

Harrison, Brenda

From: Dorka, Lilian
Sent: Tuesday, June 4, 2019 9:17 AM
To: Covington, Jeryl
Cc: Rhines, Dale; Harrison, Brenda; Nieves-Munoz, Waleska
Subject: FW: Complaint Under Title VI of the Civil Rights Act Against NMED on the WCS DP-1817 public process
Attachments: WCS-Title-VI-Complaint_6-3-19_Final.pdf

Thanks Jeryl. Copying Brenda and copying Waleska FYI.

Lilian Sotolongo Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel
U.S. Environmental Protection Agency
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From: (b) (6) Privacy, (b) (7)(C) Enforcement Privacy
Sent: Monday, June 3, 2019 1:45 PM
To: Title VI Complaints <Title_VI_Complaints@epa.gov>
Cc: (b) (6) Privacy, (b) (7)(C) Enforcement Privacy
(b) (6) Privacy, (b) (7)(C) Enforcement Privacy Carmody, Amanda <Amanda.Carmody@clinic.law.unm.edu>; Pacyniak, Gabriel <pacyniak@law.unm.edu>
Subject: Complaint Under Title VI of the Civil Rights Act Against NMED on the WCS DP-1817 public process

To Whom It May Concern:

Attached, please find our Title VI Complaint that we are filing today against the New Mexico Environment Department (NMED) for its actions in the public process for the Waste Control Specialists LLC (WCS) application for a groundwater discharge permit (DP-1817) and for a continuing pattern and practice of discrimination in NMED's programs and actions.

We will soon upload all Exhibit documents to a download site whereupon we will email you the link to download those documents. We will also mail signed hardcopy of this complaint along with the Exhibit documents on a flash drive.

We would appreciate it if recipients of this email would confirm receipt of the cover email and the attached document.

Sincerely,

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy
[Redacted]

Santa Fe NM 87501 (b) (6) Privacy
[Redacted]

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy
[Redacted]

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C.

Citizens for Alternatives to Radioactive Dumping;)
Alliance for Environmental Strategies;)
Concerned Citizens for Nuclear Safety;)
(b) (6) Privacy, (b) (7)(C) Enforcement Privacy) COMPLAINT UNDER TITLE VI
) OF THE CIVIL RIGHTS ACT OF
) 1964, 42 U.S.C. §2000d AND
) 40 C.F.R. Part 7
COMPLAINANTS)
)

I. INTRODUCTION

Citizens for Alternatives to Radioactive Dumping ("CARD"), the Alliance for Environmental Strategies ("AFES"), Concerned Citizens for Nuclear Safety ("CCNS"), (b) (6) Privacy, (b) (7)(C) Enforcement Privacy (collectively "Complainants"), through their undersigned representative file this administrative complaint with the External Civil Rights Compliance Office ("ECRCO") of the United States Environmental Protection Agency ("EPA") for an investigation into violations of Title VI of the Civil Rights Act of 1964 by the New Mexico Environment Department ("NMED") with regard to its handling of the public process and the application of Waste Control Specialists ("WCS") for a groundwater discharge permit ("DP-1817") and with regard to a broader pattern and practice of continuing discrimination throughout NMED in permitting and other activities.

Complainants are so-called "minority" members or have minority membership in their organizations, many of whom live, work and recreate in the general area of the discharge from the WCS facility. CARD and AFES were parties in the hearing for the facility; they, along with CCNS, as groups, many of their members as individuals, and other Complainants have actively opposed WCS and its discharge permit or have struggled to ensure NMED issues a discharge permit that is truly protective of potentially impacted New Mexico groundwater—some beginning these efforts within a few months of WCS's December 17, 2012 Notice of Intent to Discharge and others more recently. Complainants therefore petition for an investigation as Complainants who have opposed this facility during the permitting process and who have suffered the effects of NMED's discrimination.

Complainants allege that NMED's public permitting process for the WCS DP-1817 permit amounted to disparate treatment of limited English proficiency ("LEP") individuals in that they were not provided the same critical information relating to the permitting process that was provided to English speakers. This resulted in a disparate effect on these individuals, limiting their ability to participate meaningfully in the permitting process.

Additionally, complainants allege that there is a broader pattern and practice of disparate treatment of and effect on LEP individuals and community members of Hispanic and Mexican descent. In an Informal Resolution Agreement ("Resolution Agreement" or "Agreement") between NMED and EPA, NMED agreed to provide LEP community members with equal and meaningful access to its services and activities as well as to involve communities of Hispanic and Mexican descent in the permitting process and address their needs and concerns.¹ However, in multiple permitting processes, NMED is failing to provide critical information to LEP individuals, involve communities of Hispanic and Mexican descent or to address their needs and concerns. As a result, NMED is failing to provide these individuals with equal and meaningful access to its services and activities.

Finally Complainants allege that NMED has a broader pattern and practice of permitting facilities and discharges in areas of the state with high concentrations of LEP and minority community members. Sometimes, as in the case of the WCS discharge permit, a permit is approved without requiring protections that are standard in permits elsewhere in the state.² Minority groups in these areas are already overburdened with multiple environmental stressors, poor health and high death rates—specifically in southeastern New Mexico.

¹ Informal Resolution Agreement, New Mexico Environment Department and the US. EPA 11-12 (Jan. 19, 2017)

² Findings of Fact and Conclusions of Law submitted by CARD and AFES in the matter of the Application of WCS for a Groundwater Discharge Permit, GWB-18-11(P) 2-9, October 19, 2018 (provided in a file as "Exhibit 2")

II. JURISDICTIONAL REQUIREMENTS

A. NMED is a recipient of EPA financial assistance

The New Mexico Environment Department is a state government agency that oversees New Mexico's environmental laws.³ Based in Santa Fe, NMED employs over 550 employees⁴ and receives federal funding⁵ to promote a simple mission; "To protect and restore the environment, and to foster a healthy and prosperous New Mexico for present and future generations."⁶ In relevant part, NMED authorizes permits and manages the public process for those permits, including the WCS discharge permit DP-1817 which process was authorized under the Water Quality Act and 20.6.2 NMAC and managed through NMED's Ground Water Quality Bureau ("GWQB"). NMED is located at: New Mexico Environment Department, Office of the Secretary, Harold Runnels Building, 1190 St. Francis Drive, Suite N4050, P.O. Box 5469, Santa Fe, NM 87502-5469.

B. This complaint is filed timely with ECRCO within 180 days of the alleged discriminatory act.

NMED facilitated the public process for WCS DP-1817 from July 17, 2013 to December 5, 2018. As detailed below, NMED has repeatedly failed to provide meaningful access or opportunity for LEP individuals and individuals of Hispanic or Mexican descent to participate and to comment in this process. The Secretary's final order approving the DP-1817 Permit was issued on December 5, 2018. Therefore, these discriminatory acts continued at least until that date when NMED ended the public participation process and approved the permit. EPA regulations require complaints to be filed within one hundred eighty (180) days of the alleged discriminatory act. This complaint is timely, being filed on June 3, 2019.

C. NMED's actions, omissions, and/or policies, patterns and practices subject a person or class of persons to discriminatory treatment or discriminatory impact on the basis of their race, color, national origin (including limited English proficiency), disability, sex, or age.

1) WCS DP-1817 permitting process

a) Disparate treatment

- i) NMED treated LEP community members disparately by providing far less critical information to LEP individuals than to English speakers throughout the WCS DP-1817 permitting process. For the first five years of this process, until the September 1, 2017 public notice was translated into Spanish, NMED repeatedly issued English-only notices and draft permits. Even after a second public notice was translated into Spanish on November 17, 2017, until July of 2018, only 10

³ About NMED, <https://www.env.nm.gov/about-us/> (last visited June 26, 2018)

⁴ *Id.*

⁵ NMED has received \$22.53 million from EPA for Fiscal Years 2009 – 2019, *Recipient Profile, Environment Department, New Mexico*, USASPENDING, <https://www.usaspending.gov/#/recipient/0998a333-06bb-82ba-5501-bdec891e2493-C> (last visited April 3, 2019).

⁶ About NMED (June 26, 2018), <https://www.env.nm.gov/about-us/> (last visited June 26, 2018)

sentences of information about the permit, the discharge and the facility were available in Spanish. The total amount of information ever available to Spanish speakers throughout the entire six year WCS process was a little more than 17 pages of information plus the translated Index of the Record. Spanish speakers were not allowed to read any of the draft permits, as none was translated even though all were short.

Meanwhile, English speakers had access to around 4,000 pages of information including all three draft permits. Many of the 17 pages in Spanish were missing important information, misrepresented what was said in the draft permit and included mistakes including the wrong date and time for the hearing. Though English speakers could read the actual draft permits, the regulations and other documents in the Record to correct these deficiencies, for the most part LEP Spanish speakers could not. An important issue for DP-1817 was that the final Draft 3 Permit had removed almost all protections that had been written into the Draft 2 Permit. LEP persons could never read Draft 2, or any of the public notices about that draft and had available only a misrepresentation of Draft 3, so it was impossible for them to make this comparison. Despite agreeing to do so in the Resolution Agreement, NMED never agreed to define any documents, including any of the draft permits, as "vital documents." Thus, vital information that was readily available to the public in English was not available in any way to the LEP public. This created a substantial barrier to LEP participation and amounted to disparate treatment of LEP individuals.

- ii) NMED also treated LEP and minority community members disparately by making almost no effort to understand the concerns and needs of the LEP and other affected communities of Hispanic and Mexican descent. Despite provisions in the Resolution Agreement that required NMED to create a "description of the community (including demographics, history, and background)" and to have a "... plan of action for addressing the community's needs and concerns ..." *each time* the public participation process was triggered,⁷ neither of these was carried out for DP-1817. NMED did not even follow the requirements of their own Public Participation Policy that "[e]ach Bureau shall develop a PIP for each activity requiring public participation (e.g., permitting actions ...)"⁸ No Public Involvement Plan was ever created for this activity, no community stakeholders were identified and little effort was made to create partnerships with private and public entities to share information. NMED said they couldn't create a PIP for a public permit process that had been going on for so long. Nevertheless, they were able to create a PIP for the Waste Isolation Pilot Plant ("WIPP") Draft Permit

⁷ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11 (Jan. 19, 2017)(Exhibit 1)

⁸ New Mexico Environment Department, Public Participation Policy 07-13, 4 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-13.pdf> (provided in a file as "Exhibit 3")

Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting ("Volume Mod") even though that permit process had been going on far longer than the process for DP-1817.⁹ Not understanding minority communities' history and background as well as their needs and concerns and having no plan to address those concerns amounts to disparate treatment of LEP and minority communities by NMED.

- iii) NMED also treated LEP community members disparately by releasing the translated Index of the Record significantly later than the English version, and by making this and the second fact sheet, that was to summarize the draft permit, unavailable to the community by not noticing their availability in Spanish. The translated Index was also never provided to the Eunice Public Library, the local information repository as promised.

