, Alabama Shipyard**, the first permit in the eFile permitting category was issued on October 17, 2012, with an effective date of April 23, 2012, the permit expired on April 22, 2017. *See* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=29906081&dbid=0>. The next permit was issued on November 9, 2022, with an effective date of April 22, 2022, and expiration date of

- UOP, ADEM modified the Permit on November 8, 2022, the expiration date remained the same, February 1, 2026.²³⁸

The sequence of events leading to ADEM's issuance of all five Permits in the one-week period. The owners and operators of the facilities submitted permit renewal applications to ADEM at different times, consistent with their respective Permit renewal cycles (different days, months and years).²³⁹ ADEM reviewed the application materials and prepared draft permits and draft Statement of Basis documents. ADEM issued draft versions of these five Permits for public notice and comment over an 18-month period. Therefore, the 30-day public comment windows for each of the five Permits ran during different time periods. Complainants submitted comments on the five Permits at different times. ADEM was required to consider the comments submitted and prepare a draft response to comment document for each of the five Permits. Even though ADEM had issued draft versions of these five Permits for public notice and comment over an 18-month period, the Department decided to deliver the proposed versions of all five Permits, along with their responses to the public comments for each, to EPA for its required CAA Title V review during a one-week period in September 2022.^{240, 241} Since EPA did not issue an objection to any of these five Permits pursuant to CAA § 505(b)(1) during its 45-day review period, ADEM was authorized to issue the final Permits. ADEM issued the final Permits as follows: on November 4, 2022, for AL Bulk Terminal and Plains Marketing; on November 8, 2022, for UOP; and November 9, 2022, for Alabama Shipyard and Kimberly-Clark.²⁴²

April 22, 2027. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104951505&dbid=0>. (ADEM adjusted the effective and expiration dates to track with the renewal cycle schedule). The final SOB is not in eFile. These are the only Title V permits in eFile under “permitting.”

²³⁸ Permit No. 503-8010, UOP, the initial permit was issued on August 15, 2003, with an expiration date of August 14, 2008. (there was no effective date in the permit). See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104469536&dbid=0>. The draft Statement of Basis for the first renewal is dated September 17, 2012 (more than four years after the first permit was due to expire). See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104469538&dbid=0>. The final permit was issued and effective on November 19, 2012, with an expiration date of November 18, 2017. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=31531020&dbid=0>. The permit was renewed with an issuance and effective date of February 2, 2021, with an expiration date of February 1, 2026. See

<http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104455621&dbid=0>. The permit was then modified on November 8, 2022, the expiration date remained the same, February 1, 2026. See <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104940812&dbid=0>.

²³⁹ See generally ADEM's eFile system, available at <http://app.adem.alabama.gov/eFile/>.

²⁴⁰ See Clean Air Act § 505(b), 42 U.S.C. § 7661d(b).

²⁴¹ Based on information provided on the Region 4 AL Permit Database, it appears that ADEM transmitted the Plains Marketing and AL Bulk Terminal permits to EPA on September 15, 2022, and the Kimberly-Clark, Alabama Shipyard, and UOP permits to EPA one-week later on September 22, 2022. See Attach B. at 2, Screenshot from Region 4 Proposed Title V Permit Database (noting that EPA's 45-Day Review period ended for the first four permits on October 30, 2022, and for the second four permits on November 6, 2022).

²⁴² See Attach. A, at 255 (AL Bulk Terminal), 498 (Alabama Shipyard), 676 (Kimberly-Clark), 924 (Plains Marketing), and 1052 (UOP).

ADEM's business practice of issuing 17 Title V permits in three batches identified in the above table shows an undisputed sequence of events,²⁴³ since historically it had processed applications, proposed permits for public comment, submitted permits to EPA for its objection period, and then issued final permits in a staggered fashion. For these 17 permits ADEM deviated from its standard practice and issued them in batches. Under the circumstances involving the Impacted Communities, this shows a "compelling piece of the puzzle" of ADEM's "motivation" of discrimination.²⁴⁴

ADEM's departure from standard practice. Prior to 2020, with the exception of the five Title V Permits that are the subject of this Complaint and 12 other permits issued in two batches, for facilities with draft Title V Permits where Complainants commented, ADEM processed and submitted those permits to EPA, and issued the final permits in a stepwise, sequential, staggered manner. Further evidence of ADEM's departure from its standard practice. Finally, evidence of the staggered manner in ADEM's issuance of permits is seen in EPA Region 4's database of Title V permits.²⁴⁵

The foreseeability of the consequences of ADEM's decision. "[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."²⁴⁶ ADEM has been implementing Title V of the CAA for 22 years, having received final full approval from EPA to implement the program on November 28, 2001.²⁴⁷ On nine prior occasions non-profit organizations, which included Complainant organizations, petitioned EPA on other ADEM-issued Title V permits.²⁴⁸ Thus, ADEM is well aware of the procedures, timing and requirements in the CAA and the implementing regulations for the public to prepare and submit a petition to EPA. Moreover, it was "obviously foreseeable" to ADEM that if it issued multiple permits at the same time, there would be disparate impacts on those interested in evaluating and filing Title V petitions for the five Permits.

Indeed, on the first occurrence of ADEM's business practice to issue Title V permits at the same time, the Petitioners called the change in practice to EPA's attention in their Petition. Notably, the UOP Title V Petition included a detailed footnote identifying the challenge ADEM created in issuing the four permits at the same time, which explained:

²⁴³ *N.C. State Conf. of NAACP*, 831 F.3d at 229, cited in DOJ Title VI Manual, Section VI, at 12.

²⁴⁴ *Id.*

²⁴⁵ See <https://www.epa.gov/caa-permitting/alabama-proposed-title-v-permits>.

²⁴⁶ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979), cited in DOJ Title VI Manual, Section VI, at 15. ("Columbus Bd. of Educ.").

²⁴⁷ 40 C.F.R. Part 70, Appendix A.

²⁴⁸ See EPA Title V Petition Database, available at <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

Departing from its historical practice of transmitting one or two permits at the same time, ADEM transmitted a total of four Title V permits to EPA on the same day, all of which have significant public interest. ADEM generally staggered the public notice and comment schedule for the UOP permit (state public comment period ended October 26, 2020) with the three permits for Alabama Power Company (APC) plants: APC Plant Barry (state public comment period ended October 22, 2020); APC Gaston Steam Electric Generating Plant (Permit No. 411-0005, state public comment period ended July 29, 2020); and APC Greene County Steam Electric Generating Plant (Permit No. 405-0001, state public comment period ended July 29, 2020)). ADEM's staggered schedule allowed the staff person assigned the APC permits and management to process the APC's permits sequentially. Rather than continue the sequential processing for the four permits, ADEM elected to transmit all four of these permits all on the same day. ADEM's simultaneous submittals of the draft Title V permits meant EPA's 45-day review and objection clock ran simultaneously. On the day after EPA's deadline to object, ADEM's Director issued all four permits. The result of ADEM's departure from its historical practice set a single deadline - April 5, 2021 - for the public to file petitions on any of the four permits. *See*, Attachment 9 (for the 94 permits in EPA's database, ADEM rarely submits more than one or two permits to EPA on the same day; when ADEM has simultaneously submitted permits on the same day, none of ADEM's other simultaneous submittal and issuance dates are for permits with the level of public interest for the four permits it issued on February 2, 2021).²⁴⁹

Thus ADEM has direct experience and knowledge of the timing and due dates for petition filing and it was obvious to the Department the disparate impacts it creates in issuing multiple Title V permits on the same day (or over a one-week period) on those interested in preparing and filing a petition. Given the detailed analysis required for a successful petition ADEM clearly appreciates the level of effort needed to prepare a petition for one facility and one Title V permit, in comparison the level of effort more multiple permits.

Furthermore, prior to filing the original May 2023 Complaint, Complainant GASP specifically reached out to ADEM via letter and asked that the Department withdraw the five Title V Permits from EPA and resubmit them in a phased manner in order to facilitate meaningful public participation by Petitioners.²⁵⁰ ADEM did not withdraw any of the five Permits. Indeed, ADEM failed to respond to GASP's letter at all. ADEM's adherence to its new business practice with full knowledge of the predictable effects of such adherence shows discriminatory

²⁴⁹ UOP Petition, at 6, n.30, (April 2, 2021), *available at* <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

²⁵⁰ Attach. B, at 7.

intent.²⁵¹ participation in the permitting process by Petitioners, other organizations in Alabama, and their members.²⁵² GASP requested that ADEM respond to this request within five business days, given the pending petition deadlines, but ADEM neither acknowledged receipt of nor responded to GASP's letter.

The history of discriminatory conduct. As discussed above, on two prior occasions ADEM transmitted multiple permits that had received adverse comments from Complainants' organizations to EPA in groups. While the Organizations had resources to prepare and submit comments on the permits during the sequentially issued public notice periods, the Organizations lacked resources to challenge the "batches" of permits at the same time. Thus, ADEM's action to issue the permits in this manner creates disparate impacts on the Commenters because they could neither evaluate nor prepare and file petitions on all the permits included in each of the two batches.

2. Discriminatory Treatment by ADEM's Pattern and Practice of Lack of Public Participation

The historical background. As discussed in Section IV.A, analyzing the historical background in the City of Mobile generally and as related to the Impacted Communities in particular, the history of race discrimination and the pattern and practice of ADEM's lack of public participation are particularly relevant and important considerations in this subclaim.²⁵³ Indeed, the incident of ADEM issuing five Permits over a one-week period, is just one of a multitude of ADEM's failure to provide public participation opportunities for the Impacted Communities. The examples provided below establishes a pattern and practice of discriminatory action in ADEM's permitting actions occurring within the two years prior to issuance of the five Permits, as well as other continuing and emerging ADEM actions.

a) ADEM's Issuance of Five Permits over Two Days in September 2022

The first example includes the five permits that ADEM provided for public comment over a fourteen month period (from March 2021 to May 2022) where they received comments from the Complainants raising concerns about the pollution impacts on the Impacted Communities they represent. ADEM similarly delivered all five permits to EPA for review in one day in August 2022 and then finalized them on September 20 and 21, 2022.²⁵⁴ Complainants identified problems with those permits and ADEM's process, but they were unable to file any CAA Title V objection petitions to those permits due to ADEM's failure to notify commenters of

²⁵¹ *Columbus Bd. of Educ.*, 443 U.S. at 464-65, cited in DOJ Title VI Manual, Section VI, at 15.

²⁵² See Attach. B, at 7. (GASP Withdrawal Request Letter.)

²⁵³ *N.C. State Conf. of NAACP*, 831 F.3d at 233 (4th Cir. 2016).

²⁵⁴ See n.196, *supra*.

the final permit documents and resource constraints. Importantly, the lack of ADEM taking the time to email and notify the commenters that it had responded to the comments they submitted and that ADEM issued the final permit, weighed heavily on the commenter's ability to file petitions. Communicating with the interested public is essential, indeed EPA has recognized that recipient agencies should "encourage effective public participation and outreach."²⁵⁵ ADEM's decision to not share the final response to comment and permit with the commenters was not an "outreach" activity. Furthermore, not communicating the finality of its actions meant that effective public participation was thwarted. ADEM did not tell commenters about its final actions, which was essential information for commenters to know so they could evaluate whether they wanted to file petitions with EPA. Moreover, ADEM's decision to not share the news about its final decisions meant that it did not provide for a "inclusive and meaningful" public participation process for the five permits issued over the two-day period in September 2022.²⁵⁶

ADEM's departure from standard practice. Despite the fact ADEM had generally notified commenters in the past, they changed their practice and did not do so for the five permits issued over the two-day period in September 2022.