NMED agreed to translate only one primary document, the Index of the Administrative Record. However, the translated Index was posted on the website about a month after the English version was posted—almost half way through the 60-day pre-hearing period when written statements may be submitted for the hearing.¹⁰ This problem was compounded when NMED never noticed the availability of the translated Index, either posted online or at any information repository. At least some English speakers had been informed when the English version was posted. In addition, although two English versions of the Index were provided to the Eunice Public Library, NMED never provided the translated version.¹¹

There were similar problems with the translated second fact sheet. Its availability was also never noticed in any way in Spanish. NMED claimed they could not notice the availability of translations and fact sheets,¹² yet just a few months before they had supplemented the first hearing notice with an additional public notice simply to announce the availability of the first fact sheet and its translated version.¹³ Again, NMED further limited the amount of information available to LEP individuals compared to what was available to English speakers and these actions amounted to disparate treatment.

⁹ Public Involvement Plan for the Waste Isolation Pilot Plant (WIPP) EPA ID#: NM4890139088; Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July 2018 (provided in a file as "Exhibit 4")

¹⁰ Affidavit of (b) (6) Privacy in the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, GWB-18-11(P), 2, #14, September 17, 2018 (provided in a file as "Exhibit 5")

¹¹ See contents of NMED binder for English and Spanish DP-1817 documents, located at the Eunice Public Library (photos taken by (b) (6) Privacy on October 4, 2018 after the last day of the hearing) (files provided as a folder as "Exhibit 6")

¹² NMED's Response to CARD's and AFES' Opposed Motion, in the Matter of the Application of Waste Control Specialists LLC Discharge Permit (DP-1817) [No. GWB-18-11(P)] for continuance of the September 21, 2018 Deadline and of the October 2, 2018 Public Hearing, 13-14, September 28, 2018 (provided in a file as "Exhibit 7")

¹³ Ground Water Quality Bureau, Notice of Public Hearing, Waste Control Specialists, LLC (DP-1817) *Fact Sheet Available*, issued by email 7-9-2018 (not entered into the Record) (provided in a file as "Exhibit 8")

- iv) NMED treated LEP community members disparately by providing them translated information that was significantly inferior to the information provided to English speakers. Once translation of public notices began in September of 2017, less information was available in PN-2s than ever before. Information that had been available in previous English notices was removed, incorrect information was added and not corrected.

This was only improved somewhat in the first hearing notice as critical information about the discharge was still omitted without explanation. Descriptions of how the public could participate in the hearing left out vital information about public participation and referred the public to English-only regulations for further details. The first hearing fact sheet continued to leave out critical information about the discharge and the description of the draft permit gives almost no actual information about the permit at all. English speakers could correct and supplement what was lacking by reading the short draft permit. Spanish speakers could not.

The second hearing notice does add some new information and provides a more complete description of how the public can participate in the hearing, but continues to leave out critical information that is in the permit. This fact sheet has perhaps the most problems of all and though it was supposed to contain all vital information included in the permit, instead, it omitted large amounts of vital information, introduced new information that contradicted the permit, changed the meaning of summarized passages and passages that were supposed to be quoted word for word, and included incorrect information.

Nor were the concerns, needs, history and background of the affected Hispanic community members discussed or even mentioned though social concerns are supposed to be considered during permitting.¹⁴ Again, throughout the permitting process for DP-1817 English speakers continued to have access to previous, more detailed public notices, three draft permits and thousands of other pages of information in English to supplement and correct deficiencies in documents after translation began. LEP Spanish speakers did not. English-speakers could read the regulations to understand how to provide written comments, Spanish speakers could not.

- v) NMED treated LEP community members disparately by providing fewer opportunities to access NMED's programs and activities during the DP-1817 permitting process by limiting access to NMED's translator/interpreter, website and phone system. None of the public notices or fact sheets for DP-1817 informed Spanish speakers that a translator/interpreter was generally available, not just

¹⁴ See *In re* Application of Rhino Env'tl. Services, 2005-NMSC-024, ¶¶ 22-24, 138 N.M. 133, 139-40, 117 P.3d 939, 945-46 (holding that "[w]hen the New Mexico Environment Department [] reviews a permit application to operate a landfill, the Department *must* consider public opinion at a public hearing . . . [t]he [] review must include consideration of public testimony about the proposed landfill's adverse impact on a community's quality of life")(emphasis added)(provided in a file as Exhibit 9)

Finally, NMED's lack of attention to the history, background and demographics of the affected community and its lack of a plan to address community needs and concerns beyond the need for translation, also had the disparate effect of making it impossible for LEP individuals to make those needs and concerns known and addressed as part of the permitting process.

D. NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the public participation and permitting process

2) Disparate treatment

- a) NMED systemically treats LEP community members and members of Hispanic or Mexican descent disparately by not making adequate efforts in most or all permit processes to understand their community' needs and concerns; their history, demographics, and background; by not creating a plan to address those needs and concerns in permitting processes throughout their programs, and by not making the same quantity and quality of vital information available to LEP persons.
 - i) NMED does not consult and work with potentially affected and affected communities to understand their history and background, and whether there are social and environmental concerns for LEP individuals, such as a lack of access to health care, a density of polluting facilities, low life expectancy or having their area become known as a "nuclear corridor."¹⁵ They do not make a concerted effort to create partnerships with a variety of private and public entities to share information. Thus, their knowledge about LEP and minority community concerns is extremely limited and these community concerns and needs are not incorporated into the permitting process.

NMED's continuing refusal to allow any involvement by the LEP and Hispanic or other minority public in the creation of Public Involvement Plans has resulted in PIPs that describe little about potentially affected communities beyond a possible need for translation. Sometimes even that is missed since NMED over-relies on EJSCREEN as almost the sole basis for making a determination regarding the existence or absence of social or civil rights concerns and usually uses a small target area around the facility—typically 4 or 6 miles. This despite EPA warnings not to rely on EJSCREEN in this way and that looking at small geographic areas can lead to substantial uncertainty in demographic and environmental data.¹⁶ Occasionally other data, like US census data, is incorporated as well. Since PIPs do not include information on community needs and concerns beyond translation and some participation needs, no detailed plan of action to address communities' other concerns is ever included. If PIPs are supposed to be the detailed action

¹⁵ CIS Development Project: Eddy-Lea Energy Alliance LLC, *Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility*, 5,(May 11, 2017)

¹⁶ U. S. Environmental Protection Agency EJSCREEN Fact Sheet (August 14, 2018) https://www.epa.gov/sites/production/files/2018-08/documents/2018_ejscreen_fact_sheet_8-14-18.pdf (last visited June 3, 2019)(provided in a file as "Exhibit 10")

during the public hearing itself. In addition, during the permit hearing, almost the entire NMED website was English-only with some information in Spanish, mostly having to do with the Resolution Agreement, the three implementing Policies and how to file a discrimination complaint with NMED. A few translated documents about DP-1817 were posted during the hearing but even fewer had their availability noticed so they were still inaccessible to LEP individuals. Despite public requests over a period of years for a Spanish option for their phone system, not a single phone number at NMED, including that for the non-discrimination coordinator, has such an option. Limiting LEP individuals' access to information throughout the permitting process while English speakers had full access to all documents in the Administrative Record, to every page on NMED's website and to NMED's entire phone system, amounted to disparate treatment of LEP individuals.

b) Disparate effect

NMED's handling of the DP-1817 permitting process had a disparate effect on LEP community members because so severely limiting the amount of information available to LEP persons did not provide them a meaningful opportunity to participate in the process compared to English speakers. The WCS facility, the discharge from that facility, the geology and hydrology of the discharge area in New Mexico, and the draft permit proposed to regulate the discharge are each extremely complex issues that are difficult to understand. The public permitting process is also complicated. Even at its fullest, the amount of information available to LEP persons was not sufficient to allow them to inform themselves adequately.

NMED compounded this deficiency in the amount of translated information by providing information to the LEP community that was deficient in quality as well since much of it included multiple errors and omissions. In addition, almost all the information provided was also provided late in the process, no earlier than the public hearing stage and some even part way through the pre-hearing period, while English speakers had been included from the beginning. Because of the complexity of the subject and the convoluted process NMED had envisioned for LEP individuals to access information additional to public notices or fact sheets, LEP individuals needed additional time to inform themselves yet received less time with vital information than English speakers had.

NMED's actions thus resulted in the disparate effect of making it impossible for LEP individuals to participate fully in the permitting process because they could not understand the most basic aspects of the permit, the discharge and the WCS facility. They could not correct this deficiency as English speakers could, since they were not able to access all the vital information that was readily available to the public in English. Not informing LEP individuals that a translator/interpreter was always available to help them, and making it more difficult for them to communicate with NMED by phone than it was for English speakers further reduced their ability to inform themselves and participate in the public process in a meaningful way.

plans inform communities, they fall woefully short in this regard. PIPs are also not translated and so are unavailable to the LEP community.

Sometimes not even this effort is made, as despite requirements in NMED's Public Participation Policy to create at least a PIP for every action that triggers public participation, NMED does not always meet this obligation.

- ii) NMED systemically treats LEP community members disparately by providing far less vital information to LEP individuals than to English speakers in their programs and activities throughout the state. NMED has committed to translate "vital documents" for affected limited English proficiency communities.¹⁷ However, NMED does not have a definition of "vital document," which allows NMED to practice subjectivity when deciding which documents to translate. This has resulted in only one primary document (the WCS Index of the Record) being translated out of the hundreds of permit hearings that have occurred since NMED signed the Resolution Agreement. None of these hundreds of permits, even when short, has been defined as a "vital document" or translated. PIPs are never translated. Thus, the amount of information available to LEP individuals is still greatly limited and vital information regarding permits and facilities that is readily available to the English speaking public continues to be unavailable to the LEP public.
- iii) NMED systemically treats LEP community members disparately by not notifying them of all available LEP services and translated documents, thus further decreasing the amount of vital information available to LEP persons in comparison to English speakers. Despite PIPs sometimes stating that public notices will contain a statement that NMED has an in-house translator/interpreter and that non-English speakers may call NMED to request language assistance to learn more about the permit and permitting process, public notices in at least the Ground Water Quality Bureau and the Hazardous Waste Bureau continue to be published without this information. NMED has also stated that it is not their responsibility to inform the LEP public of the availability of translated documents.¹⁸
- iv) NMED systemically treats LEP community members disparately by continuing to limit LEP individuals' access to the NMED phone system and by providing far less information on their website in Spanish than in English despite the website being listed in PIPs as a significant part of outreach activities. There continues to be no Spanish option on NMED's phone system and only minimal information in Spanish on their website as most pages, by far, are still in English.
- v) NMED systemically treats LEP community members disparately by not analyzing the need for translation and not budgeting for language services at the

¹⁷ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017, 7, (Exhibit 1)

¹⁸ NMED's Response to CARD's and AFES' Opposed Motion, 13-14 (September 28, 2018)(Exhibit 7)

programmatic or statewide level for any of their public permit processes. Limiting these analyses only to the local or facility level ignores federal guidelines and also ignores the need for information for the large number of LEP New Mexicans who live throughout the state—NMED's program area. Many LEP persons have an interest in land development and water issues whether those issues are next door or across the state. Since many facilities include facility transportation that can create a disparate effect in communities far from the facility site, limiting these analyses to such a small area also limits the information available to potentially affected LEP individuals who do not live within a small area nearby the facility. PIPs often state that translation/interpretation will be arranged "...to the extent possible," or that if additional services are requested beyond what is described in the PIP, "...the budgetary implications will be reviewed." Clearly NMED is not addressing even the information needs of interested LEP New Mexicans throughout the state or even, sometimes, those beyond the 4 or 6 mile EJSCREEN limit.¹⁹

- vi) NMED systemically treats LEP community members disparately by following their LEP Accessibility and Outreach Policy that directs NMED employees to "... assess historical participation ... to evaluate whether there was participation by LEP individuals in the past."²⁰ This reasoning violates federal guidelines that require recipients to assess LEP community needs at a programmatic level instead of reviewing on a case by case level.²¹ This approach also punishes LEP communities by "blaming the victim" when NMED has historically obstructed public involvement by this segment of the public.
- vii) NMED systemically treats LEP and minority community members disparately by providing inadequate and incomplete non-discrimination training for it's employees. Each of NMED's three policies implementing the Resolution Agreement requires non-discrimination training for employees. Yet again, however, the LEP and minority public have not been allowed any involvement in creating the curriculum for the training or even to know what that curriculum is. That the training does not fully cover all important aspects of non-discrimination, however, has been made clear through statements made by NMED employees during multiple permit processes.
- viii) NMED systemically treats LEP and minority community members disparately by not providing a formal process to include such community members in the creation, review or correction of policies, PIPs, definitions of vital documents, summaries of vital information, translated fact sheets or other translations. In

¹⁹ LANL DP-1793 transcript, 332-333, November 8, 2018 (Exhibit 12)

²⁰ Limited English Proficiency ("LEP") Accessibility and Outreach Policy, Policy and Procedure 07-11, 7, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-11.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 11")

²¹ Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 35,606, 35,607 (Jun. 25, 2004) (EPA LEP Guidance) <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 18")

other words, NMED has removed community influence from the very processes and policies created to provide a non-discriminating public process for these same communities. NMED claims that there is at least a process to submit public comment on the PIPs but in fact, that is not the case. There is no process—only a statement that the public is welcome to submit suggestions or comments on PIPs or other processes to NMED's general counsel. NMED does not acknowledge the receipt of such suggestions and comments, discuss them with the submitters or announce whether or not any suggestions will be incorporated in NMED's public process.

- ix) NMED systemically treats community members of Hispanic and Mexican descent disparately by not ensuring that hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j) to provide information on effects from facilities and from facility transportation during normal operations and during accidents. Although in the Resolution Agreement NMED committed to ensuring the inclusion of such information in *all* hazardous waste permit applications, in fact they have not been requiring the information to be included in recent hazardous waste permit processes, providing various excuses as to why such information is not needed.

b) Disparate effect

- i) NMED's practice of not investigating LEP and minority community history, background, needs and concerns beyond a possible need for translation has resulted in those concerns and needs being ignored in virtually all of NMED's permitting processes. In fact, when such social concerns about possible disparate impacts and civil rights issues have been raised during hearing processes NMED has claimed that the public process is not the place to discuss such concerns.²²

The small target area usually addressed in PIPs makes even the community's need for translation questionable as potentially affected communities are eliminated from consideration. This has resulted in a pattern and practice of disparate effect as LEP persons cannot participate meaningfully in the permitting process when their needs and concerns are not addressed and even translation needs are sometimes ignored. When the process to site a facility or approve a permit ignores the environmental, health and pollution history and background of a minority or LEP community, this also leads to disparate effects on that community as the permit cannot be truly protective without somehow incorporating that information.

- ii) NMED's pattern and practice of not identifying vital documents and translating them has resulted in a disparate effect on LEP individuals throughout the state as

²² Transcript of the Proceedings, In the Matter of Los Alamos National Laboratory's Groundwater Discharge Permit, DP-1793, November 8, 2018, Volume 2, 329-337 (Cross-Examination by (b) (6) Privacy of NMED witness Stephen Pullen)(provided in a file as Exhibit 12); Transcript of the Proceedings, In the Matter of the Waste Isolation Pilot Plant's Hazardous Waste Facility Permit, October 25, 2018, 22-46 (EPA ID NO. NM4890139088)(Cross-Examination by (b) (6) Privacy of NMED witness Paul Maestas)(provided in a file as Exhibit 13)

they receive far less information about NMED's programs and actions than English speakers do and therefore cannot participate equally and in a meaningful way in the permitting process. This disparate effect is compounded by not analyzing the need for language services programmatically and budgeting only on the local or facility level. Large numbers of potentially affected LEP individuals are missed when NMED only looks at a few miles around a facility or discharge area. Their ability to participate is disparately affected compared to English speakers who have no barriers to NMED's information.

- iii) NMED continues to have a pattern and practice of not notifying LEP individuals that there is an in-house interpreter/translator available and not notifying them when and where translated documents are available. This has created a disparate affect on these individuals as it further limits their access to documents and information, including information about how to participate in NMED's public processes so they cannot adequately inform themselves. English speakers have no such problem as almost all information at NMED is in English. Although some PIPs are beginning to say that notices will include statements that this interpreter/translator is available and statements on how LEP persons can receive additional information, in fact, public notices still do not include this information. Since the PIPs are not translated, even this much information is denied to LEP individuals.
- iv) NMED's practice of maintaining an English-only phone system and the limited amount of information in Spanish on their website has also created a disparate effect on LEP persons as these individuals' cannot communicate with NMED and inform themselves in the same way that English speakers can. It is impossible to participate meaningfully in NMED's programs and actions without adequate information.

In fact, the combination of little translation, lack of notice of the availability of a translator/interpreter, lack of notice of the availability of translated documents beyond public notices, an English-only phone system and a website with substantially less information in Spanish than in English create a perfect storm of disparate effects that together make it virtually impossible for LEP persons to participate fully in NMED's programs and actions.

- v) NMED's practice of analyzing the need for language services for LEP communities by assessing their historical participation in NMED's permitting actions creates a disparate impact on these communities by potentially further reducing their access to information and making it impossible for these communities even to begin to participate in public processes now. It is NMED that has historically obstructed these communities from participating by providing no information at all in Spanish or in languages other than English. Although some Bureaus like the Solid Waste Bureau, have historically provided notice in Spanish and even other languages in the past, most Bureaus have not. NMED has a lot to make up for and limiting language services and outreach to communities

of Hispanic and Mexican descent because these communities have not been involved historically, simply makes the disparate impact greater.

- vi) NMED's refusal to allow LEP and minority individuals to have any influence on the employee non-discrimination training when that training is specifically supposed to make NMED more inclusive for these individuals, has resulted in inadequate training and a disparate impact on these persons. When employees are not trained to understand the importance of LEP and minority community concerns and impacts, these are not included or assessed when siting facilities and writing permits. Plans and permits that do not address these concerns are inherently incomplete and inadequate to protect these individuals and their communities.

Employees are telling the public that the permitting process is not the place to discuss civil rights, social concerns and disparate impacts when in fact, it is exactly in this process where these should be discussed. When employees provide inaccurate information to LEP and minority individuals and their representatives, they create a disparate impact on these individuals and communities as they are obstructed from having any influence on permitting decisions and therefore are unable to participate meaningfully in the process.

- vii) NMED's practices of not allowing LEP and minority community members to have any involvement in the creation of the three policies implementing the Resolution Agreement, not allowing them to be involved in the creation of any of the PIPs, and of not having a formal policy for these individuals to review and correct problems with the definition of vital documents, summaries of vital information, translated fact sheets or other translations, has created a disparate impact on these community members. Because these communities have been kept at arms length throughout the creation of these policies and processes, the policies and processes continue to be flawed and have not been effective in creating a culture of non-discrimination throughout NMED's programs and activities.

Without a formal process to incorporate public input, LEP and minority community members cannot make sure that policies and PIPs are adequate to assure that their needs and concerns are incorporated into the permitting process. When NMED forges ahead with the public permitting process without a review process, refuses to allow policies and PIPs to be discussed in hearings, only promising to fix them at some vague time in the future, LEP and minority community members are left in the dust with their needs and concerns ignored and unfulfilled.²³ Not involving the LEP and minority public in creating and improving the policies and PIPs, has created a disparate impact on these communities with no true way to correct it.

Without a formal and timely review and correction process that is incorporated into the permitting process itself, community members also cannot make sure that

²³ WIPP Volume Mod transcript, 36-38, October 25, 2018 (Exhibit 13)

vital documents are translated and that summaries and translations are accurate. Again, this creates a disparate impact as it not only decreases the amount of information available to LEP persons but also leaves them with flawed information in contrast to the variety of additional accurate information that is available for English speakers.

One or more of these problems exist in many public processes throughout NMED's programs, yet there is no formal way to review and correct mistakes. Sending a letter or email to NMED's general counsel for a review once a year does little to help when inaccurate summaries or translations are circulated before a comment period or hearing and not corrected.

- viii) NMED's pattern and practice of not ensuring that *all* hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j) to provide information on effects from facilities and from facility transportation during normal operations and during accidents, has resulted in a disparate effect on minority communities as it is impossible to create a disparate impact study of effects from such facilities on potentially affected and affected minority communities without first understanding what those effects are. Despite the fact that these studies of effects are required in the regulations, NMED continues to avoid requiring them in hazardous waste facility applications even for important and potentially dangerous facilities like WIPP and Triassic Park.