The foreseeability of the consequences of ADEM's decision to not notify commenters about its issuance of the five permits in September 2002. As discussed elsewhere, ADEM has been implementing this program for more than twenty years and knows how important it is for the public to learn about the final actions the Department takes in a timely fashion. Indeed, the CAA specifies deadlines for filing a petition challenging the final permits issued by ADEM, and if that deadline is missed, the commenters have lost their chance to use that part of the process. The organization that commented on the September 2022, permits had filed Title V petitions with EPA in the past. Thus it was reasonable for ADEM to assume that the commenters would evaluate and potentially file petitions for one or more of the five permits. The commenters submitted lengthy and detailed comments expressing serious and significant concerns about the flaws in the permits. Indeed, the comments on the Hog Bayou facility permit were of keen interest to the Complainants because that facility is located within Africatown. Similarly, the W&T Offshore facility permit is also of concern due to proximity to the Mobile airshed and the fact that extracted resources from that facility could travel through the Impacted Communities, releasing emissions. Based on the comments it was foreseeable to ADEM that if the concerns were not addressed that the commenters would appeal to EPA and file a petition. Given ADEM's terse responses to the comments they knew it was likely commenters would decide to file petitions. Finally, it was most certainly foreseeable to ADEM that if they did not share the news about the final documents with the commenters, particularly since the key staff person working on these issues had left the non-profit organization

²⁵⁵ 65 Fed. Reg. at 39,657.

²⁵⁶ *Id.*

and the position had not yet been filled, ADEM could escape petitions on these five permits.

The negative impact of ADEM's decision not to notify commenters. ADEM's decision to forego notify commenters of its final permitting decisions on the batch of permits had devastating negative impact: the commenters did not know the final actions had been taken and lost their ability to petition EPA. As discussed elsewhere and in the comment letter, emissions from the Hog Bayou facility are of concern. Because ADEM failed to notify commenters of its decision, the commenters time, effort and resources spent in commenting on the five facilities was in effect lost, at least at that stage of the process.

b) ADEM's Dismissive Response to Comments Documents

The second example is ADEM's repeatedly offered dismissive responses to public comments filed by Complainants, which failed to meaningfully engage with substantive comments. Summarized in the table below is a tabulation of the comments made by Complainants and the number of times ADEM amended its action in response to the comments, including comments of the need for disparate and cumulative analysis.

Table 8. ADEM's Consideration of Comments Submitted by Complaints Since May 2023

ADEM's Proposed Action	Number of Comments Submitted by MEJAC, GASP and Others	Number of Times ADEM Amended Its Proposed Action in Response to Comments
Proposed Consent Order for Hosea O. Weaver & Sons, Inc., Mobile County, Alabama, for two violations of failure to control particulate emissions from the baghouse stack and one violation of failure to report the test results, Air Permit No. 503-8069-X001	11 comments ²⁵⁷ 27 pages of comments & 9 exhibits	0 ²⁵⁸ 3 page ADEM response to comments

²⁵⁷ Comments on H.O. Weaver & Sons, at 5, 6 (June 9, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105132540&dbid=0>.

²⁵⁸ ADEM's Response to Comments (June 27, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105132208&dbid=0>.

Draft Major Source Operating Permit for the DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility, Air Permit No. 503-8085	4 comments ²⁵⁹ 13 pages of comments & 3 exhibits	0 ²⁶⁰ 4 page ADEM response to comments
Comments on ADEM's State of Alabama Ambient Air Monitoring 2023 Network Plan	6 categories of comments ²⁶¹ 25 pages & 9 attachments	0 ²⁶² 1 page ADEM response to comments

As seen in the table above, for three actions – the proposed Consent Order for the H.O. Weaver & Sons asphalt plan, the Mobile Bay Gas Title V permit, and ADEM's proposed annual ambient monitoring plan – ADEM failed in all actions to meaningfully engage in the comments. While the length of the agency's response does not need to equal the number of pages submitted, here there is such a stark contrast between the number of pages submitted in the comments compared to the length of the response show a lack of meaningful consideration. As discussed elsewhere in this Complaint, ADEM also fails to identify which of Commenters' comments each of the responses address, which leads to general confusion in analyzing the response to comment documents.

ADEM announced the opportunity for comment on all these actions, and Commenters submitted detailed comments of concern. For the three actions that were finalized in in the above Table, ADEM failed to make any changes to its original proposals. ADEM simply finalized what it proposed. Furthermore, given the very short amount of time from the close of public comment period to issuance of the final permit/action, one can see why the response are so short – not much time was been spent in analyzing and preparing responses. From the terse and incomplete responses, it is not even clear that ADEM read the comments and considered them. Furthermore, responses lack the details necessary for the public to

²⁵⁹ Comments on the Proposed Title V Permit for DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility, at 10 (June 30, 2023). (citation omitted), *available at* [https://mosaiceps.epa.gov/sites/default/files/FRU/23.08.21%20-%20MEJAC%20&%20GASP%20DCP%20Gas%20Plant%20\(Air%20Permit%20No.%20503-8085\)%20Public%20Comment%20&%20Exhibits_0.pdf](https://mosaiceps.epa.gov/sites/default/files/FRU/23.08.21%20-%20MEJAC%20&%20GASP%20DCP%20Gas%20Plant%20(Air%20Permit%20No.%20503-8085)%20Public%20Comment%20&%20Exhibits_0.pdf).

²⁶⁰ ADEM's Response to Comment on the DCP Operating Company Title V Permit, at 4 (Dec. 6, 2023), *available at* <https://mosaiceps.epa.gov/sites/default/files/FRU/DCP%204REN%20MSOP%20Final%20Response%20to%20Comments.pdf>.

²⁶¹ Attach. D, at 231.

²⁶² Attach. D, at 285.

evaluate the bases for ADEM's decisions. The response are generally unclear. Inherent in the public notice and comment process is that the agency meaningfully consider them. Meaningful consideration of comments is particularly important where the agency's decisions have harmful effects on minorities, which is the situation here. Moreover, agencies must respond to significant comments. The importance of ADEM meaningfully engaging with Complainants comments is underscored by the fact that ADEM's inaction has much more harmful effects given that the comments – raising the concerns of the Impacted Communities composed of residents of a protected class – were neither heard nor were their significant concerns addressed.

c) ADEM's Failure to Adequately Respond to Comments Regarding ADEM's Annual Air Quality Monitoring Plan

Interactions related to the State of Alabama Ambient Air Monitoring 2023 Network Plan also highlight the dismissive nature of ADEM's consideration of Complainants' public comments, especially those seeking to address disparate impacts of air pollution on the Impacted Communities. MEJAC, GASP and others submitted 23-pages of comments to ADEM regarding the 2023 Draft Network Plan to address its CAA air quality monitoring obligations.²⁶³ The comments raised various deficiencies in and recommendations to improve the Plan, including improvements to better understand disparate air pollution impacts on overburdened communities in Africatown and Mobile County. Despite the requirements for states to address public comments on air monitoring plans, ADEM provided a one-page response to comment document that failed to meaningfully engage and respond to the public comments.²⁶⁴ ADEM made no changes to proposed plan in response to the comments. Accordingly, MEJAC, GASP and others then raised their concerns with the monitoring plan and ADEM's lack of response to EPA, arguing that EPA should not approve the plan because it was incomplete. That EPA request also explained that a key deficiency in the air monitoring plan was ADEM's failure to respond to and engage with the MEJAC and GASP comments regarding the need for ambient monitoring in Mobile County to assess air pollution impacts in the Africatown environmental justice community. For example, while our comments requested air monitors in the Africatown community in light of the more than 40 air pollution sources operating in and near the community, the lack of information regarding the mix and quantity of those sources' air pollution, and the absence of any air monitors in that area, ADEM's response simply made a conclusory statement that there are no areas in Alabama that require additional monitoring. ADEM did not even mention Africatown, let alone address our specific concerns regarding air quality in the community. EPA subsequently reviewed the Plan and requested that ADEM "elaborate on its responses to three issues" addressed in those public comments, which ADEM provided in a 2-page

²⁶³ Attach. D, at 231.

²⁶⁴ Attach. D, at 285.

supplemental response to comments that *it provided only to EPA* and which Complainants only received when EPA sent it to them.²⁶⁵

While EPA found ADEM's response to comments incomplete, EPA just required the Department to provide additional information and analysis to EPA. EPA ultimately approved ADEM's annual monitoring plan.²⁶⁶ There are no new monitors planned to track ambient air quality conditions for the Impacted Community. ADEM's failure to meaningfully engage with the public comments shows continuity in their lack of public participation for the Impacted Community and is discrimination. Moreover, the fact that neither ADEM nor EPA developed plans to site new monitors to track ambient air quality for the Impacted Communities means there continues to be a lack of information regarding cumulative ambient air impacts from the more than 40 facilities in and surrounding Africatown and the other Impacted Communities (as well as the hundreds of permitted sources in Mobile County), which is further evidence of discrimination.

d) ADEM's Refusal to Meet with Complainants Regarding Ongoing Noncompliance Issues at the H. O. Weaver & Sons Asphalt Plant – The Source of Priority Concern to MEJAC – and Failure to Meaningfully Engage with and Respond to Complainants' Comments on the Enforcement Consent Order for the Facility

This is an example of ADEM's lack of public participation and the lack of cumulative impact analysis. As a result of numerous complaints from Africatown residents, ADEM inspected the asphalt plant owned and operated by H. O. Weaver & Sons, Inc. located at 1908 Bay Bridge Cutoff Road in Mobile, Alabama 36610. ADEM's inspection resulted in its Proposed Order to impose a civil penalty of \$24,000 on the facility for two violations of failure to control particulate emissions from the baghouse stack and one violation of failure to report the test results within 15 working days.²⁶⁷ Indeed there were holes in the baghouse collection system that the facility failed to identify and repair, which caused particulate and dust to leave the property and travel to the neighboring residents' properties, creating significant adverse disparate impacts. MEJAC and GASP submitted 27-pages of comments arguing for a broader consent order with a higher penalty amount and other relevant changes to address the facility's impact on Africatown residents, including the following:

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Attach D, at 287 (Alabama Department of Environmental Management, In the Matter of Hosea O. Weaver & Sons, Inc. Mobile, Mobile County, Alabama Facility ID No. 503-8069-X001, [Proposed] CONSENT ORDER NO. ____.)

- ADEM failed to and must consider the community of Africatown, and therefore its action is subject to the Civil Rights Act, which ADEM did not consider
- ADEM failed to consider the public health impacts of these violations (and other violations not-yet-assessed) as required by law, which is especially egregious given that the emissions from this facility impact the surrounding Africatown environmental justice community that is already disproportionately impacted by air pollution and other environmental hazards
- The facility must apply for a title V major source permit because its permit allows for SO₂ emissions at 246.8 tons per year (TPY), well over the 100 TPY threshold for Title V
- Recommending a more fulsome joint inspection of the facility with EPA inspectors, given the seriousness of health and environmental impacts²⁶⁸
- Permit provisions for real-time fenceline monitoring of particulate matter, VOCs, SO₂, odors and hazardous air pollutants to ensure continuous compliance and provide the environmental justice community with data of off-property air pollution violations
- Strongly urging the Facility to curtail operations until a complete joint inspection by ADEM and EPA is conducted, all emissions are controlled (*e.g.*, particulate matter, VOCs, SO₂, hazardous air pollutants and odors), and publicly available real-time fenceline monitoring is in place.²⁶⁹

Importantly because ADEM was required to determine if the alleged violations impact the health of the surrounding communities and the Permittee continued to allow emissions from the asphalt plant to escape the property boundary while the Proposed Consent Order was on public notice, MEJAC and GASP's comment letter specifically "request[ed] a call with ADEM the week of June 19th to discuss our comments and understand ADEM's next steps." MEJAC and GASP made this

²⁶⁸ Indeed, EPA inspectors conducted such joint inspections in 2021, including the use of Geospatial Measurement of Air Pollution (GMAP) mobile monitoring unit. *See* EPA Region 4, Air Enforcement Branch, Inspection Report, attached to cover letter from Steve Rieck, Environmental Scientist, North Air Enforcement Section, to Mr. Yojane Valera, Terminal Manager, Center Point Terminal Chickasaw, LLC (June 16, 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104675888&dbid=0&cr=1>. "The GMAP is a mobile air monitoring vehicle with analyzers for methane, benzene, toluene, ethylbenzene, xylene, and other VOCs. The GMAP allows for real-time monitoring and mapping of pollutants while the vehicle transverses the facility." *id.* The GMAP was operated to measure ambient levels of various pollutants. The EPA inspector also used an Optical Gas Imaging (OGI) camera to survey storage tank operations, truck loading to monitor for fugitive leaks of VOCs and HAPs. *id.* Although the compliance inspection inspected actual emissions released to the ambient air using the OGI camera, most of the ADEM permits use generic AP-42 emission factors to report emissions and demonstrate compliance, which have not been demonstrated to represent the emissions from the particular facility.

²⁶⁹ Comments on H.O. Weaver & Sons, at 5, 6 (June 9, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105132540&dbid=0>.

meeting request because the Proposed Consent Order failed to address ongoing noncompliance at the facility. While ADEM sent a preliminary email regarding the requested meeting, it failed to follow-through, schedule and have a meeting with MEJAC and GASP.²⁷⁰ ADEM issued the final Consent Order without meeting with MEJAC and GASP. The violations at the facility continue to plague the neighborhood, which were the specific issues MEJAC and GASP wanted to address with ADEM in working collaboratively via the phone call on a path forward to bring the facility into compliance with all requirements.

In addition, ADEM finalized the consent order without making any changes in response to the comments or conducting any outreach to see if the surrounding community suffered any impacts during the violations.

Offensive emissions from Weaver's asphalt plant continue to adversely affect the Africatown residents' health, local environmental conditions, and quality of life. Indeed, on October 22, 2023, an adjacent neighbor made a complaint to ADEM's Web Complaint system, explaining that the odors from the Weaver asphalt plant were "inside" the resident's home and he and his family were forced to wear masks inside.²⁷¹ According to ADEM's complaint record, ADEM waited unreasonably long – five days – to inspect the Weaver asphalt plant. The five-day period was long after the offensive episode and the inspector could not verify the overwhelming odors and identify the cause(s) and needed corrections.²⁷² Moreover, the lack of ADEM's ability to resolve 20-years of similar complaints dust, particulate matter and offensive odors regarding the Weaver asphalt plant shows that ADEM's permit program continues to authorize and allow for odors and other pollution from this facility that continue to this day to adversely impact the community.

e) ADEM's Decision to Provide Merely 15-Days for Public Comment on the Synthetic Minor Operating Permit for MEJAC's Source of Priority Concern (H. O. Weaver & Sons Asphalt Plant)

ADEM has broadened the discriminatory practices for facilities that are in and near the Impacted Communities. In addition to issuing final permits in batches, it is proposing unreasonable public comment periods for draft permits in two ways.

²⁷⁰ Attach. D, at 300.

²⁷¹ ADEM Complaint No. 5S-002YL6X77 ("It's about 11:00 pm October 22, 2023, the odor is inside my house tonight, my family is wearing masks inside, I am praying that this complaint gets some type of attention, not only for me, but for the community of Africatown magazine point, Alabama 36610.; Observed: It been twenty years dealing with this odor from this asphalt plant." (October 22, 2023 11:28 PM, Received via Web By Web Complaint), *available at* <https://prd.adem.alabama.gov/complaints/5S-002YL6X77>.

²⁷² ADEM's comments indicate that "Operators at the plant confirmed running at night 22 October 2023. There was no unusual odor present during my visit, only a mild characteristic asphaltic odor within the plant." *Id.*

The first discriminatory practice is seen in this example of ADEM's public participation opportunity for its proposed permit action for the Weaver asphalt plant. After having already received notice of the significant interest of MEJAC and the surrounding Africatown community in the permitting and operation of the H. O. Weaver & Sons facility during the enforcement Consent Order activities described above, ADEM completely disregarded the ability of the Africatown community to participate when it published its public notice announcing the opportunity to comment on a new permitting action. ADEM announced the start of public comment on a proposed Synthetic Minor Operating Permit at the end of the day on November 21, 2023, which was two days before the Thanksgiving holiday. ADEM's Public Notice explained that comments are due "15 days following publication" of the notice. As MEJAC and others had expressed to ADEM in the prior comments on the Hosea O. Weaver & Sons, Inc. Consent Order, that this facility and its air pollution emissions and impacts are of priority concern to MEJAC.²⁷³ Therefore, the organizations were surprised that ADEM announced the incredibly short 15 day comment period, which included days over the Thanksgiving holiday weekend.

The short comment period of just 15 days was not adequate for review and comment on ADEM's draft air permit for the Weaver asphalt plant. ADEM's public participation opportunity did not provide for a public hearing so that the impacted residents could express their concerns. Therefore, under MEJAC's leadership, MEJAC, Mobile Alabama NAACP, the Clean Healthy Educated Safe and Sustainable Africatown (Africatown~CHESS) organization, the Mobile County Training School Alumni Association (MCTSA), the Mobile Center for Fair Housing, and GASP submitted an eight-page letter to ADEM formally requesting both a Public Hearing during the window of January 16-31, 2024, to be held at the Robert Hope Community Center located in the historic Africatown community (and not another location more than two miles from Africatown where ADEM had historically held requested hearings for facilities in Africatown, including the UOP facility that is one of the permits included in this Complaint) and an extension of

²⁷³ See e.g., Comments from MEJAC's President Ramsey Sprague and GASP's Executive Director Michael Hansen to Ronald w. Gore, Chief, Air Division, ADEM, "ADEM's Proposed Consent Order for Hosea O. Weaver & Sons, Inc., Mobile County, Alabama, for two violations of failure to control particulate emissions from the baghouse stack and one violation of failure to report the test results, Air Permit No. 503-8069-X001", (June 9, 2023) (with copies to the following: Marilyn E. Elliott, Nondiscrimination Coordinator, Alabama Department of Environmental Management; Jeanne Gettle, Acting Regional Administrator, EPA Region 4; Brian Holtzclaw, Section Chief, Environmental Justice and Children's Health Section, Strategic Programs Office, Office of the Regional Administrator, EPA Region 4; Carol Kemker, Director, Enforcement Compliance Assurance Division, EPA Region 4; Caroline Freeman, Director, Air and Radiation Division, EPA Region 4; Michael Sparks, Chief, Air Permits Section, EPA Region 4; Suong Vong, Team Lead, External Civil Rights Compliance Office, EPA Headquarters; JJ England, Monique Hudson, and Debashis Ghose, Office of Regional Counsel, EPA Region 4; Sara L. Laumann, Laumann Legal LLC, Counsel to MEJAC; and Kristi Smith, Smith Environmental Law), Counsel to GASP, <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105132540&dbid=0&cr=1>.

the comment period for the draft permit until February 29, 2024.²⁷⁴ These requests and comments were echoed by Africatown's Clotilda Descendants Association, the Mobile Baykeeper organization, and additional Africatown residents, as well. ADEM has indicated it will schedule a hearing and allow for more time to comment. However, it was unreasonable for ADEM to propose such a short comment period as an initial matter, especially having known the historical and recent community interest in it, and Complainants and other nonprofit groups should not be burdened with making these requests.²⁷⁵ Africatown residents' health, local environmental conditions, and quality of life have been seriously impacted by emissions from the Weaver asphalt plant since the plant started operating more than 25 years ago. ADEM's initiation of the permitting process and 15-day public participation opportunity in its public notice announcement ignored that interest and sought to limit the meaningful public participation of the residents of color in the City of Mobile's Africatown Planning Area, especially as several of those 15 days fell during the holiday period.

f) ADEM's Decision to Create More Overlapping Comment Periods for Sources in Africatown in Publishing Public Notices on November 21 and 22, 2022 (for two Facilities) and Publishing Two More Notices on December 15, 2023 (for two Facilities)

ADEM's second new practice is creating overlapping public comment periods for facilities in the Impacted Communities and in Mobile County that are of concern to Complainants. For example, in the days before the 2023 Thanksgiving holiday, on November 21, 2023, ADEM announced the start of public comment for two sources in Africatown: the Weaver asphalt plant discussed above, and a proposed enforcement Consent Order for the Scotch & Gulf Lumber LLC (aka Canfor) plant on November 22, 2023. The proposed enforcement Consent Order for the Scotch & Gulf Lumber plant addresses violations of its air permit when an air pollution control device became disabled in December 2022 and April 2023.²⁷⁶ ADEM's public participation opportunity had a deadline for comments on the proposed enforcement Consent Order for Scotch & Gulf Lumber LLC of December 22, 2023. As seen in Figure 7 above, the Scotch & Gulf Lumber facility is located in the City of Mobile's Africatown Planning Area. Under MEJAC's leadership another letter was drafted to request an extension, and MEJAC reached out to other community groups to sign

²⁷⁴ Attach. D, at 302.

²⁷⁵ While ADEM's regulations may only require the 15 day comment period, that is a minimum. Given the historical background of events at this facility and the extreme level of public interest (including the recent detailed comments on the proposed enforcement Consent Order) over the life of this facility (more than 20 years), ADEM knows there is keen interest from the community in controlling emissions. Furthermore, ADEM knows that merely providing 15 days for comment on a proposed permit is not enough time for meaningful review. ADEM has a history of discriminatory conduct on this facility as discussed above in its failed actions and public participation activities.

²⁷⁶ See <https://adem.alabama.gov/newsEvents/notices/nov23/pdfs/11gulf.pdf>.

on. MEJAC sent the letter to ADEM requesting an extension on the public participation comment period for Scotch & Gulf Lumber proposed enforcement Consent Order until January 31, 2024, to allow a thorough review of all the available documentation of the facility's permit and pollution compliance history to put the incident into appropriate context.²⁷⁷ As MEJAC's letter to ADEM explained, Africatown's (and other community's) experience has been lacking in previous ADEM Consent Orders drawn for other area polluting facilities like the Weaver asphalt plant, Evonik,²⁷⁸ and others. On December 18, 2023, ADEM modified its public participation plans and granted until January 31, 2024, for comments from the groups that requested more time.²⁷⁹

Then, on December 15, 2023, ADEM published two more public notices regarding significant modifications to the Title V permits for two facilities with permits covered by this Complaint, the AL Bulk Terminal²⁸⁰ and Kimberly-Clark.²⁸¹ Thus, ADEM's notices created an overlapping public participation review period of 30-days and deadline for comment of February 16, 2024, for both permits. ADEM is aware from the public comments, the Title V petition to EPA, and other communications, that emissions from these facilities are of significant concern to the Impacted Communities. Moreover, ADEM is also aware of the challenges to meaningful public participation it imposes on the Impacted Communities when the Department proposes overlapping comment periods. ADEM's public notices announcing these proposed actions explain that these modifications are in response to the EPA Administrator's Title V Order, which means ADEM's proposed actions are of significant interest to Complainants. Once again ADEM's overlapping public comment periods are evidence of discriminatory treatment adversely affecting the

²⁷⁷ Attah. D. at 848 (Extension request for Scotch).

²⁷⁸ Comments on Evonik, (April 19, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105087144&dbid=0>; ADEM Response to Comments on Evonik, (May 16, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105101246&dbid=0>.

²⁷⁹ Attach. D, at 313. It does not appear ADEM has a written outreach plan for the Impacted Communities.

²⁸⁰ Alabama Bulk Terminal, Blakeley Island Terminal, Facility / Permit No. 503-3035, Public notice, *available at* <https://www.adem.alabama.gov/newsEvents/notices/dec23/12alabulk.html>; *see also* Alabama Bulk Terminal's Application, (dated Oct. 13, 2023, uploaded to ADEM's eFile system on Oct. 20, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105244542&dbid=0&cr=1>; *see also* ADEM's Draft Significant Modification to MSOP No. 503-3035, *available at* <https://adem.alabama.gov/newsEvents/notices/dec23/pdfs/12ala-draft.pdf>; *see also* ADEM's [draft] Statement of Basis for the Significant Modification to MSOP No. 503-3035, *available at* <https://adem.alabama.gov/newsEvents/notices/dec23/pdfs/12ala-basis.pdf>.