III. NMED's discriminatory actions, omissions, and/or policies, patterns, and practices

A. Background

1) New Mexico

New Mexico is the only state where no single racial group is in the majority, though those of Hispanic and Mexican descent come close as the 2017 ethnic breakdown in New Mexico is 48.8% Hispanic, 38.2% White, 9.1% American Indian.²⁴ Hispanics maintained this percentage in 2018 and New Mexico is the state with the highest percentage of Hispanics in the country²⁵. 35.7% of the population speaks a language other than English in the home and the majority of these residents are Spanish speakers.²⁶

New Mexico is one of the poorest states in the nation, being tied with Louisiana for the second highest poverty rate in 2017. This poverty rate is worse for people of color in New Mexico with 23% of Hispanics and 33.8% of Native Americans living in poverty in 2017 compared to only 12.1% of non-Hispanic Whites—almost two and three times as

²⁴ New Mexico Department of Health, State Center for Health Statistics, Bureau of Vital Records and Health Statistics, Epidemiology and Response Division, *New Mexico Selected Health Statistics, Annual Report 2017*, 7, <https://nmhealth.org/data/vital> (last visited June 3, 2019)

²⁵ Instituto Cervantes at FAS - Harvard University, *Hispanic Map of the United States 2017*, 12-14, November 2017, http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic_map_2017en.pdf (last visited on June 3, 2019)(provided in a file as "Exhibit 50")

²⁶ United States Census Bureau, New Mexico Quick Facts, New Mexico, <https://www.census.gov/quickfacts/NM> (last visited on June 3, 2019)

many. US percentages at the same time were, 19.4% for Hispanics, 33.8% for Native Americans and 9.6% for non-Hispanic Whites. These high poverty rates continued during all the years that the WCS discharge permit public process was ongoing.²⁷ For years, New Mexico has also been among those states with the highest child poverty rates. In 2017 it was ranked as the worst state in the nation for child poverty with a child poverty rate of 30%. There are significant racial disparities in the child poverty rate as well, with the Hispanic rate being twice the rate for Whites (24% compared to 12%) and the Native American rate almost three times that of Whites (32%)²⁸ In 2016 New Mexico had the highest unemployment rate of all the states (6.7%).²⁹ Even in 2019 New Mexico has not fully recovered from the Recession and still has an unemployment rate of 5% while the US average is just 3.8%. Only one state and the District of Columbia have higher rates of unemployment.³⁰

Education is also depressed with 2013-2017 high school graduation rates at 85.0% giving the state a rank of 45 among all states and a rank of 50th for the percentage of third graders able to read at grade level in 2016.³¹ Causes for this poor graduation rate include poverty and large numbers of LEP students. In 2014-2015 New Mexico had the worst graduation rate of all states and also had the highest percentage of students who qualified as English Language Learners (27%). Most of these LEP students are Spanish speakers; there are also Native American speakers.³²

As far as health care goes, in New Mexico, Hispanics are more than twice as likely as Non-Hispanic Whites to lack healthcare coverage (25% vs.12%) and those Hispanics living in poverty are much more likely never to have received cancer-screening exams or early and continuous prenatal care. The burden of respiratory diseases that are prevalent in the southeastern part of the state also falls more heavily on Hispanics than on other ethnic groups with asthma prevalence higher among Hispanics (12.6%) than Whites (11.4%) and Native Americans (9.4%).³³

²⁷ New Mexico Department of Workforce Solutions, Rachel Moskowitz, Bureau Chief, Economic Research & Analysis Bureau, *Poverty in New Mexico*, 8-10, 2019, https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf (last visited on June 3, 2019)(provided in a file as "Exhibit 51")

²⁸ New Mexico News Port, Justina Grant and Cayla Montoya-Manzo, *New Mexico Ranked Worst in the Nation for Child Poverty*, December 5, 2017, <http://www.newmexiconewsport.com/new-mexico-ranked-worst-nation-child-poverty/> (last visited on June 3, 2019)

²⁹ RI Department of Labor and Training, Labor Market Information, Unemployment Rates for States 2011 - Present, 2016, <http://www.dlt.ri.gov/lmi/laus/us/annavg.htm> (last visited on June 3, 2019)

³⁰ U.S. Department of Labor, Bureau of Labor Statistics, Unemployment Rates for States, Seasonally Adjusted, April 2019, <https://www.bls.gov/web/laus/laumstrk.htm> (last visited on June 3, 2019)

³¹ New Mexico Department of Health, Epidemiology and Response Division, 2018 The State of Health in New Mexico, 90, April 2018, <https://ibis.health.state.nm.us/report/soh/Introduction.html> (last visited on June 3, 2019)(provided in a file as "Exhibit 52")

³² Albuquerque Journal, Kim Burgess, Journal Staff writer, *NM 2015 Graduation Rate was Worst in Nation*, May 8, 2017, <https://www.abqjournal.com/1000114/nm-2015-graduation-rate-worst-in-nation.html> (last visited on June 3, 2019)

³³ New Mexico Department of Health, *2018 The State of Health in New Mexico*, April 2018, (Exhibit 52)

2) **Lea County**

Lea County is a rural county with an economy that focuses on farming, ranching and mining, including potash, oil and gas. The economy also includes "warehousing" and transportation. Oil and gas production far surpasses any other source of employment.³⁴ A majority of the population in the county is Hispanic (58.5% in 2018). In Lea County fewer people were graduated from high school between 2013 to 2017 than in the US (72.9% compared to 87.3%) and far fewer received B.A.s (13.1% compared to 30.9%). More people speak a language other than English in the home in Lea County than in the state and almost twice as many as in the US (39.9% compared to 21.3%) Of all counties, adults in Lea County were least likely to have a primary childcare provider.³⁵

Like most counties in New Mexico, Lea County has been designated a "primary care health professional shortage area." 24.2% of people are uninsured in Lea County, almost twice the national rate of 12.7% and higher than New Mexico's rate at 18.1%. Although the percentage of people living in poverty in the county from 2013 to 2017 was somewhat lower than the New Mexico poverty rate (16.1% compared to 19.7%), both rates were higher than the US rate of 12.3%.³⁶ This partial economic improvement is probably helped by one of the largest oil and gas development booms in history. However, it has not been as significant as it could be for the local area as many workers in the industry are imported from other states and are not necessarily permanent residents. Though creating many jobs, the industry also contributes significantly to the high pollution levels in Lea County and most of southeastern New Mexico. Thus, local people of Hispanic and Mexican descent, still suffer from poorer health, lower education levels, higher poverty and less access the health care. The unemployment rate was still higher in the county than in the state and nation in 2017 despite the "boom" (6.6 in Lea County, 6.1 in New Mexico and 4.4 in the US).

Like next-door Chaves County that we described in our previous 2002 Title VI complaint, Lea County and most of southeastern New Mexico have poor air quality. Measured in particulates, Lea County is just as bad as Chaves County though additional factors also come into play including enormous methane pollution. Besides the refineries and the thousands of oil and gas wells that pepper the landscape, this area is subject to multiple other pollution and contamination sources including WCS itself; the Navajo Refinery, URENCO USA, a uranium enrichment facility; the Sundance Services Parabo Disposal Facility, an oilfield waste disposal facility or landfarm; and the Lea County Landfill. All of these are close by the towns of Eunice and Hobbs. In 2014 the Waste Isolation Pilot Plant (WIPP) radioactive and hazardous release affected the northern part of the county and fallout from the 1945 Trinity atomic bomb test may have touched the

³⁴ New Mexico State University, Office of Policy Analysis at Arrowhead Center, *The Economic Base of Lea County, NM*, July 2017, <https://arrowheadcenter.nmsu.edu/wp-content/uploads/sites/19/2017/09/Lea-County-2017.pdf> (last visited on June 3, 2019)

³⁵ New Mexico Department of Health, Indicator-Based Information System (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018, <https://ibis.health.state.nm.us/community/highlight/report/GeoCnty/25.html> (last visited on June 3, 2019)

³⁶ *Id.*

county as well. The Triassic Park hazardous waste disposal facility site, subject of our 2002 complaint, is just over the county border.³⁷

Transportation is one of the main economic sectors in the area and facility transportation to WCS, WIPP, Triassic Park, URENCO, various landfarms, landfills, refineries and wells produces an unknown but large amount of pollution. The oil and gas economic boom has massively increased the number of cars and trucks on the roads in Lea County as well as throughout southeastern New Mexico and the accident rate has increased as well. Though the total amount and kinds of pollution have not been completely studied, diesel exhaust is listed as one of the main causes of the area's high lung cancer rate.³⁸

Consolidated Interim Storage Facilities for more than 10,000 spent fuel rods produced in the US are proposed both for the WCS facility itself and for the Holtec International facility, both also in Lea County. Facility transportation of that high level radioactive and hazardous waste through Lea County, now planned to be by rail, would also create an unknown amount of pollution, diesel exhaust and irradiation along the transportation routes.

With multiple pollution and contamination sources, low education rates, high numbers of non-English speakers, somewhat high poverty rates, a high minority population and very poor access to health care, it is no surprise that Lea County has one of the lowest life expectancy rates—the absolute lowest for women in 2014³⁹ and one of the highest cancer mortality rates in the state; health in the county is poor in general. The cardiovascular disease rate is among the highest in the state. Lea County also had the highest asthma hospitalization rate and from 2013 to 2017 had more than twice the state rate of childhood asthma hospitalizations (29.7/10,000 to New Mexico's 14.4). Low income, Low English Proficiency (LEP), particulates and lack of access to health care are some of the causes. Infant mortality in 2012 - 2016 was also higher than both the state and the nation in Lea County (7.5 deaths/1000 live births compared to 5.8 for the state and 5.9 for the US). Congenital malformations, deformations and chromosomal abnormalities were the greatest cause of these deaths—all possibly related to pollution and contamination. The high lung cancer death rate (42.0/100,000 in Lea County, 28.1 in New Mexico) is caused mostly by smoking, but other causes are familiar: radon, arsenic, diesel exhaust, air pollution and arsenic in the water; along with Low English Proficiency, poverty and lack of education.⁴⁰ Indeed, though Lea County is one of the worst counties affected, most of southeastern and some of south central New Mexico suffer from similar statistics and causes. The highest cancer mortality rate in the state exists in this area and **only in this area** of New Mexico. Lea County is part of this highest cancer mortality area.

³⁷ *Southeast New Mexico Threats Map*, Deborah Reade Design, LLC, 2019 (Exhibit 35)

³⁸ New Mexico Department of Health (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018

³⁹ Institute for Health Metrics and Evaluation, *New Mexico Life Expectancy Female, County Comparisons*, 2014, <https://www.worldlifeexpectancy.com/usa/new-mexico-life-expectancy-by-county-female> (last visited on June 3, 2019)

⁴⁰ New Mexico Department of Health (NM-IBIS), *Health Highlight Report for Lea County*, November 28, 2018

3) Eunice

Eunice is the nearest New Mexican municipality to the WCS discharge, being 6 miles away from the facility itself and a mere 4.5 miles away from the point of discharge in New Mexico. Eunice is a small town with a population of approximately three thousand, of which 54% are Hispanic,⁴¹ with 45% speaking Spanish at home.⁴² The city boasts “a friendly small town atmosphere, great schools and churches, clear skies, mild winters and a low cost of living.”⁴³ These are all true and Eunice is a lovely town. Eunice is also a poor town with 68% of students eligible for reduced or free lunches and is tied for the second highest school dropout rate in the state—at least twice the state average at 8%.

The town is also situated in the middle of the Permian Basin, and Eunice is entwined in oil and gas development with hundreds of oil wells directly surrounding the town⁴⁴ and pump-jacks dotted even throughout the town itself in both commercial and residential neighborhoods.⁴⁵ The smell of methane is pervasive, as it is in nearby Hobbs and the surrounding area. There are also multiple other potentially polluting facilities nearby. As described above, between Eunice and the WCS discharge point is URENCO USA, a uranium enrichment facility; and the Sundance Services Parabo Disposal Facility, an oilfield waste disposal facility or landfarm. Also nearby is the Lea County Landfill.