²⁸¹ Kimberly-Clark Corporation, Facility / Permit No. 503-2012, Public notice, *available at* <https://www.adem.alabama.gov/newsEvents/notices/dec23/12kimclark.html>; *see also* ADEM's Draft Significant Modification to MSOP No. 503-2012, *available at* <https://adem.alabama.gov/newsEvents/notices/dec23/pdfs/12kcc-draft.pdf>; *see also* ADEM's [draft] Statement of Basis for the Significant Modification to MSOP No. 503-2012, *available at* <https://adem.alabama.gov/newsEvents/notices/dec23/pdfs/12kcc-basis.pdf>

Impacted Communities. ADEM's proposed permit actions create a burden on the Complainants' and others to request yet additional extensions to the comment period. Despite being fully aware of the challenge publishing two notices on the same day would pose to the Impacted Communities, ADEM proposed the following, as shown in the below table.

As ADEM was aware when it decided to issue these four public participation comment periods that overlap, those four opportunities would add to three existing deadlines the Impacted Communities face. ADEM's decision meant it has created a new business practice to discriminate against the Impacted Communities via the Department's overlapping public participation plans.

Table 9. Public Participation Comment Periods for Facilities of Interest to Communities in Mobile County

Deadline	Description
November 29, 2023 (extended to December 11, 2023)	Deadline for comments on the Outokumpu Stainless USA, LLC Prevention of Significant Deterioration Permit for the proposed expansion to their existing stainless steel mill, Facility No. 503-0106. Initial deadline was November 29, 2023, ADEM refused to grant the request for an extension until January 12, 2024, requested by Complainants. ADEM granted merely 11 days, until December 11, 2023. <i>See</i> discussion below.
January 9, 2024	Deadline for a Title V Petition due to EPA's Administrator on ADEM's Major Source Operating Permit issued to DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility, Air Permit No. 503-8085
December 21, 2023 (Mid to Late February 2023)	Deadline for comments and the public hearing date on the synthetic minor operating permit for the Weaver asphalt plant. ADEM granted extension made at the request of Complainants to mid to late February 2024. ²⁸²

²⁸² MEJAC's representative called ADEM on December 15, 2023, to find out the dates ADEM selected. As of one-week later, December 22, 2023, MEJAC had not heard from ADEM.

g) MEJAC was Prohibited from Commenting: ADEM Failed to Grant MEJAC Adequate Time to Prepare Comments and Engage Its Technical Experts in the Highly Complex Proposed Clean Air Act Permit for the Outokumpu Stainless USA, LLC

The third business practice ADEM has developed is to fail to grant the time requested for public review of permits, indeed not even coming close to what was asked. On November 27, 2023, MEJAC submitted a letter to ADEM requesting that it extend the public comment period on ADEM's proposal to allow a significant expansion of existing steel mill operations at Outokumpu Stainless USA, LLC from November 29, 2023, to January 12, 2024. MEJAC's letter explained the reasons for ADEM modifying its public participation plan and the extension request as follows. First, MEJAC noted that the proposed permit package is technically and legally complex, will require significant time to review, and will include engagement with outside experts to support MEJAC's analysis. MEJAC sought to engage modeling and engineering experts to address the more than 16 new emission sources and related pollution from the project, which ADEM described as follows:²⁸³

The expansion will consist of an additional mixed annealing and pickling line ("MAPL") with degreasing (LA43), a 143 MMBtu/hr continuous annealing furnace (LA44), shot blasting operations with a baghouse (LA45), sodium sulfate pickling (LA46), mixed nitric and hydrofluoric acid pickling (LA47); an acid regeneration plant ("ARP") for the mixed nitric and hydrofluoric acid from the MAPL with iron oxide removal and storage (LA71) and acid regeneration line with 10.75 MMBtu/hr burners (LA72); a dual-line steckel mill with two 24 MMBtu/hr holding furnaces (LA21 & LA22), two 305 MMBtu/hr walking beam furnaces (LA23 & LA24), two roughing & finishing mills with a single stack (LA25), and two steckel coiler furnaces with 20.8 MMBtu/hr burners (LA26 & LA27); new 6 MMBtu/hr burners to the meltshop hotbox (LO2A) and an additional 10 MMBtu/hr ladle treatment stand (LO2B) to be controlled by the existing AOD baghouse (LO2); a new 30 MMBtu/hr passive annealing furnace (LO41B); a new 25 MMBtu/hr slab holding furnace (LO42B) to be routed to the existing stack (LO11); and an additional cold rolling mill (LO51).

Second, MEJAC explained that several of the experts that would support MEJAC's analysis of this proposed permit are engaged in significant cases with filing deadlines during ADEM's comment period. Third, MEJAC explained that ADEM's late November comment deadline falls immediately after the Thanksgiving holiday, and several members of the team reviewing this proposed permit planned holiday time away from their homes with family in other states. Fourth, MEJAC explained members of the team reviewing this package also have vacations planned at the end of December. MEJAC noted the need to review the proposed permit carefully since the substantial new emissions from the proposed expansion were a

²⁸³ ADEM Preliminary Determination at 2, available at <https://adem.alabama.gov/newsEvents/notices/oct23/pdfs/10outo-predet.pdf>.

serious concern to MEJAC.²⁸⁴ Finally, MEJAC explained it planned to use experts to assist in the review and needed additional time to obtain and retain those experts. Specialized experts were needed given the highly-complex proposed permit package.

ADEM's response to the request was to modify its public participation plan and grant just 11 additional days to file comments, until December 12, 2023, which is seen below:²⁸⁵

Good morning,

The Department held a public hearing last night to accept oral comments/testimony regarding the proposed Outokumpu PSD permits. There were no members of the public in attendance. However, based solely on your request, the Department has agreed to accept public comments concerning these permits until 5:00 p.m. on December 11, 2023.

Please acknowledge receipt of this email, and please let me know if you have any questions.

While this steel mill is not located in Africatown, its proximity in north Mobile County, the significant increase in emissions authorized by the proposed permit, and ADEM's permitting process (including the decision to undertake permitting authorizing significant new emissions during the holiday period) are nevertheless of concern to MEJAC's members, including those who have friends and family near the steel mill. MEJAC is concerned that ADEM's authorization of construction of new sources and new emissions in the Mobile County airshed will further worsen ambient air quality, which is of serious concern because neither ADEM nor EPA have sited adequate ambient air quality monitors to support assertions that Mobile County is in attainment for all of the NAAQS pollutants. In particular there are no monitors representative of ambient air quality in the Impacted Communities. It is well understood that new emissions from the more than 16 new emission sources at the steel mill could contribute to not only localized disparate adverse impacts for the minority residents that live near the mill, but also contribute disparate adverse impacts for the minority residents across Mobile County. The 11 additional days ADEM provided were simply not enough for MEJAC and its experts to undertake the detailed review explained in the extension

²⁸⁴ Attach D, at 310.

²⁸⁵ Attach D, at 311. Notably, ADEM scheduled a hearing on its proposed PSD permit. We are not aware of any specific public outreach ADEM conducted to inform the affected minority community (besides using its regular email notification). Thus it is not a surprise that no members of the public were in attendance.

request and comment as needed.²⁸⁶ ADEM's unreasonable decision to not provide enough time means MEJAC and its coalition members, including Africatown residents, were once again prohibited from meaningfully engaging in a permitting process that would authorize 16 new emission units and their related pollution in Mobile County. ADEM's decision to only provide 11 additional days is also evidence of discrimination against the adjacent minority community impacted by emissions from the new construction permit.

h) ADEM's Failure to Timely Provide the Final Title V Permit and Final Response to Comment Document to the Public for the DCP Operating Compressor Station

Another business practice ADEM is now using is to delay issuing the final Title V permits and related documents well after EPA's 45-day review period had ended, which cuts into the 60-days the public has to review and file a petition with EPA. In September 2023, MEJAC and GASP submitted comments to ADEM on its proposed renewal of the Title V operating permit for the DCP Operating Compressor Station in Mobile County.²⁸⁷ It appears that ADEM submitted the Title V permit to EPA shortly thereafter, and that EPA did not object to ADEM's issuance of the permit. Thus, under statutory deadlines created in the CAA, the deadline for MEJAC and GASP to file a Title V Petition with the EPA Administrator requesting that he object to ADEM's issuance of the permit is 60 days after the end of EPA's opportunity to object, or January 7, 2024.²⁸⁸ The time period does not start when ADEM issues the final permit. Therefore, MEJAC's representatives had been actively tracking EPA Region 4's Title V Permit Database as well as ADEM's eFile, which are the locations where ADEM's final Title V permit and response to comment document will be uploaded and available to the public. Historically, ADEM issued these documents the day or shortly after the end of EPA's review and objection period. Since the public has 60 days from the end of EPA's review period to file a petition with EPA, time is of the essence. Since ADEM did not follow its business practice on this facility, on November 29, 2023, MEJAC's representative reached out to ADEM's general email for submitting comments to

²⁸⁶ MEJAC's concerns for the residents of the minority community members were heightened in light of the prior comments submitted to ADEM on its previous proposed Prevention of Significant Deterioration construction permit for the steel mill, *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104486994&dbid=0&cr=1>; ADEM's response to comments *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104488600&dbid=0>; *see also* Attach. D, at 314-318. (EPA EJScreen Community Report shows high Air Toxics and asthma and a higher than State average Black population and Native American population within 3 miles.).

²⁸⁷ Comments on the Proposed Title V Permit for DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility, (June 30, 2023), *available at* [https://mosaiceps.epa.gov/sites/default/files/FRU/23.08.21%20-%20MEJAC%20&%20GASP%20DCP%20Gas%20Plant%20\(Air%20Permit%20No.%20503-8085\)%20Public%20Comment%20&%20Exhibits_0.pdf](https://mosaiceps.epa.gov/sites/default/files/FRU/23.08.21%20-%20MEJAC%20&%20GASP%20DCP%20Gas%20Plant%20(Air%20Permit%20No.%20503-8085)%20Public%20Comment%20&%20Exhibits_0.pdf).

²⁸⁸ 42 U.S.C. § 7661d(b)(2); *see also* EPA's Alabama Proposed Title V Permits, <https://www.epa.gov/caa-permitting/alabama-proposed-title-v-permits>.

ask where and when the Title V Permit and supporting documents would be available.²⁸⁹ ADEM's response on November 29, 2023, explained that the final documents would be in its eFile system in the next two weeks.²⁹⁰ The final response to comment and other documents were uploaded to EPA's database several days after MEJAC's inquiry.²⁹¹ ADEM departed from its standard practice of issuing the final permit at the close of EPA's review period. ADEM's delay resulted in significantly reducing amount of time available for MEJAC and GASP to review ADEM's final documents and evaluate, prepare, and timely file a Title V Petition into less than half of the time it had historically provided.

MEJAC and GASP's opportunity to review, analyze, and evaluate issues for a potential Title V Petition to EPA's Administrator are significantly hampered by ADEM's untimely action in making the final documents available. MEJAC and GASP have filed three Title V petitions with EPA regarding ADEM's issuance of permits. ADEM also knows how many days the CAA provides for the public to file a Title V petition once EPA's review concludes. Thus, ADEM was fully aware that if it delayed issuing the final permit for more than 30 days, ADEM would substantially reduce the amount of time that MEJAC, GASP, and others have to challenge ADEM's final permit. Thus, ADEM certainly was aware of the foreseeable consequences of its action. ADEM's business decision once again hampered the ability of the Impacted Community to meaningfully engage in the petition process provided under the CAA and EPA's regulations. And while the DCP Operating Compressor Station is located south of Africatown, its emissions are nevertheless of concern to MEJAC for the same reasons discussed above regarding emissions from the steel mill and impacts on Mobile County's compliance with the NAAQS. Moreover, there are environmental justice concerns for the low-income community residents that live near the compressor station because of their low-income.²⁹²

²⁸⁹ Attach D. at, 705. Additionally, ADEM fails to explain in its public notices who the public can contact regarding questions it has about its proposed actions. Despite requests from Complainants for ADEM to include this information, the only email included in the public notices is where to submit the comments.

²⁹⁰ *Id.*

²⁹¹ ADEM's Response to Comment on the DCP Operating Company Title V Permit (Dec. 6, 2023), *available at* <https://mosaiceps.epa.gov/sites/default/files/FRU/DCP%204REN%20MSOP%20Final%20Response%20to%20Comments.pdf>.

²⁹² Attach. D., at 319-323.

3. Discriminatory Treatment in the Specific Incident of ADEM's Issuance of the Five Permits Subject to this Complaint Without Considering the Disparate and Cumulative Impact of the Pollution They Authorized on the Impacted Communities

ADEM issued the five Title V Permits for the facilities without considering the disparate and cumulative impact of the air pollution the Department's proposed approval authorize.

Historical background. As discussed in Section IV.A, analyzing the historical background in the City of Mobile generally and related to the Impacted Communities in particular, the history of race discrimination and recent patterns of ADEM's business practices are particularly relevant and important considerations in this subclaim.²⁹³ Indeed, ADEM's discriminatory treatment by issuing the five Permits over a one-week period and failing to consider the disparate and cumulative impacts of the air pollution they authorized on the Impacted Communities continues the years of discrimination the Impacted Communities have faced.

The sequence of events leading to ADEM's transmittal of all five Title V Permits to EPA that lacked the disparate and cumulative impact analysis. The owners and operators of the facilities submitted Permit renewal applications to ADEM and ADEM reviewed the application materials and prepared draft renewal Permits and the draft Statement of Basis for each Permit. At no point did ADEM use its authority under the Part 70 regulations and determine that the applications were incomplete and require the permit applicants to submit the disparate and cumulative impact analysis information. ADEM provided an opportunity to comment on each Permit. In response to each of the opportunities to comment, Complainants submitted comments on the five Title V Permits raising the disparate and cumulative impact issues.²⁹⁴ Next, ADEM prepared a draft response to comment document for each of the five Permits. While public comment periods on the draft Permits were noticed sequentially over a long time period, ADEM waited to send the five Permits them to EPA in a batch over the one-week period. ADEM's business practice of batching the Permits in this manner was despite its knowledge of all the concerns regarding the risks from the cumulative emissions of these five Permit.

Moreover, as the current EPA-approved agency in Alabama for implementation of the CAA, ADEM is well aware of the cluster of more than 40 major, minor, synthetic minor, and unpermitted²⁹⁵ sources in and near the

²⁹³ *N.C. State Conf. of NAACP*, 831 F.3d at 233, cited in DOJ Title VI Manual, Section VI, at 11.

²⁹⁴ See Section VI.A.3.

²⁹⁵ These include both sources for which ADEM as determined do not need a permit, as wells as those that need permits that have not applied for them.

Impacted Communities. As presented earlier in this Complaint, EPA's emission inventory demonstrates that there are hundreds of stationary sources of air pollution in Mobile County as well as emissions from a wide variety of other sources in and near the Impacted Communities. In preparing the response to comment documents there is no information in ADEM's eFile system that shows it reached out to the five Permit applicants to request either information for ADEM to conduct the disparate and cumulative analysis or ask the five Permit Applicants to conduct and submit the disparate and cumulative analyses. As discussed above, ADEM's responses to these concerns show a fundamental lack of understanding of its Title VI obligations. Moreover – despite the risk of impacts from each of the facilities' emissions along with the known cumulative emissions from other facilities and sources – ADEM failed to conduct the required disparate and cumulative impact analysis. In sum, ADEM treated the comments raised by the Impacted Communities in a discriminatory manner.

The pattern and practice. Although this claim is regarding the incident of ADEM's failure to act in response to comments that must be addressed under Title VI, because there were five different facilities involved, the pattern and practice of ADEM's decision making is evident. Rather than respond to the comments and conduct the disparate and cumulative impact analysis required by Title VI, ADEM's pattern and practice is to ignore the comments and the concerns expressed for all five of the Permits. Thus, the draft Permit packages, which each included a draft response to comment document for each of the facilities' permit, were transmitted to EPA with huge holes. Despite the requirements of Title VI of the Civil Rights Act, the draft response to comment documents for each of the five Permits failed to respond to the comments regarding the need for disparate and cumulative impact analysis.

The history of discriminatory conduct. To our knowledge, ADEM has never considered disparate and cumulative impacts in its permitting actions. Moreover, Complainants have commented on more than 30 facilities' Title V permits over the past three years, and in none of those proposed permit packages did ADEM consider disparate and cumulative impacts – neither in the proposed permit packages nor in response to comments accompanying the final permits.

Substantial disparate impact on the protected group. ADEM's failure to consider disparate and cumulative impacts from air pollutants authorized by ADEM's issuance of these five Permits for these five different facilities – along with the cumulative emissions from other sources in Mobile County – means that ADEM's decision to not conduct the analyses leads to a disproportionate and negative impact on the Impacted Communities. The consequences of ADEM's non-action means that ADEM did not consider the impacts and risks to the residents in the Impacted Communities in issuing these five Permits. This is clearly a unique situation that requires close scrutiny.

First, focusing on the geographic area where the five facilities are located shows the impacts and risks from their collective air emissions that has and will continue to cause negative effects for the Impacted Community. Indeed, the EJScreen data showing the adverse health impacts seen in the Impacted Community clearly demonstrate this. Second, ADEM's inaction means that it failed to provide the Impacted Communities with the opportunities and protections that Title VI provides them as a Impacted Communities of color.

Third, ADEM's inaction harms this particular group of people because the consequences of ADEM's inaction are sufficiently adverse or harmful.²⁹⁶ The nature, size and likelihood of impact to the Impacted Community is tremendous. These five facilities are all large major industrial operations with hundreds of tons of air pollutants emitted annually. Three of the facilities are geographically located in the Impacted Community. The other two facilities are geographically close-by. Mobile's prevailing wind direction means that the emissions from the two facilities that are geographically close to the Impacted Community will often flow in the direction towards and actually impact the community of color.²⁹⁷ It is well known that the pollutants from these facilities cause health and environmental harm.

Although ADEM expressed in responding to comments from the Impacted Community on the proposed statewide ambient monitoring plan that the ambient air quality in the Impacted Community is protective of the CAA's National Ambient Air Quality Standards, it provided no factual information or data to support its assertion. Moreover, requests by the Impacted Community for ADEM to site ambient air quality monitors in the neighborhood were ignored. Given the fact the more than 40 facilities decided to construct and operate their air emission sources in and near the Impacted Communities, and the fact the Impacted Community residents have experienced a wide range of harms over many years, public comments from representatives of Impacted Community on the UOP permit asked for fenceline monitors. ADEM failed to include requirements for fenceline monitors in the UOP permit, despite the serious harms to residents that were voiced during the hearing and in written comments.²⁹⁸ Examples of the wide range of harms from

²⁹⁶ See *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1980), cited in DOJ Title VI Manual, Section VII, at 12.

²⁹⁷ See 65 Fed. Reg. at 39,681 (EPA recognizes that an area of adverse impacts may be irregularly shaped due to ... conditions such as wind direction).

²⁹⁸ The Impacted Community also requested that ADEM require fenceline monitoring as part of the recent Consent Order for the H. O. Weaver & Sons asphalt plant because since the plant began operating more than 20 years, ADEM has not been able to keep the source in compliance. Additionally there are state-specific regulations in the EPA-approved State Implementation Plan (e.g., dust, particulate and odors) and the plant's emissions from these pollutants cross the plant's property line and are experienced both inside and outside the homes of the Impacted Community residents. ADEM's enforcement presence and actions have not resolved the issues. In response to the Impacted Communities comments, ADEM denied the request for fenceline monitoring.

these facilities include: physical damage to homes and property; economic harm on property values; psychological harm from the disruptive nature of these facilities; chronic health impacts; the incredibly loud noise that is prevalent throughout the neighborhood; social and recreational harms (e.g., often times the air quality is so horrible residents are forced indoors, even then at sometimes they need to wear masks); and cultural (e.g., Africatown history is rich in traditions, and the ability of residents to express those cultural traditions outside is often limited by adverse air quality impacts). There is no evidence ADEM investigated any of the serious concerns, they were ignored.

Fourth, ADEM's decision to grant these five Permits in this concentrated geographic location without conducting the disparate and cumulative impact analyses and mitigating harms, means ADEM has made a decision to distribute the burden and undesirable air pollution and other harms on the protected class members that live in the Impacted Communities.²⁹⁹ The discriminatory effect of ADEM non-actions in responding to comments and finding ways to mitigate emissions from the five Permits is inherently obvious and predictable. It is clear that ADEM's non-action decision regarding these five Permits (and failing to conduct the cumulative analyses), results in the Impacted Communities carrying an unfair share of the harm.³⁰⁰

Fifth, ADEM's decision to not conduct the disparate and cumulative impact analyses for its proposal to issue the five Permits to these facilities means that the Impacted Community has been denied knowledge and use of the results of such an analyses. Moreover, given the totality of the facts, it seems more likely than not that the disparate and cumulative impacts analyses will demonstrate significant harms. If the disparate and cumulative analyses show harms, ADEM must work to mitigate the harms that affect the protected community. Indeed, there are a wide variety of options to mitigate, reduce and eliminate the harms.³⁰¹

No legitimate business reason for ADEM's failure to conduct the disparate and cumulative analysis. Finally, as discussed below, there is no legitimate, non-discriminatory reason for ADEM's failure to conduct the required

²⁹⁹ See e.g., DOJ Title VI Manual, Section VII, at 14, citing *Damian* at 127; see also *S. Camden Citizens*, 145 F. Supp. 2d at 490; *United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012).

³⁰⁰ See, e.g., DOJ Title VI Manual, Section VI, at 18-19, citing *McCoy v. Canterbury*, No. 3:10-0368, 2010 WL 5343298, at *5 (S.D.W. Va. Dec. 20, 2010) (a "series of discrete episodes" of the challenged practice can "raise a plausible inference that it has discriminatory impact on minorities"), *aff'd*, 428 Fed. App'x 247 (4th Cir. 2011); see also *Mitchell*, 599 F.2d at 585-86 (affirming district court's finding of disparate impact "on the basis of the few specific applications of the policy proven, such inferences of likely other applications as these instances could rationally support, and judicial notice of the world as it is and as it is known in common experience to be").

³⁰¹ See e.g., 65 Fed. Reg. 39,683 (mitigation measures can include modifying the permit conditions to lessen or eliminate the demonstrated adverse harms).

disparate and cumulative impact analyses for each of the five Permits. Even if ADEM were to articulate reasons for its actions and inaction, in light of the evidence presented in this Complaint that demonstrates discrimination, EPA must determine ADEM's reasons are not the true reasons and are actually a pretext for discriminatory intent. Relatedly, ADEM cannot assert these five facilities provide economic development, which benefit the Impacted Communities. Those benefits are not economic benefits delivered directly to the Impacted Communities. Given the nature of these business, their goods, services, jobs and profits are not experienced by the Impacted Communities.³⁰²

4. Discriminatory Treatment by ADEM's Pattern and Practice of Issuing Other Air Permits, Taking Other Actions that Lack the Disparate and Cumulative Impact Analysis, and Taking Other Actions that Raise Civil Rights Issues

ADEM's failure to conduct the disparate and cumulative impact analysis for sources with Permits and emissions that harm the Impacted Communities extends beyond the five Permits issued over the one-week period. There is additional evidence of disparate treatment of the Impacted Communities and other communities in ADEM's on-going pattern and practice of issuing permits and taking other CAA actions for sources in and near City of Mobile's Africatown Planning Area, the nearby communities and Mobile County. These incidents include examples where ADEM fails to conduct the disparate and cumulative impact analysis, as well as examples of discriminatory treatment where the Department fails to meet its Title VI obligations.³⁰³

³⁰² 65 Fed. Reg. 39,683.