4) Waste Control Specialists (WCS)

The WCS property spans the New Mexico-Texas border, though the waste management facility itself is in Andrews County, Texas. This facility is located about 6 miles east of Eunice, New Mexico and consists of four distinct licensed facilities. **The Hazardous Waste Facility** is licensed to treat, store, and dispose of hazardous waste including polychlorinated biphenyls and asbestos. **The Texas Compact Waste Disposal Facility** is licensed to dispose of Class A, B, and C low-level radioactive waste. **The Federal Waste Disposal Facility** is similarly licensed to dispose of low-level radioactive waste and additionally licensed to dispose of mixed low-level radioactive waste. Highly unstable and potentially explosive transuranic mixed waste originally headed for WIPP is also stored indefinitely in the Federal Waste Disposal Facility. Finally, the **Byproduct Material Disposal Facility** is licensed to dispose of uranium metal products.⁴⁶ In addition, WCS has applied to the Nuclear Regulatory Commission to be licensed as a **Consolidated Interim High Level Waste Storage Facility**.⁴⁷ If licensed, materials onsite would also include thousands of spent fuel rods and

⁴¹ EJSCREEN ACS Summary Report, Location: City: Eunice city, created Apr. 10, 2018.

⁴² *Id.* at 2.

⁴³ Eunice, New Mexico City Website, Home Page, <https://www.cityofeunice.org/>

⁴⁴ Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018 (Exhibit 36)

⁴⁵ Satellite map of Eunice, New Mexico community center and nearby blocks showing pumpjacks, Google Maps, May, 2018, (Exhibit 47); Satellite map of Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018 (Exhibit 48)

⁴⁶ New Mexico Environment Department, Ground Water Quality Bureau, Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, June 9, 2017 (3rd and final Draft Permit) http://nuclearactive.org/wp-content/uploads/2017/08/d_WCS_GWDP_1817_060917.pdf (last visited June 3, 2019)(provided in a file as "Exhibit 16").

⁴⁷ Letter to Mark Lombard, Director, United States Nuclear Regulatory Commission re: License Application to Construct and Operate a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas, Docket 72-1050, Apr. 28, 2016, <https://www.nrc.gov/docs/ML1613/ML16132A533.pdf>.

wastes from reprocessing high-level waste.⁴⁸ Through various permits issued by Texas, WCS is authorized to discharge water from five outfalls, four of which have been constructed.⁴⁹ Of these, discharges from two outfalls flow into New Mexico.⁵⁰

A. Examples of past and ongoing discriminatory practices

(1) CARD's 2002 Title VI Complaint Alleged Similar Violations

In 2002, CARD filed a Title VI complaint against NMED with the EPA, regarding a permit for a hazardous waste facility in Triassic Park. The 2002 complaint alleged that NMED's permitting process discriminated against LEP individuals by failing to allow meaningful access, similar to the allegations in this complaint. Specifically, the 2002 complaint alleged that the public was obstructed from participating in the public participation process for the facility, was denied access to vital documents, and that NMED refused to consider social and discrimination concerns when deciding whether to approve the permit. It also alleged that NMED had a statewide pattern and practice of similar discriminatory permitting and lack of access for LEP individuals. The EPA accepted CARD's Triassic Park complaint for investigation in 2005, which later led to the 2017 Resolution Agreement between NMED and the EPA. The Resolution Agreement required that NMED develop and implement a language access policy and a public participation policy in order to come into compliance with federal civil rights law.

(2) The Resolution Agreement and NMED's Subsequent Policies

Title VI of the Civil Rights Act of 1964 prohibits NMED from implementing their programs in a discriminatory manner, meaning that NMED must ensure that LEP individuals have meaningful access to their services. NMED committed to provide meaningful access when they signed the 2017 Resolution Agreement,⁵¹ whereby they promised to take specific steps to ensure that community demographics, history, background, needs and concerns were understood and addressed; that effects from hazardous waste facilities and from facility transportation were understood; and that their public participation and permitting programs did not discriminate.⁵² NMED agreed that meaningful public involvement consists of informing, consulting and working with communities at various stages of the decision making process to make sure their needs and concerns are being addressed.⁵³ Pursuant to the Resolution Agreement, NMED created a Public Participation Policy, a Limited English Proficiency Accessibility and Outreach Policy, and a Disability Accessibility and Outreach Policy.

On February 6, 2018, Butch Tongate, the Cabinet Secretary at the time, signed NMED's Public Participation Policy, so that NMED's public participation proceedings would comply with Title VI of the Civil Rights Act of 1964.⁵⁴ NMED's new Public Participation Policy provided that "NMED shall provide proper and appropriate public

⁴⁸ Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, Jun. 9, 2017 (Exhibit 16).

⁴⁹ *Id.* at 2 (outfall 004 was never constructed).

⁵⁰ *Id.*

⁵¹ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017 (Exhibit 1).

⁵² *Id.* at 11 and 12

⁵³ *Id.* at 11

⁵⁴ New Mexico Environment Department, Public Participation Policy 07-13, February 6, 2018 (Exhibit 3)

participation opportunities related to NMED's actions and proceedings."⁵⁵ However, on January 11, 2018, CARD's counsel received a phone call from NMED's General Counsel, Jennifer Hower, indicating that NMED was not willing to receive any public input on their policies even from LEP and minority communities as the policies were an "internal matter." Thus, the policy was created without any public input at all despite EPA guidance to the contrary.⁵⁶ Furthermore, NMED tasked each bureau to do preliminary screening and develop its own Public Involvement Plans (PIPs) under the Policy, also with no public involvement even from LEP and minority potentially affected and affected communities. Again, such involvement in the PIPs is a cornerstone of EPA guidance.⁵⁷

On February 6, 2018 Secretary Tongate signed NMED's Limited English Proficiency Accessibility and Outreach Policy, so that NMED could provide LEP persons with meaningful access as per Title VI.⁵⁸ NMED's new LEP Policy provided that "NMED shall provide LEP persons and populations meaningful access to NMED's actions and proceedings."⁵⁹ NMED, once again, developed the policy with no public input, including no input from LEP persons. NMED employees were to determine the extent of providing LEP services, in part, by assessing past participation, stating "Employees shall also assess *historical* participation ... to evaluate whether there was participation by LEP individuals in the past."⁶⁰ If an employee determined that LEP services were warranted, NMED agreed to translate "*vital documents*."⁶¹ NMED's LEP Policy, however, did not sufficiently define which "vital documents" must be translated. Instead, NMED only vaguely addressed "vital documents" in a footnote, stating "Classifying a document as vital or non-vital is sometimes difficult ..."⁶² Translation, interpretation and other services provided to LEP persons were limited by being subject to NMED's available resources.⁶³

On February 6th, 2018 Secretary Tongate also signed NMED's Disability Accessibility and Outreach Policy, so that NMED could provide disabled persons with meaningful access as per Section 504 of the Rehabilitation Act of 1973 and the ADA of 1990, as amended by the ADA Amendments Act of 2008.⁶⁴ NMED, once again, developed the policy with no public input including from any disabled individuals. However, in contrast to the services provided to LEP persons, these services had no financial limitations as the policy stated that "NMED will provide, at no cost to the individual, appropriate auxiliary aids and services including...qualified interpreters...to ensure effective communication...."⁶⁵

⁵⁵ *Id.* at 1 and 2.

⁵⁶ EPA Public Participation Guidance, 71 Fed. Reg. at 14,207, 14,211 (Exhibit 19)

⁵⁷ *Id.*

⁵⁸ New Mexico Environment Department, LEP Policy (February 6, 2018), (Exhibit 11)

⁵⁹ *Id.*

⁶⁰ *Id.* at 7 (emphasis added).

⁶¹ *Id.* at 9 (emphasis added).

⁶² *Id.* at 2.

⁶³ *Id.* at 7-8.

⁶⁴ New Mexico Environment Department, Disability Accessibility and Outreach policy 07-10 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-10.pdf> (last visited June 3, 2019)(provided in a file as "Exhibit 22")

⁶⁵ *Id.* at 2

Unfortunately, these Public Participation and LEP Policies fall short of federal guidelines interpreting the prohibition against discrimination on the basis of national origin pursuant to Title VI. This has resulted in NMED failing to meet its Title VI obligations both for WCS and for other public processes in the Department. On March 12, 2018, the Environmental Justice Clinic at Yale Law School, on behalf of CARD, sent a letter to Lilian Dorka, Director of the External Compliance Program of the EPA's Office of Civil Rights, outlining these serious shortfalls.⁶⁶ The letter reiterated the problem of having public participation policies and Public Involvement Plans created with no public participation or involvement, and especially with no involvement from LEP, minority or disabled individuals for whom the policies and PIPs were supposedly written. The letter described in detail how far the policies diverged from EPA non-discrimination guidance and requested that NMED amend its policies to adhere to these guidelines. Indeed, there is nothing in any of the policies to implement Agreement requirements to understand the history and background of the community or to address community needs and concerns beyond translation and participation needs. The PIPs gather some small amount of demographic data but do not address or even gather information on needs and concerns.

On April 26, 2018, NMED described its progress and efforts to comply with the Resolution Agreement in a letter to Director Lilian Dorka and soon after, CARD, NMED and EPA met by phone to discuss NMED's progress. NMED's efforts did not address most of the concerns described in the March letter and many of their planned actions were not completed. Problems with the policies and the continuing lack of access, and lack of understanding of communities and their concerns, was described again in a December 17, 2018 letter to Jennifer Hower from UNM's Natural Resources and Environmental Law Clinic. This letter was signed by 21 community groups. Almost six months later these same concerns continue as part of our Prayer for Relief. NMED never responded directly to either letter to let the signers know if their suggestions would or not be incorporated into NMED's public process or whether the suggestions were even being considered.

NMED, however, failed to comply with the Resolution Agreement. The policies did not guarantee an improved process and NMED continued to permit hundreds of facility and discharge permits without meeting their Title VI obligations. One of the more important permits was that for the WCS discharge permit, DP-1817. Unsatisfied, with NMED's obstruction and lack of progress, on April 16, 2018, CARD filed a Complaint with NMED for violation of the Resolution Agreement. At that time, NMED had provided only 10 sentences in Spanish in two public notices about the WCS facility, discharge and permit (some of which contained incorrect information), and had translated none of the draft permits or other vital documents. English speakers meanwhile had access to three permit drafts and about 4000 pages of information in English. Despite this obvious imbalance, in June of 2018, NMED's Assistant General Counsel for the GWQB stated that "...the process we have followed thus far, and intend to follow going forward

⁶⁶ Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, *Re: NMED Limited English Proficiency & Public Participation Policies Following the Resolution Agreement in EPA Case No. 09R-02-R6*, March 12, 2018 (provided in a file as "Exhibit 20")

will...ensure that LEP individuals are given ample opportunity to participate...and provide their input and concerns."⁶⁷ The WCS facility, its discharge and the risks involved are complex. To imply that 10 sentences in *any* language are adequate for the public to understand enough about these issues to participate in any meaningful way in the permit process is absurd.