³⁰³ In addition to the evidence presented in these claims, Complainants are concerned about a public statement communicated by the senior ADEM management official that is responsible for signing and issuing the Clean Air Act permits, including the five Permits that are the subject of this Complaint, that appears to show a workplace culture in which certain racist derogatory language or sentiments are tolerated. *See* Attach. D, at 754-55, stating that certain CAA permitting requirements should be read as "Preventing Sources in Dixie," part of Ron Gore (ADEM), *What's Wrong with the Clean Air Act?* (June 2017), made at national conference (https://www.awma.org/store_product.asp?prodid=224), and/or a regional conference (<http://flawma.org/wp-content/uploads/2017/06/Whats-Wrong-with-the-Clean-Air-Act-Gore.pdf>).

While the statement of concern was made outside the context of this Complaint, it is nevertheless important here where several claims are based on discriminatory intent. In discussing the Clean Air Act's "Prevention of Significant Deterioration Permit" program, which contains the requirements for companies that want to construct major sources of air pollution, the presentation states that the real meaning of the PSD program is "**Preventing Sources in Dixie**." The slides following it present the official's opposition to the PSD program "as if 'Dixie' is being denied its right to permit and sanction polluting sources without federal guidance and review. ADEM's official appears to use the term 'Dixie' as an affirmative and positive euphemism for Alabama despite its negative connotations. The word 'Dixie' refers to the antebellum South and is often seen as offensive for evoking a very nostalgic and romanticized view of slavery and Jim Crow. It also refers to persistent negative

In issuing Title V and other CAA permits, entering into enforcement Consent Orders, and taking other actions, ADEM entirely avoided its Title VI obligations to ensure that its air permitting program in general, and the health impacts and risks caused by the sources specifically, do not have the effect of discriminating against minority communities as required by 40 C.F.R. §7.35(b). Accordingly, to the extent its final actions involve facilities that impact minority communities, ADEM has caused a disparate impact to the minority communities living nearby and committed discriminatory acts in violation of Title VI. In the following nine examples Complainants raised these and related issues to ADEM on behalf of their members. ADEM's failure to conduct a disparate and cumulative impacts analysis (and take related concerns into consideration), is a pattern and practice that extends beyond the five Permits issued during the one-week period.

ADEM's documents for this proposed action were not in EPA Region 4's database as of December 15, 2023.

(a) Comments Submitted on ADEM's Draft Major Source Operating Permit for the DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility, Air Permit No. 503-8085 (Aug. 21, 2023)

The Complainants' comments on the Title V permit for the DCP Operating Company, L.P.'s Mobile Bay Gas Treating and Processing Facility specifically identified that ADEM had a legal duty to protect civil rights, and stated that:

Discrimination by a recipient of federal funds, including ADEM, is prohibited by Title VI of the Civil Rights of 1964. Title VI of the Civil Rights Act of 1964 prohibits the use of federal funds by recipients that discriminate on the basis of race, color or national origin. As a recipient of federal funds for programs delegated to it by the EPA, ADEM has a legal duty to protect civil rights.³⁰⁴

Complainants' identified that in order to fulfill that duty and ensure compliance with its obligations under Title VI, as well as address environmental justice generally and as requested in this comment, ADEM must conduct an analysis of the community surrounding this source and the impact of the source's permitted emissions on that community prior to issuing this permit. Complainants' made this

sentiments in the south towards Federal authority leading into, during, and after the Civil War. Though its origins are disputed, it was used in minstrel shows beginning in the mid-1800s, solidifying its racist connotations. Such inclusion of the term in a public presentation by a senior ADEM official provides evidence of circumstantial or indirect evidence of discriminatory intent in the Department's CAA permitting and related activities.

³⁰⁴ Attach D., at 381.

comment because ADEM's proposed Statement of Basis for this Title V permit merely addressed this responsibility as follows:³⁰⁵

ENVIRONMENTAL JUSTICE

ADEM utilized the EJSCREEN and Justice 40 screening tool to perform an analysis of the area.

ADEM's final response to comments merely provided its boilerplate response as follows:

The draft permit contains emission limits based on state and federal regulations that are protective of human health and the environment. Moreover, the Department has a robust public engagement program (See <http://www.adem.alabama.gov/MoreInfo/pubs/ADEMCommunityEngagement.pdf>) that utilizes a number of tools, such as EPA's EJ Screen: Environmental Justice Screening and Mapping Tool, to ensure that local residents and stakeholders are provided a meaningful opportunity to participate in the permitting process.³⁰⁶

(b) Comments Submitted on ADEM's State of Alabama Ambient Air Monitoring 2023 Network Plan (June 30, 2023)

The Complainants' comments on ADEM's State of Alabama Ambient Air Monitoring 2023 Network Plan expressly stated that:

Based on a substantive EJ analysis, it is clear that the historic Africatown community requires air monitoring and, importantly, community involvement in siting these air monitors. In order to comply with the CAA and Title VI of the Civil Rights Act of 1964, ADEM must provide air monitoring in Africatown because this community faces a disproportionate amount of air pollution from sources permitted by ADEM. ADEM should modify its Draft Network Plan to include additional monitors to continuously measure ozone, particulate matter, volatile organic compounds, sulfur dioxide, and hazardous air pollutants. As discussed below, we urge ADEM to work closely with EPA and the community in siting these monitors.³⁰⁷

³⁰⁵ *Id.* at 391.

³⁰⁶ See ADEM's Response to Comment on the DCP Operating Company Title V Permit, at 4 (Dec. 6, 2023), available at <https://mosaiceps.epa.gov/sites/default/files/FRU/DCP%204REN%20MSOP%20Final%20Response%20to%20Comments.pdf>.

³⁰⁷ See generally Attach D., at 231.

Complainants further identified that ADEM should undertake a more sufficient and meaningful consideration of environmental justice impacts in developing the 2023 Network Monitoring Plan in order to fulfill its legal duty to protect civil rights and ensure compliance with its obligations under Title VI.³⁰⁸ Moreover, Complainants' spent the bulk of their comments presenting why ADEM should modify its draft Network Plan to expand monitoring of air pollution in the Africatown community,³⁰⁹ and requested that:

ADEM modify its draft Network Plan to include additional monitors to continuously measure ozone, particulate matter (PM), including PM2.5, and PM10, volatile organic compounds (VOCs), sulfur dioxide (SO₂), and hazardous air pollutants to be sited in the Africatown environmental justice community in Mobile. There is no question that this community faces disproportionate levels of air pollution and resulting negative health effects.³¹⁰

As discussed above, ADEM's response simply made a conclusory statement that there are no areas in Alabama that require additional monitoring. ADEM did not even mention Africatown, let alone address our specific concerns regarding air quality in the community.

(c) Comments Submitted on ADEM's Proposed Consent Order for Hosea O. Weaver & Sons, Inc., Mobile County, Alabama, for two violations of failure to control particulate emissions from the baghouse stack and one violation of failure to report the test results, Air Permit No. 503-8069-X001 (June 9, 2023)

The Complainants' comments on ADEM's proposed enforcement Consent Order for the H. O. Weaver & Sons facility specifically identified that ADEM – a recipient of federal funds and subject to the Civil Rights Act of 1964 – must take into consideration that the asphalt plant is surrounded by the community of Africatown, and asked that ADEM engage the surrounding community; further explaining that ADEM must insure it fulfills its legal duty to protect civil rights as required Title VI of the Civil Rights Act of 1964.³¹¹ Such consideration is required under Title VI because the alleged violations resulted in an emissions impact to a minority community that already bears disproportionate socioeconomic harms.³¹²

³⁰⁸ *Id.* at 234-6.

³⁰⁹ *Id.* at 236-250

³¹⁰ *Id.* at 236.

³¹¹ *Id.* at 236-7.

³¹² *Id.* at 237.

ADEM response to comment document ignored and did not respond to these concerns.³¹³

(d) Comments Submitted on ADEM's Proposed Consent Order for Evonik in Theodore, Mobile County, Alabama, for incorrectly installing a bypass valve, which resulted in unauthorized hazardous air emissions, under Major Source Operating Permit No. 503-5011 (April 19, 2023)

The Complainants' comments specifically identified that ADEM entirely failed to consider impacts on the health and safety of the community surrounding the Evonik facility in assessing the seriousness of the alleged violations to determine the appropriate penalty for the Consent Order, which is required under Ala. Code § 22-22A-5(18)c.³¹⁴ There are also public participation issues here because there was nothing in the proposed Consent Order to suggest that ADEM engaged the community in any manner prior to issuing the proposal to ascertain whether they experienced health threats during the 106 days of methane emissions.³¹⁵ Commenters further expressed concern that ADEM failed provide detailed and ongoing requirements regarding the corrective measures to ensure such violations do not occur in the future, failed to take environmental justice into consideration and excluded the public from comments on a Source-selected supplemental environmental project.³¹⁶

ADEM's response ignored its obligation to consider impacts on the minority community.³¹⁷ Moreover, it fails to understand its public participation obligations under Title VI to the minority community if a Supplemental Environmental Project (SEP) is pursued by the facility. ADEM's response indicated that because it already provided the public with a chance to suggest a project, and no suggestions were received, ADEM was not going to provide notice to the public about should the facility elect to prepare and implement a SEP.³¹⁸ ADEM's response entirely avoided its obligations to engage with the minority community about the violations and involve the minority community if SEP were developed, merely indicating that

³¹³ ADEM's Response to Comments (June 27, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105132208&dbid=0>.

³¹⁴ Comments on Evonik, at 4 (April 19, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105087144&dbid=0>.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ ADEM Response to Comments on Evonik, at 1 (May 16, 2023), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105101246&dbid=0>.

³¹⁸ See 65 Fed. Reg. at 39,662 (ADEM's response was in sharp contrast to EPA's statement on community input and SEPs. EPA has explained that its SEP Policy contains a section on community input which may be particularly useful guidance for involving the public in the development of remedial measures to address potentially disparate impacts. See EPA Supplemental Environmental Projects (SEP) Policy, (March 22, 2002), *available at* <https://www.epa.gov/enforcement/supplemental-environmental-projects-sep-policy>).

violations and excess emissions had stopped. Such dismissive responses further demonstrate ADEM's lack of respect towards and discriminatory treatment of the minority community.

(e) Comments Submitted on ADEM's Proposed Renewal of Title V Draft Permit No. 503-8066, to Mobile Energy, LLC for a Third Renewal Operating Permit for the Hog Bayou Energy Center located at 1003 Paper Mill Road, Mobile, Alabama 36610 (Oct. 5, 2021)

The Complainants' directly raised ADEM's Title VI responsibility in the Hog Bayou Title V permit, this facility is of particular concern to Complainants as seen in Figure 7, because it is located in the City of Mobile's Africatown Planning Area. Complainants' comments expressed that:

The Hog Bayou Energy Center's operations disproportionately burden Black residents with toxic pollution. For decades, residents have been exposed to the environmental injustice of toxic emissions from this industrial facility. However, ADEM entirely fails to address this concern in any of the provisos, conditions, or terms in the proposed Title V air permit renewal. Instead, ADEM's proposed permit would allow racially disparate pollution burdens on predominantly Black residents living near the Hog Bayou Energy Center.³¹⁹

Complainants' advised ADEM that:

Racially disproportionate impacts should be addressed in a permit that meets environmental laws and regulations. However, ADEM proposes a Title V permit renewal for the Hog Bayou Energy Center that not only fails to adhere to environmental regulatory requirements, as discussed below, but also fails to address, much less mitigate or avoid, racially disproportionate pollution burdens.³²⁰

As discussed above, this was one of the permits that ADEM sent to EPA in the second batch in August 2022. ADEM's final response to comment document is not in EPA Region 4's database, the only version of that document appears in draft.³²¹ The final response to comment document is not in ADEM's eFile. It appears ADEM never finalized the response to comment document. The final

³¹⁹ Comments on Hog Bayou, at 3 (Oct. 5, 2021), *available at* https://mosaiceps.epa.gov/sites/default/files/FRU/DSCEJ&CHESSLtrADEMHogBayouTV_10062021_final.pdf; final permit issued Sept. 20, 2022 (expiration date of Sept. 19, 2027), *available at* https://mosaiceps.epa.gov/sites/default/files/FRU/A978066F_03_00.pdf.

³²⁰ Comments on Hog Bayou, at 4.

³²¹ ADEM's Hog Bayou Draft Response to Comments, *available at* <https://mosaiceps.epa.gov/sites/default/files/FRU/ADEM%20Draft%20Response%20to%20Comments%20-%20Hog%20Bayou.pdf>.

Statement of Basis supporting ADEM’s final Title V permit was issued on September 20, 2022,³²² and explained that the prior Title V permit was issued on June 9, 2016, with an expiration date of June 13, 2021. Thus, this is another example of ADEM issuing a final Title V permit where adverse comments were received from Complainants and creating a new five-year permit new renewal cycle schedule (the permit now expires on September 19, 2027), which differs from the previous renewal cycle. Yet another business practice that discriminates against the Impacted Communities. There is no mention in the Statement of Basis that comments were received. ADEM’s Statement of Basis presented plant-wide potential to emit emissions as follows, pollutants at levels of concern to the Impacted Communities:³²³

Table 10. Facility-Wide Emissions at Hog Bayou

Pollutant	PTE (tons/year)
PM/PM₁₀/PM_{2.5}	62.23
NO_x	142.34
CO	435.01
SO₂	7.57
VOC	62.66
Total HAP	9.31
CO₂e	1,279,941

(f) Comments Submitted on ADEM’s Proposed Approval of the Draft Prevention of Significant Deterioration Permit Nos. 503-0095-X038, 503-0095-X040, 503-0095-X041, 503-0095-X042, and 503-0095-X043 for AM/NS Calvert, LLC Steel Mill, Facility No. 503-0095, located at 1 AMNS Way in Calvert, Alabama (March 9, 2021)

The Complainants’ comments specifically identified the community of color that lives in the area impacted by the Calvert Steel Mill that has been disproportionately impacted from air pollution from this and other industrial sources for decades. For this proposed permit ADEM merely attaching an EPA EJScreen Report to its Preliminary Determination document for the proposed approval of the Prevention of Significant Deterioration Permit. Complainants’ comments expressed concern that ADEM’s proposal failed to consider the impacts of the new emissions on the minority and local income community that would be impacted. Complainants noted that ADEM’s website had numerous tools that it and the public can could use, including a citizen guide for public participation that it has a process for filing and investigating civil rights and environmental justice

³²² ADEM Hog Bayou Statement of Basis (Sept. 20, 2022), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104896734&dbid=0>.

³²³ *Id.* at 9.

complaints.³²⁴ Moreover, Complainants' concerns were heightened by the fact that ADEM proposed to exclude exceedances of the public health based NAAQS requirements from its analysis and approve the permit.³²⁵

Despite Complainants' comments advising ADEM that it failed to consider disparate and other adverse impacts to minority communities. ADEM's response to comment made no changes to the permit and asserted that the draft PSD permits all contain emission units based on state and federal standards that are protective of human health and the environment.³²⁶ ADEM also suggested the use of EPA's EJSCREEN was to ensure that the local residents and stakeholders were given a meaningful opportunity to participate in the process, but did not explain how using EJSCREEN provides meaningful participation:³²⁷

The draft permit contains emission limits based on state and federal regulations that are protective of human health and the environment. The noted use of EPA's EJScreen was to ensure that local residents and stakeholders were given a meaningful opportunity to participate in the permitting process.

C. In the Alternative, The Above Four Disparate Treatment Sub Claims Cause Disparate Impacts on the Basis of Race, in Violation of Title VI and EPA Regulations

In addition to the disparate impacts on and the discriminatory treatment of the Impacted Communities resulting from ADEM's issuance of the five Permits, the information provided above in Claim B. also shows that the Impacted Communities have been and continue to be subject to disparate impacts resulting from ADEM's treatment in Title V permitting and other CAA activities for sources in Africatown and Mobile County generally. The information shows that:

1. Disparate impacts on the basis of race created by ADEM in issuing the five Permits in the one-week period
2. Disparate Impacts on the basis of race created by ADEM's pattern and practice of lack of public participation
3. Disparate impacts on the basis of race created by ADEM's issuing five Permits without considering the disparate and cumulative impact of the pollution they authorized on the Impacted Communities

³²⁴ See generally Comments on Calvert Steel Mill PSD permit (March 9, 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104486994&dbid=0>.

³²⁵ *Id.* at 23; see generally 18-25 (expressing concerns regarding ADEM's use of other methods to exclude NAAQS exceedances).

³²⁶ See ADEM Response to Comments Calvert Steel Mill, at PDF 4 (March 29, 2021), *available at* <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104488597&dbid=0&cr=1>.

³²⁷ *Id.*

4. Disparate impacts on the basis of race created by ADEM's pattern and practice of issuing other air permits, taking other actions that lack the disparate and cumulative impact analysis, and taking other actions that raise civil rights issues

Thus, ADEM's general title V permitting, other CAA actions for sources in and near the Impacted Communities, and other ADEM actions result in disparate impacts on the basis of race, in violation of Title VI and EPA regulations.

VII. ADEM Cannot Justify Its Failure to Comply with Title VI

One of the factors EPA will evaluate is whether ADEM can justify its failure to comply with Title VI. Generally, a recipient must "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission."³²⁸ In reviewing recipient actions, EPA evaluates whether the policy was "necessary" by requiring that the justification bear a "manifest demonstrable relationship" to the challenged policy.³²⁹ Notably, the EPA's two forms of legitimate justifications include: (1) a demonstration that the permitting action will provide a public health or environmental benefit to the affected population; (2) a demonstration that the permitting action will have economic benefit, if the benefit is "delivered directly to the affected population."³³⁰

A. ADEM Has No Substantial Legitimate Justifications for Its Actions

In issuing the five Permits impacting residents of the City of Mobile's Africatown Planning Area and other surrounding Impacted Communities over the one-week period, ADEM did not attempt to establish a justification for doing so. As explained above, ADEM's issuance of the Permits to the five sources in the one-week period prohibited the parties that commented on the permits – including Complainants – from meaningfully engaging in the CAA's Title V petition opportunity. ADEM provided no justification for issuing the five Permits over the one-week period. Furthermore, interested parties are now significantly hampered in ADEM's responses to the Administrator's Order on the five Permits (as Complainants already are with ADEM announcing the public comment period for

³²⁸ Draft Revised Investigation Guidance at 39,683; *see also* Civil Rights Compliance Toolkit, Chapter 1 FAQs, at 4 (Jan. 18, 2017); *see also* Exec. Order No. 14096, 88 Fed. Reg. 25251, 25255 (directing federal agencies to ensure that all programs or activities receiving Federal financial assistance that potentially affects human health or the environment comply with Title VI).

³²⁹ Civil Rights Compliance Toolkit, Chapter 1 at 9.

³³⁰ *S. Camden Citizens*, 145 F. Supp. 2d at 497 (OECR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether the permitted facility, in fact, will provide direct, economic benefits to the community. However, a justification may be rebutted if EPA determines that a less discriminatory alternative exists).

two of the facilities, as discussed above), as well as when three of these Permits are next up for renewal within a one-week period in 2027.

Indeed, as discussed above, ADEM did not even stagger the start of the public comment periods for AL Bulk Terminal and Kimberly Clark, and instead unreasonably decided to start the periods on the *same* day. Furthermore, as discussed in Section IV.B.1, for three of the five Permits ADEM adjusted the five-year Permit renewal cycles to begin and end on the same day of the same year. In contrast, for the other two of the five Permits, ADEM maintained the existing five-year permit renewal cycles it had established when it issued the first Title V permits for the facilities.³³¹ ADEM is well aware of the consequences of comment periods that start on the same day (and/or which overlap) – the Impacted Communities will have significant challenges in participating in the process. The table below presents ADEM’s issuance dates and the expiration dates for the five Permits, showing these public participation challenges and further evidence of ADEM’s discriminatory intent.

Table 11. Summary of the Issuance and Expiration Dates for the Five Permits

Permit	Issuance Date	ADEM Expiration Dates
Plains Marketing, No. 503-3013	11/4/22	11/3/27
AL Bulk Terminal, No. 503-3035	11/4/22	11/3/27
Kimberly-Clark, No. 503-2012	11/9/22 ³³²	11/8/27
Alabama Shipyard, No. 503-6001	11/9/22	4/27/27
UOP, No. 503-8010	2/2/21 (initial issuance)	2/1/26

Moreover, ADEM’s failure to analyze the disparate impacts allowed under the five facilities’ Permits, the cumulative impacts, and how their operations effect the Impact Communities – as requested in multiple public comments – means

³³¹ A review of the five-year permit renewal cycle historical information for the five Permits (initial title V permits and all renewals) shows that ADEM maintained the month and day it had established for the permit renewal cycles it has used since the start of the Title V program for Alabama Shipyard and UOP, however, it modified the permit renew cycles for Plains Marketing, AL Bulk Terminal and Kimberly-Clark.

³³² Notably, the final permit is *not* in ADEM’s eFile, however, it is in EPA Region 4’s Title V Permit Database, *available at* https://mosaiceps.epa.gov/sites/default/files/FRU/A972012F_3_00.pdf.

ADEM failed to consider and address the Title VI disparate and cumulative impact concerns. ADEM cannot demonstrate that the facilities will provide a public health or environmental benefit, the facilities all emit air pollution, which is not a benefit but a harm to the Impacted Communities. ADEM also failed to demonstrate that there are economic benefits from these facilities that will directly flow to the Impacted Communities. ADEM may now attempt to argue that its decisions to renew these Permits were justified in some way. However, given the tremendous burdens the Impacted Communities already face from emissions and violations from these facilities, it is doubtful ADEM could justify renewing all five Permits and forgo compliance with Title VI.

B. There are Less Discriminatory Alternatives Available to ADEM

EPA's investigation will also consider whether there are less discriminatory alternatives available to ADEM. Even if ADEM could provide a substantial legitimate justification for ignoring its Title VI requirements in issuing these five Permits (which it cannot) and failing to conduct the disparate and cumulative impact analyses, there are less discriminatory alternatives available with respect to its decisions to:

- Issue the five Permits over a one-week period;
- Issue Permits for three facilities with expiration dates that fall within a one-week period in 2027; and
- Fail to consider the disparate and cumulative impacts of the air pollution authorized by these five Permits and the hundreds of other Permitted facilities and sources of air emissions in Mobile County on the Impacted Communities.

During the public notice and comment period for the five Permits, and on prior instances of permit issuances, ADEM declined to accept recommendations from Complainants about its permits and supporting analysis which, if adopted, would mitigate the identified discrimination that impacts Complainants' members and other members of the Impacted Communities, some of which are described below. ADEM can also evaluate ways to mitigate the adverse impacts of its permitting decisions,³³³ but failed to do so for these Five permits and the other permits discussed in this Complaint. ADEM may allege it has no authority to create any permit limits or measures that exceed what is legally required under its Clean Air Act State Implementation Plan and the requirements of the Clean Air Act for the five facilities with Permits and the other regulated facilities. As discussed above, ADEM has such authority and must use it to comply with Title VI.

³³³ Draft Revised Investigation Guidance at 39683 (Less discriminatory alternatives for a permitting action can include "practicable mitigation measures" that "modify permit conditions to lessen or eliminate the demonstrated adverse disparate impacts.").