On May 4, 2018, NMED accepted CARD's Complaint and delegated the investigation to Kathryn Becker in NMED's Office of General Counsel. Ms Becker reviewed CARD's Complaint against NMED and, on October 2, 2018, recommended that the Complaint be dismissed based on failure to prove by a preponderance of the evidence that NMED caused harm due to a discriminatory action. On October 12, 2018, Secretary Tongate approved the recommendation of Ms Becker and approved the conclusion that the Department did not cause harm and did not discriminate against LEP persons in its public notice. Even at this point, Spanish speakers had only very limited information and what they did have was confusing as it omitted important facts and included multiple changes and mistakes.

(3) WCS and the DP-1817 permitting process

Both NMED and WCS (the applicant) are subject to specific public notice requirements under New Mexico regulations. These New Mexico regulations require outreach in both Spanish and English, include specific information that must be included in each type of public notice (PN-1s, PN-2s, and hearing notices) and specify how each type of notice, at a minimum, must be published.⁶⁸

On July 17, 2013, NMED received a groundwater discharge permit application from WCS. NMED proposed an initial draft permit for approval on October 2, 2015,⁶⁹ and subsequently issued two amended draft permits on March 3, 2017,⁷⁰ and May 4, 2017.⁷¹ None of the draft permits, was translated into Spanish. Each draft permit included public comment periods and was noticed with Public Notice-2s ("PN-2"). Only two of the six PN-2s were translated into Spanish as NMED continued to issue English-only PN-2s for almost a year after signing the Resolution Agreement.

NMED obstructed participation for all members of the public with mistakes, omissions and confusion during the public process for DP-1817, but this obstruction was more extreme for LEP individuals and the effects of this obstruction fell more heavily on these individuals because of their extremely limited access to information. Where English speakers could make up for deficiencies in public notices and fact sheets by reading the

⁶⁷ Email from Lara Katz, NMENV to (b) (6) Privacy, June 4, 2018 (provided in file as "Exhibit 21")

⁶⁸ 20.6.2.3108 NMAC.

⁶⁹ NMED Letter to Elicia Sanchez, Sr. Vice President, Chief Financial Office and General Manager of WCS re: Draft Discharge Permit, DP-1817, Waste Control Specialists LLC, Apr. 20, 2015, WQCC 17-01(A), Administrative Record 02212-30.

⁷⁰ NMED Letter to Elicia Sanchez, Sr. Vice President, Chief Financial Office and General Manager of WCS re: Draft Discharge Permit, DP-1817, Waste Control Specialists LLC (Sep. 25, 2015), WQCC 17-01(A), Administrative Record 02107-28.

⁷¹ Ground Water Discharge Permit, Waste Control Specialists LLC, DP-1817 draft, Jun. 9, 2017 (Exhibit 16)

actual WCS draft permits (usually about 20 pages long), other documents or the regulations, these sources of information were kept from Spanish speakers.

(a) Public noticing and fact sheets

There were ten public notices in all for WCS: one Public Notice 1 (PN-1) published by the applicants on August 14, 2013 and concerning their application; six Public Notice 2s (PN-2s) published between October 2, 2015 and November 17, 2017, noticing draft permits, extensions of comment periods and Spanish translations. Only the last two of the PN-2s were translated into Spanish. Two hearing notices were published on June 5, 2018 and August 2, 2018 announcing different hearing dates; and a supplemental hearing notice was published July 9, 2018 announcing the availability of the first Spanish and English Fact Sheet.⁷² There was no supplemental or other notice to announce the availability of the second Spanish and English Fact Sheet or the availability of the Spanish Index of the Record.

The public notices and fact sheets are described in detail in CARD's and AFES' Findings of Fact and Conclusions of Law submitted after the WCS hearing⁷³

September 1, 2017 Public Notice 2⁷⁴

The first NMED public notice to be translated into Spanish was published on September 1, 2017. PCBs and asbestos were not included as potential contaminants in the description of the quality of the discharge though they are described as contaminants in the permit. This omission occurs in all public notices, but for the first time, radionuclides have been removed from the description of contaminants as well. In the second hearing Fact Sheet NMED said the reason for this removal was "... that the Department determined references to radionuclides were not appropriate because the Department does not have regulatory authority over radionuclides."⁷⁵ What was inappropriate, however, was the removal of this information from the translated public notices as the regulations put no limitations on this discharge information, except that it should be brief. Furthermore, in his written hearing testimony, Stephen Pullen, NMED's witness, described why the Department needed radiological data from well TP-31, when he explained, "[t]he Department requires this information so that it might ascertain ... the quality of groundwater in the OAG [groundwater zone]."⁷⁶ If radiological data is critical to ascertaining the quality of New Mexico groundwater, it is certainly appropriate information for the public as well. This PN-2

⁷² New Mexico Environment Department, WCS (DP-1817) hearing notice, *Fact Sheet Available*, issued by email July 9, 2018 (not entered into the Record) (provided in a file as "Exhibit 8")

⁷³ CARD and AFES Findings of Fact and Conclusions of Law, 9-28, (Exhibit 2)

⁷⁴ New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English provided in a file as "Exhibit 27;" Spanish as "Exhibit 28")

⁷⁵ New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2018, 2 (2nd hearing fact sheet)(English provided in a file as "Exhibit 23;" Spanish as "Exhibit 24")

⁷⁶ New Mexico Environment Department's Statement of Intent to Present Technical Testimony, in the Matter of Waste Control Specialists LLC (DP-1817)[GWB 18-11 (P)] *Technical Testimony of Stephen Pullen*, 23, September 21, 2018 (provided in a file as "Exhibit 26")

also gives an incorrect volume figure of 300,000 gallons per day.⁷⁷ All references to the groundwater at 19 feet being the groundwater most likely to be affected by the discharge (as it is described in the draft permit) have been removed. No explanation is given for this removal.

Even though Spanish translation of public notices has begun, information is still being kept from Spanish speakers—information that is and has been available to English speakers. English speakers can learn about the groundwater at 19 feet and that there could be radionuclides in the discharge both through reading the draft permit and reading previous public notices. They can also find out about the PCBs and asbestos that could be in the discharge by reading the draft permit. LEP persons cannot. Not providing equally complete vital information about the discharge and groundwater to LEP persons compared to English speakers amounts to disparate treatment. This treatment had a disparate effect on LEP persons because it did not provide an equal and meaningful opportunity for them to participate in the DP-1817 process.

November 17, 2017 Public Notice 2⁷⁸

The last PN-2 was published on November 17, 2017, and was also translated into Spanish. However, this notice included less information than any previous PN-2. PCBs, asbestos and radionuclides are all still missing from the description of potential discharge contaminants and no volume of any kind is given. The incorrect volume in the previous public notice is not corrected. NMED's handling of the permitting process continued to amount to disparate treatment and continued to have a disparate effect on LEP persons.

June 5, 2018 First Hearing Notice⁷⁹

The first hearing notice was translated into Spanish. It noticed an August hearing date and provided about one page of additional information on the permit, the discharge and the facility. There is still no mention of the asbestos and PCB waste described in the draft permit.

Most of the public notice is taken up with describing hearing procedures but the notice does not make it at all clear that the public can provide comment or written statements except at the hearing itself in Eunice. All descriptions of how the public can participate refer to providing oral or written comments at the hearing. The notice goes on to say that the hearing will be conducted pursuant to 20.1.4.NMAC and

⁷⁷ New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English provided in a file as "Exhibit 27;" Spanish as "Exhibit 28"); Oral Testimony of Stephen Pullen, In the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, October 3, 2018

⁷⁸ New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017, Administrative Record 02322 to 02323 (English provided in a file as "Exhibit 29;" Spanish as "Exhibit 30")

⁷⁹ New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018, Administrative Record 02407 to 02413 (English provided in a file as "Exhibit 31;" Spanish as "Exhibit 32")

20.6.2.3110 NMAC. 20.1.4.300.B(2) NMAC allows written statements to be submitted before the hearing during the pre-hearing period. This information is not at all transparent and is "hidden" in the regulations making it appear that people have to participate at the hearing itself in Eunice to comment. You have to be pretty sophisticated about the regulations, internet research and the English language to be able to find this out.

Though this information is equally hidden in the English public notice, an English speaker can read and understand the regulations if they can find them. Even if an LEP Spanish speaker were to find the regulations, the regulations are in English and therefore inaccessible to them. In addition, although in April NMED had filled a full time position for an in-house Spanish language translator and interpreter to be available to the LEP public both for hearings and to assist LEP individuals generally,⁸⁰ only information on availability during the hearing was included in the notice. In fact, during the entire WCS public process, NMED never explained to the LEP public that such general language assistance was available; yet they complained that no one called to use this assistance after the notice was published and seemed to feel this proved that no one really wanted translation.⁸¹

Again, with this notice English speakers still had more information and access to information than Spanish speakers had. This disparate treatment also prevented LEP persons from learning that they could provide written comment during the 60-day pre-hearing period. This could have been explained to them by the in-house interpreter, but information on that option was not provided either. This treatment had a disparate effect on LEP persons because it did not provide an equal and meaningful opportunity for them to inform themselves and thus they could not participate in the DP-1817 process in an meaningful way.

First Hearing Fact Sheet⁸²

The first hearing fact sheet was created in June of 2018 and a "y public notice was published on July 9, 2018 just to notice the availability of the fact sheet in English and Spanish."⁸³ Links were provided in the online notice to English and Spanish versions of the hearing notice, English and Spanish versions of the fact sheet, and to an English version of the draft permit. It also re-noticed the public hearing. This fact sheet finally added a wealth of information for the LEP public. Even at this point, however, the total amount of information in Spanish consisted of about six pages and ten sentences. No primary documents at all had been translated including any of the short draft permits themselves, the Index of the Record or any documents from the Record other than notices and fact sheets. English speakers still had all of these and

⁸⁰ Letter from Jennifer Hower, NMED General Counsel to Lilian Dorca, Director, External Compliance Program, Office of Civil Rights, U.S. Environmental Protection Agency, 2 (April 26, 2018)

⁸¹ Personal conversation between Deborah Reade and Michelle Hunter, Bureau Chief, Ground Water Quality Bureau, summer 2018

⁸² New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) June 5, 2018 (1st hearing fact sheet-English)(provided in a file as "Exhibit 25")

⁸³ NMED WCS (DP-1817) hearing notice, *Fact Sheet Available*, July 9, 2018 (Exhibit 8)

thousands of additional pages of information about the discharge, geology, hydrology, the facility, the permit and more.

Though the summary of the geology and hydrology of the area is mostly quite good in this fact sheet, there is still no description of the groundwater at 19 to 35 foot zone though it is described in the permit as the "[g]roundwater most likely to be affected" by the discharge and as the "focus of the groundwater detection monitoring in this Discharge Permit."⁸⁴

The fact sheet also still doesn't describe PCBs and asbestos as possible contaminants in the discharge. The description of the different parts of the facility is not very detailed and —most unfortunate of all—the description of the draft permit gives almost no information about the permit at all—only about how the different sections are organized. As with the hearing public notice, the fact sheet says that an interpreter will be available at the hearing but does not tell the public that the interpreter/translator is available to help them outside of the hearing as well.