Moreover, the following less discriminatory alternatives were available, and continue to be available to ADEM:

1. ADEM has the option, and until February 2, 2021, appears to have done so, of issuing its Title V permits when adverse comments are received in a staggered manner. ADEM must return to its historical business practice and issue permits where it receives adverse comments in a staggered manner.
2. ADEM has the option, but refuses, to consider the disparate and cumulative impacts of the full implementation of its permitting program on the Impacted Communities and other minority communities in Alabama. ADEM has the option, but refuses, to conduct a disparate impact analysis when deciding whether to issue or deny individual permits, instead of relying on general county-wide compliance with NAAQS emission levels, which does not assess cumulative impacts, hotspots, or location of specific sensitive protected populations. ADEM also has the option to conduct modeling, site additional monitors in the Impacted Communities (ozone, particulate matter (PM), including PM_{2.5}, and PM₁₀, volatile organic compounds (VOCs), sulfur dioxide (SO₂), and hazardous air pollutants),³³⁴ require fenceline monitoring,³³⁵ and examine the impact of permitting

³³⁴ Attach. D, at 231.

³³⁵ Public Comments on UOP permit, *available at*

https://mosaiceps.epa.gov/sites/default/files/FRU/UOP_Public%20Comments.pdf (public comments expressed concern the proposed permit failed to contain any facility-based air monitors, because the plant's emissions "don't just stink. They cause headaches, respiratory irritation, asthma, and more." Instead the Commenter explained that ADEM proposed to allow for compliance based on "visual inspection of invisible gasses...[and that] Compliance can only be determined by requiring adequate monitoring to measure polluting output" *id.* at PDF 31; another commenter expressed concern about the lack of monitoring because of the impacts to neighboring residents that "often smell strong unpleasant odors coming from the Plant's pollution" that "causes headaches, respiratory irritation, asthma, and more. On many days it is hard to be outdoors." Further requesting that ADEM require facility-based air monitors. *id.* at PDF 32; *see also* Public Hearing Transcript for UOP Permit, *available at* <https://mosaiceps.epa.gov/sites/default/files/FRU/UOP%20Hearing%20Transcript.pdf> (ADEM's location for the hearing was two miles away from the neighborhood located next to UOP at a location unfamiliar to the Impacted Community residents, thus the hearing was not attended by the residents. The one commenter that spoke on their behalf explained that the residents that live next to UOP explain "how often they dealt with noxious odors, how often that affected their ability to have family over. Their grandchildren with asthma could not reliably visit them, because the fumes that would come over from UOP would be so overwhelming and triggering to their children that they didn't feel it was safe of the grandchildren. You have people that complained of chronic headaches, nosebleeds, respiratory issues, and skin lesions that they all attributed to when they would say, Yes, there's a flare, or there's a particular noxious odor that's coming across the fence line into our community. We feel this way in response. This is how our body reacts. We feel that there needs to be a fence line at least fence-line monitoring, particularly on the north side of the facility, that is directly along these homes. It's residential properties that line the ... north side of the fence. But

decisions such as for these five Permits on the Impacted Communities, but has failed to do so here, and fails on a routine basis to do so when making similar permitting and other decisions.

3. ADEM has, but has not taken, the option and opportunity to affirmatively engage with the Impacted Communities in a meaningful process by which ADEM receives and incorporates the Impacted Communities' input regarding permitting decisions. Specifically, ADEM fails to provide notice actually intended to advise residents nearby the facilities regarding the permitting process and their rights to participate in the process. In addition, ADEM has failed to deliver information about the permitting process to the Impacted Communities, or to solicit comments in a way that meaningfully engages the Impacted Communities. Options that could address these shortfalls include convening a series of public meetings, held at community centers or schools within the Impacted Communities, at which ADEM could deliver information about the individual permits and projects, and provide the public with an opportunity to ask questions and orally deliver comments and express concerns.

Moreover, as discussed above, Complainant GASP requested that ADEM withdraw the permits submitted to EPA in mid-September 2022, which included the five Permits at issue here, and re-submit them to EPA in a phased manner in order to facilitate meaningful public participation in the permitting process by Petitioners, other organizations in Alabama, and their members. GASP requested that ADEM respond to this request within five business days, given the pending petition deadline. ADEM neither acknowledged receipt of nor responded to GASP's letter.³³⁶

facility-based monitors need to be implemented for the purposes of not just the – the neighbors, but also for the workers present.” The Commenters expressed other concerns, including UOP's use of the most outdated and least preferred method for determining PTE, AP-42 emission factors, which EPA counsels as using as a last resort. *id.* at 23-24; *see also* ADEM Response to Comments, *available at* https://mosaiceps.epa.gov/sites/default/files/FRU/UOP_Response%20to%20Comment_V9.pdf, (ADEM's response to the request for an on-site monitor was that the ambient air monitor 1.2 miles away has not indicated an exceedance of the NAAQS. ADEM's response on all the environmental justice concerns was its standard boilerplate:

The draft permit contains emission limits based on state and federal regulations that are protective of human health and the environment. And, the Department has a robust public engagement program (*See*

<http://www.adem.alabama.gov/MoreInfo/pubs/ADEMCommunityEngagement.pdf>) that utilizes a number of tools, such as EPA's EJ Screen: Environmental Justice Screening and Mapping Tool, to ensure that local residents and stakeholders are provided a meaningful opportunity to participate in the permitting process.

id. at 1, 2.

³³⁶ *See* Attach. B, at 7 (GASP Withdrawal Request Letter); *see also* Section IV.B.

VIII. Relief Requested

Complainants request that the EPA External Civil Rights Compliance Office accept this Amended Complaint and investigate whether ADEM has violated Title VI of the Civil Rights Act and its implementing regulations,³³⁷ through its issuance of the Permits to the following five sources in the one-week period and failing to address Title VI issues raised during the public comment periods on these Permits:

- Plains Marketing, Permit No. 503-3013
- Alabama Bulk Terminal, Permit No. 503-3035
- Kimberly-Clark, Permit No. 503-2012
- Alabama Shipyard, Permit No. 503-6001
- UOP, Permit No. 503-8010

To the extent that ADEM is in violation of Title VI, Complainants request that the Department be brought into full compliance and ask that EPA provide the following relief from ADEM's discriminatory practices, including:

1. Conduct an analysis to determine based on one or more of the three Claims presented that the incident of issuing the five Permits and ADEM's pattern and practices in implementing the Clean Air Act's permitting programs are based on race, color or national origin and are in violation of Title VI.
2. Act immediately and require that where there are interested Impacted Communities in Alabama that ADEM cease its practice of issuing multiple permits with the same or overlapping appeal and comment periods, and instead issue final permits and proposed actions in a staggered manner. Correcting just one of ADEM's new business practices in isolation will not cure the disparate impacts and discriminatory treatment. Require that ADEM improve its public participation practice and develop a Clean Air Act Public Involvement Plan for and in collaboration with the City of Mobile's Africatown Planning Area Impacted Communities,³³⁸ which should include the following: ADEM-hosted pre-public notice public meetings in the City of Mobile's Africatown Planning Area for air permits (and other proposed agency actions) of facilities in or near the City of Mobile's Africatown Planning Area to discuss the permitting action (the source, the changes to the permit, etc.);³³⁹ enhanced methods of public

³³⁷ See 40 C.F.R. § 7.130.

³³⁸ 65 Fed. Reg. at 39,658; *see also id.* at 39,669 (in implementing Title VI EPA adheres to the principle of "[m]eaningful public participation early and throughout the decision-making process" which it explains "is critical to identify and resolve issues, and to ensure proper consideration of public concerns."

³³⁹ 65 Fed. Reg. at 39,658. (including scheduling meeting and hearing times that are convenient for residents that work and at places within the Impacted Community, avoiding creating scheduling conflicts with other community and cultural events).

outreach, including methods likely to reach the Impacted Community;³⁴⁰ and improved public notices.³⁴¹ Finally, EPA must fashion additional remedies so that ADEM adequately responds to Title VI comments on its proposed actions (e.g., ongoing EPA oversight, civil rights training for Air Division staff and management, and direction to ADEM that it meaningfully consider, respond, and revise permit actions to address and incorporate comments from impacted communities in Alabama).³⁴²

3. Ensure actions are taken by EPA and/or ADEM to remedy the discriminatory treatment (and/or the disparate impacts) caused by ADEM's practice of issuing the five Permits over the one-week period, specifically: ensure that the three permits with renewal dates in the same week (*i.e.*, Plains Marketing, Alabama Bulk Terminal, and Kimberly-Clark) are reopened and revised setting staggered renewal dates (as ADEM did in setting the renewal dates for Alabama Shipyard and UOP). EPA must also create opportunities for filing Title V petitions on the additional issues in the five Permits that Complainants were prohibited from raising in the initial petition to EPA and create similar opportunities to file Title V petitions for the other permits ADEM issued around that same time.³⁴³
4. Direct ADEM to conduct activities to assess and improve air quality in Mobile County, including: a cumulative impact analysis of the air pollution sources in Mobile County;³⁴⁴ and siting air quality monitors to continuously measure ozone, particulate matter (PM), including PM_{2.5}, and PM₁₀, volatile organic compounds

³⁴⁰ *Id.*

³⁴¹ See e.g., 65 Fed. Reg. at 39,658 (EPA's list of elements of an effective public participation process, most of which are missing for the Impacted Communities); Additionally, require that ADEM include in the public notice announcement for all permits and other proposed actions (e.g., proposed enforcement orders, annual ambient monitoring plans, the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain information, see e.g., the State's Title V regulations specify that the public notice "shall identify...the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain information") Ala. Admin. Code, Regulation 335-3-16-.15(4)(b), so that members of the Impacted Communities know who to reach out to for information and get their questions answered. ADEM's public notices for Title V permits (as well as other ADEM proposed actions under the CAA) explain where to send public comments (ADEM's general email address and the senior management official to direct comments to), however, the public notices fail to contain information about "the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain information." *id.*

³⁴² The ADEM Air Division's response to comments from the Complainants' Title VI concerns shows the Division does not understand its Title VI legal obligations.

³⁴³ In addition to the agency's authority to fashion relief under the Civil Rights Act, see related relief in EPA's 40 C.F.R. Part 70 Title V implementing regulations. See, e.g., 40 C.F.R. § 70.7(f)(iii), (g) (procedures for reopening permits when mistakes are made, either by ADEM or EPA).

³⁴⁴ 65 Fed. Reg. at 39,669 (One of EPA's principles that it adheres to in implementing Title VI is "[p]otential adverse disparate cumulative impact stressors should be assessed and reduced or eliminated wherever possible." The risk assessment should be designed to take into account the health risks associated with exposures to multiple facilities whose emissions accumulate over time and interact synergistically.)

(VOCs), sulfur dioxide (SO₂), and hazardous air pollutants in the Africatown, Down the Bay, and Orange Grove/Downtown Renaissance communities, all predominately communities of color near the Port of Mobile. ADEM should provide for public involvement and comment in the development of the protocol for the analysis as well as comment on the draft cumulative impact analysis. ADEM should also provide for public involvement and comment on its plans to site the requested new ambient air quality monitors. To improve air quality, EPA must provide enhanced federal enforcement of the facilities in and impacting Africatown, including direct oversight and its own inspections and enforcement actions that serve as deterrence to owners and operators that are found in violation of the Act. This request is consistent with EPA's August 2023, announcement of its "fiscal year (FY) 2024-2027 National Enforcement and Compliance Initiatives (NECI)," which not only "focus its enforcement and compliance resources on the most serious environmental programs facing the country" but also includes "incorporat[ing] environmental justice considerations, including focusing more NECI inspections and compliance monitoring activities in overburdened or vulnerable communities, to ensure that the benefits of our nation's environmental laws can be shared by everyone living in the United States."³⁴⁵

Complainants request that EPA include them in the investigation, resolution, and EPA's oversight of the resolution of this Complaint. Additionally, please let us know if you need any additional information or have questions about this Complaint. If ADEM does not voluntarily comply with its Title VI obligations, Complainants request that EPA suspend or terminate financially assisting ADEM.³⁴⁶ We look forward to hearing from and communicating with EPA and having EPA work swiftly to resolve ADEM's ongoing violations of Title VI and EPA implementing regulations.

³⁴⁵ EPA, "Environmental Justice in Enforcement and Compliance Assurance," *available at* <https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance>.

³⁴⁶ See 40 C.F.R. § 7.130.