This first hearing fact sheet makes no mention of community social, health or other concerns and makes no mention of the extensive oil and gas development and multiple other polluting facilities in the area.⁸⁵ No PIP was created for the DP-1817 process and nowhere in that process are these concerns and needs incorporated or even considered.

The continued missing information about the discharge and the groundwater at 19 feet as well as a permit description akin to a template outline, when all this information and more is easily available to English speaker, had a disparate effect on LEP individuals. This disparate effect was compounded when these individuals were not informed of the availability of an interpreter outside of the hearing and when nowhere in the process or in this fact sheet were LEP and minority community needs even mentioned.

July 12, 2018 CARD/NMED agreement

After the first hearing notice and fact sheet were issued, CARD was ready to file this Title VI Complaint because of NMED's continuing disparate treatment of LEP individuals who still had only one page and ten sentences of translated information available to them about the discharge. However, in an agreement reached during a July 12, 2018 meeting with NMED, CARD agreed to shelve the complaint if NMED would move the date of the hearing to October, translate the Index of the Record and provide a second fact sheet that truly represented all the vital information in the Permit.

⁸⁴ Ground Water Discharge Permit ,Waste Control Specialists LLC (DP-1817) 3, June 9, 2017 (Exhibit 16)

⁸⁵ *Southeast New Mexico Threats Map*, (b) (6) Privacy Design, LLC, 2019 (provided in a file as "Exhibit 35;" Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018 (provided in a file as "Exhibit36")

August 2, 2018 Second Hearing Notice⁸⁶

The second hearing notice was translated into Spanish. It noticed an October hearing date and provided about one page of information on the permit, the discharge and the facility. It also provided more complete information on how to participate in the hearing process. There was still no mention of the asbestos and PCB waste described in the draft permit, the groundwater at 19 feet or that an in-house interpreter/translator was available.

As with the first hearing notice, the second hearing notice did not provide an equal amount of information for LEP persons, to what was available for English speakers. This disparate treatment continued to have a disparate effect on LEP persons because LEP persons continued not enough information about the permit to provide them a meaningful opportunity o participate in the DP-1817 process.

Second Hearing Fact Sheet⁸⁷

NMED issued the second hearing fact sheet in August of 2018 for the October 2, 2018 hearing. CARD had previously provided extensive comments to NMED on how to assure that the second fact sheet was truly representative of vital information in the draft permit, including pointing out passages of vital information that should be quoted word for word, which appendices should be included, and noting where the first hearing fact sheet did and did not include such representative information.⁸⁸ Because NMED still refused to translate the entire short permit, this second hearing fact sheet was supposed to represent all the vital information included in the permit so that LEP persons would finally have the same information available to them that English speakers had.

However, NMED did not follow these suggestions in some significant ways and instead introduced new information that contradicted statements in the permit, changed the meaning in passages that were supposed to be quoted word for word, summarized some permit statements so their meaning was completely changed, did not include information that was critical for understanding the most basic aspects of the permit, and included incorrect information. A draft of the fact sheet was never provided to the LEP community or to any of their representatives for review before publication. This second hearing fact sheet did not provide LEP persons with all or even most of the vital information contained within the permit, so that critical vital information that was readily available to the English-speaking public continued to be unavailable to LEP individuals. This disparate treatment had the disparate affect on these individuals that they could not participate meaningfully and equally in the WCS permit process.

⁸⁶ New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (English provided in a file as "Exhibit 33;" Spanish as "Exhibit 34")

⁸⁷ New Mexico Environment Department, Hearing Fact Sheet, August 2, 2018 (English, Exhibit 23; Spanish, Exhibit 24)

⁸⁸ Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, July 17, 2018

Details of the deficiencies of the second hearing fact sheet are described in detail in CARD's and AFES' Findings of Fact and Conclusions of Law submitted after the WCS hearing⁸⁹ but a few of the worst examples are included here.

1. The Second Hearing Fact Sheet Contradicts the Draft Permit

Instead of summarizing the May 2017 Draft Permit, the second hearing fact sheet actually contradicts the draft permit. The permit states in plain language, that "[g]roundwater most likely to be affected is at a depth of between 19 and 35 feet." CARD and AFES had requested that this information be quoted in its entirety, but it was not. Instead, the Fact Sheet says that none of the groundwater above the 225-foot interval meets the regulatory definition of "ground water," and that the 225-foot zone is the first "protectible" groundwater. The fact sheet never says where the groundwater most likely to be affected actually is—even though the permit does. This entirely new concept is introduced in the fact sheet (that the groundwater at 19 feet isn't really groundwater) shortly before the hearing. Contradicting one of the main cornerstones of the permit in one of the few translated documents does not provide a true picture of the draft permit for LEP individuals.

2. Contingency Plan Language Problems

Another critical problem arose in how NMED treated information in the summary of the *Contingency Plan*. NMED's summary portrays that plan as being far more robust than it actually is. The *Contingency Plan* is also included as part of the *Closure Plan* which is another critical part of the permit. In CARD's comments on what vital information should be included in the second hearing fact sheet, we had asked that the *Contingency Plan* be summarized so as to "... include any timeframes or deadlines..."⁹⁰ This request was not followed. The fact sheet states that under the *Contingency Plan*, well sampling to establish existing conditions will have to take place over a "specified" amount of time. However, in the third draft permit, though there are specified timeframes for creating workplans, WCS is allowed to take whatever amount of time they deem "sufficient" to establish existing conditions through sampling. No timeframes for sampling and analysis are specified.

final

The draft permit also allows WCS to establish these "existing conditions" *solely* by sampling existing and saturated wells in the groundwater zones. In contrast, the fact sheet says that they *must also* provide historical data from other sources. CARD and AFES considered the requirements in the *Contingency Plan* to be insufficient and controversial. As our hydrologist pointed out, the wording NMED was using in the permit created a situation where WCS could use future existing conditions of contamination that had actually been caused by WCS' discharge, as baseline conditions against which they could measure future discovered contamination. And WCS could take as long as they wanted to

⁸⁹ CARD and AFES Findings of Fact and Conclusions of Law, 22-28, October 19, 2018 (Exhibit 2)

⁹⁰ Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, 4 (July 17, 2018)(provided in a file as "Exhibit 37")

"prove" whether contamination they had created was above baseline. Exact wording was essential to understanding whether or not the *Contingency Plan* was effective as it was the wording that was controversial. NMED changed the meaning of *Contingency Plan* requirements completely in the fact sheet by leaving out the word "or" and mischaracterizing time limitations for testing as being specified when they were not. This provided LEP persons an inaccurate view of vital information included in the permit. English speakers could easily read the whole draft permit and thus had a complete picture of the strengths and weaknesses of this critical information. LEP persons could not.

3. Refusal to Include Appendix A and Appendix C in the Fact Sheet

Perhaps the most egregious example of permit information that was missing in the second hearing fact sheet was NMED's refusal to include either *Appendix A* or *Appendix C* in the fact sheet. This, despite CARD's statement in the cover email to our comments to NMED which noted that, "...our hydrologist particularly mentioned ... *Appendix A* and *Appendix C* as being especially critical information."⁹¹ *Appendix A* is the list of constituents or analytes that is the heart of the monitoring program. *Appendix C* is the *WCS Facility Map* and shows the layout of the facility, and includes surrounding polluting facilities like URENCO, Sundance Landfarm and the Lea County Landfill. It also shows the outfalls, NM-1, the only NMED regulated monitoring well, and two other WCS monitoring wells, as well as hydrological flow paths. There is a wealth of additional information in the legend, chart and notes that is not available in any of the public notices or fact sheets. This is critical, vital information that was readily available for English speakers but completely denied to LEP Spanish speakers. Without these appendices LEP persons cannot understand the most basic aspects of the Permit. The denial of this information to LEP persons amounted to disparate treatment and had the affect that they were unable to inform themselves about the permit and participate in the permit process in a meaningful way.

(b) The Translated Index

NMED also agreed to translate the Index of the Administrative Record to make at least one primary document available to LEP Spanish speakers. The theory was that LEP individuals could look at the Index and see if there were any documents about which they wanted more information. They could then call up or go to NMED's office and ask for the translator to help them access the additional documents or talk, through the interpreter, with a technical person who could answer questions. However, the Index was not provided in a timely manner and was never actually noticed and made available to the LEP public.

Despite NMED's statements to the contrary, though the English Index was posted on NMED's website on August 8, 2018, the Spanish translation was not posted online until almost a month later.⁹² The translated Index was also never added to NMED's

⁹¹ Email from (b) (6) Privacy, (b) (7)(C) Enforcement to Lara Katz, NMED, *Re-Comments and Suggestions for Information Inclusion in the New Fact Sheet*, July 17, 2018 (provided in a file as "Exhibit 38")

⁹² Affidavit of (b) (6) Privacy, (b) (7)(C) Enforcement WCS discharge permit (DP-1817) September 17, 2018, #14, September 17, 2018

English-Spanish binder at the Eunice Public Library—again, contrary to NMED testimony—only a second copy of the English Index was included.⁹³ No member of the LEP public, for whom the Index was translated, or their representatives, were informed of the availability of the translated Index. As far as LEP Spanish speakers were concerned, it's as if the translation had never existed.

Because of the cumbersome process required of LEP Spanish speakers to gather information from NMED, they needed more time, not less, to inform themselves. The lack of timeliness in posting the translated Index was prejudicial. NMED additionally obstructed participation by Spanish speakers and treated them disparately when none of them was noticed that the translation was available, none was informed that a translator was available, and when and all NMED's phone answering system was in English, including the phone for the non-discrimination coordinator. This disparate treatment had a disparate effect on LEP individuals in that it was significantly more difficult for them to inform themselves and communicate with NMED about the permit than it was for English speakers. this hampered their ability to participate fully in the hearing process.

(c) NMED did not inform the LEP public about new documents and translations

NMED never informed anyone in any public notice that English and Spanish Fact Sheets were available online, or that the Spanish translation of the Index was available or that it even existed. NMED stated that it is not their responsibility to inform the public of changes, corrections, new documents or translations. They presume that it is the public's responsibility to check the website often to see if any of these materials have been posted or changed and to inform other members of the public that these items are available.⁹⁴ Yet the lack of Spanish information and explanations on the website makes this effort impossible for LEP individuals.

NMED is also being disingenuous when they say it is not their responsibility to inform the public of new documents and translations, as they do sometimes notice the availability of these items as evidenced by their provision of a supplemental public notice to the first hearing notice just to announce the availability of a new fact sheet and its translation.⁹⁵ NMED's refusal to provide notice of some translated documents but not others was arbitrary and capricious and amounted to disparate treatment as the lack of notice of the availability of translations made them unavailable to LEP persons. This continued the disparate effect that Spanish speakers had access to far less information than English speakers did and were unable to inform themselves and to participate in a meaningful way in the DP-1817 process. NMED's belief that it is not their responsibility to announce the availability of translations is also a systemic problem as it amounts to a program-wide, informal policy.

⁹³ Contents of NMED binder for English and Spanish DP-1817, Eunice Public Library(October 4, 2018)(Exhibit 6)

⁹⁴ NMED Response to CARD and AFES Motion for a Continuance, 13-14, September 28, 2018 (Exhibit 7)

⁹⁵ NMED WCS (DP-1817) hearing notice, *Fact Sheet Available*, July 9, 2018 (Exhibit 8)

NMED did not meet the obligations they agreed to meet with CARD. Their actions were not accurate, representative of the permit, nor timely. Therefore CARD, AFES and the other complainants have continued with the filing of this Title VI Complaint.

(4) NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the permitting process

NMED has made some progress with non-discrimination since the 2002 Title VI complaint for Triassic Park was filed but that progress has been extremely limited. NMED no longer screams at community leaders, telling them to, "Shut up and sit down!" But they are still obstructing public participation, denying LEP individuals access to vital documents, ignoring the health, history, concerns and needs of LEP and minority communities, and thus refusing to consider social and discrimination concerns when deciding whether to approve a permit. These are the same complaints that were expressed in 2002. Almost 20 years have passed and very few of the important things have changed. Complainants must still fight for every translated word; NMED picks and chooses which regulations it will follow, and ignores legal decisions made years ago about social concerns, public notice and disparate impacts. That these problems persist in multiple permits across the state shows that NMED still has a statewide pattern and practice of discrimination.

The Resolution Agreement is a tool to help NMED meet their Title VI obligations. However, NMED has diverged from the Agreement and as a result, has practiced discriminatory acts. Showing how far NMED has diverged from meeting Agreement requirements is a simple way of showing how they are discriminating. As examples we will describe problems in the permitting process for eight permits from three Bureaus (Hazardous Waste, Solid Waste and Groundwater Quality).

Five of these permits are in southeastern New Mexico:

1. DP-1817, the WCS discharge permit in Lea County
2. DP-1481, the URENCO USA discharge permit renewal in Lea County
3. The Lea County Landfill solid waste facility permit renewal in Lea County
4. EPA No. NM4890139088, the WIPP TRU Mixed Waste Disposal Volume Reporting permit modification ("Volume Mod") in Eddy County
5. EPA No. NM0001002484 the Triassic Park hazardous waste facility permit renewal in Chaves County

and three of these permits are in northern and central New Mexico:

1. DP-1132, the LANL discharge permit in Los Alamos County
2. DP-1793, another LANL discharge permit in Los Alamos County
3. DP-1012, the Special Waste Disposal, Inc. discharge permit renewal in Torrance County.

The process for some of these permits began years ago and some are more recent. Most are "important" permits and some could even be considered to be controversial. There is certainly a statewide interest by LEP and minority individuals at least in those that are "important" and controversial. In all of these cases, very little information has been

provided in Spanish—sometimes only a few pages or only a few lines of text—despite the fact that these facilities are complex and that virtually all are in geographic proximity to significant Spanish speaking populations. In addition to these examples, there are many other permits that also don't meet Resolution Agreement requirements—the GWQB alone regulates five or six hundred permits—but the examples here should suffice to show the state of public participation in New Mexico.

(a) Policies

NMED created three policies in February of 2018 to implement the Resolution Agreement: a Public Participation Policy, an LEP Accessibility and Outreach Policy and a Disability Accessibility and Outreach Policy. Although NMED said they understood that meaningful public involvement consists of "...informing, consulting and working with communities at various stages of the environmental decision-making process" so as to address their needs,⁹⁶ NMED not only did not involve the LEP and minority public in creating these policies that were supposed to address LEP and minority issues, but also refused to accept any public input from these communities at all, saying creating the policies was an "internal matter" in which no outside groups could be involved. In fact, NMED was happy to receive and incorporate input from the state workers' employee labor union which is also a group external to NMED. They were just not happy to incorporate input from LEP and minority communities, environmental groups or environmental justice groups. This was despite NMED being directed to "make a concerted effort to create partnerships ... to share information" with all three stakeholders and more in the Resolution Agreement.⁹⁷

This has resulted in policies that are severely flawed, don't involve or even connect with communities, don't follow EPA guidelines and don't implement the provisions of the Resolution Agreement. NMED is still not meeting their Title VI obligations. Problems with these policies were detailed in the March 12, 2018 Letter from the Yale Law School Environmental Justice Clinic on behalf of CARD to Lilian Dorka of EPA's ECRCO⁹⁸. In December of 2018, 21 groups asked yet again for the community to have input into NMED's policies. NMED has responded directly to neither of these letters.⁹⁹

(b) PIPs—NMED does not understand the communities' needs and concerns, or their history, and background.

NMED relies on Public Involvement Plans to create a description of communities and to understand and address communities' needs and concerns. Although a good PIP could do this, again, NMED has refused to allow any public involvement in their

⁹⁶ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11, Jan. 19, 2017 (Exhibit 1)

⁹⁷ *Id.* at 11, footnote 16

⁹⁸ Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, March 12, 2018 (Exhibit 20)

⁹⁹ Letter from the UNM School of Law Natural Resources and Environmental Law Clinic and 21 groups to Jennifer Hower, General Counsel, New Mexico Environment Department, *Re: Second Request for Community Input on NMED's Public Participation and Limited English Proficiency Policies*, December 17, 2018

Public Involvement Plans from LEP and minority communities whose concerns and needs the PIPs are supposed to address. As was said in the March 2018 letter, "While the EPA...Guidance repeatedly mentions fostering a climate of inclusivity, NMED continues to distance itself from the concerns and needs of the public."¹⁰⁰ Since they don't include any input about their history, background, needs and concerns from communities of Hispanic or Mexican descent (except for some translation needs), the PIPs as NMED is creating them, fall short of requirements in the Resolution Agreement to address these needs and concerns.¹⁰¹

Though the PIPs provide some demographic information that can be used in deciding the need for translation, NMED's refusal to look at translation needs and budgeting on a programmatic level, plus their reliance on EJSCREEN and small target areas to determine where to investigate these needs has created problems even for translation and public participation needs—the only needs that the PIPs even attempt to address. PIPs include no plan or process to gather information about community needs, concerns, background or history beyond translation and some participation needs; nor is there any formal way for communities to review or appeal any aspects of the PIPs. Sometimes PIPs even seem to be created just to exclude community concerns.

The WIPP hazardous waste Volume Mod PIP is a case in point.¹⁰² The PIP used a 15-mile radius from the site, ignoring that the WIPP radioactive and hazardous plume released from the explosion in 2014 traveled and contaminated more than 100 miles from the site. This release was of great concern not only to LEP persons in the contaminated area but also to many LEP individuals across the state, but this concern was never mentioned or addressed in any permitting documents. In fact, during the hearing for this permit, NMED denied that contamination traveled more than 15 miles from the site even though they provided no scientific basis to support that belief.¹⁰³

The 15 mile EJSCREEN radius also missed the largest city in the area, Carlsbad and the proposed Holtec Consolidated Interim Storage site for spent fuel rods and high level waste which is 16 miles north WIPP. Again, the Holtec site and WCS, which is another proposed CIS site in the area, are major concerns in southeast New Mexico as it is estimated that together the two sites have generated more than 60,000 comments to the NRC about these proposed high level waste storage facilities and their transportation. The PIP also said nothing about the enormously high cancer mortality rate in the area—higher than in any other area of New Mexico. Despite sending NMED maps and comments about this mortality rate for years, NMED still appears not to understand the public health concerns in the area. There is no plan in the WIPP

¹⁰⁰ Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorca, ECRCO EPA, 9, March 12, 2018 (Exhibit 20)

¹⁰¹ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 11-12 (Jan. 19, 2017)(Exhibit 1)

¹⁰² New Mexico Environment Department, Hazardous Waste Bureau, Public Involvement Plan (PIP) for the WIPP Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July, 2018, <https://www.env.nm.gov/wp-content/uploads/2016/05/FINAL-PIP-WIPP-Class-3-VOR-7-26-2018.pdf> (last visited on June 3, 2019)(provided in a file as "Exhibit 43)

¹⁰³ WIPP Volume Mod transcript, 35, October 25, 2018 (Exhibit 13)

Volume Mod PIP or anywhere to address these community concerns or to determine community needs. None of these concerns is mentioned in any public notice, permit, PIP, fact sheet or any other document.

By leaving out Carlsbad and other small communities for inclusion in their language needs analysis it was concluded that Spanish translation wasn't needed when, in fact, southeastern New Mexico actually has a high percentage of Spanish speakers and LEP persons. Thus, the fact sheet was not translated nor was interpretation even offered for the hearing despite intense public interest in WIPP throughout the state that has persisted for decades. This exemplifies the problem of not analyzing and budgeting for language needs state-wide for "important" permits.

Similar problems exist for the URENCO USA discharge permit PIP which uses a six mile radius for its EJSCREEN analyses. This leaves out the town of Hobbs and several smaller nearby communities. Though translation is provided for in the PIP, budgeting for translation is limited as it is based, again, on the local instead of the programmatic level. The PIP says translation will be "... arranged to the extent possible," "... as resources allow," and that NMED will "... strive to make public participation efforts as inclusive as possible within the Bureau's budget and time limitations." They also state that if more language services are needed beyond those described in the PIP that "... the budgetary implications will be reviewed," and say that fees collected from URENCO are not sufficient to cover translation and interpretation costs.¹⁰⁴ Interestingly, NMED considered raising fees last year but decided against it.

The same budget limitations and even some of the same language are written into the Special Waste Disposal, Inc. discharge permit PIP.¹⁰⁵ That PIP uses only a four-mile radius for their EJSCREEN area which is the usual area NMED considers for affected communities.¹⁰⁶ This area is so small that it encompasses only 22 people, 55% of whom are Hispanic. Both the URENCO and Special Waste Disposal PIPs say that all public notices will contain a statement that non-English speakers may call the Bureau contact and request language assistance to learn more about the permit or permitting process and that arrangements may be made for document translation as necessary and "as resources allow" or "to the extent possible." Yet as of the May 24, 2019

¹⁰⁴ New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for URENCO USA (DP-1481) 2, 3, 5 and 10, February 22, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/7IFzxx/tEqyLuZE/AuGSilz7T1GuJdorzUzbSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lxEdg6iCI=.pdf (last visited on June 3, 2019)(provided in a file as "Exhibit 41")

¹⁰⁵ New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for Special Waste Disposal, Inc. (DP-1012) November 13, 2018, https://cloud.env.nm.gov/water/resources/_translator.php/sv5kXkHMN0qJjuZvBPd+Pjq3aremvEnPifHL17JgnnMlvAjEKX0PtHBH18Tt2Gz6gvthyvye9cL/s9PNSLbas3+51zLY/gty6Z1W1OfqwU=.pdf (last visited on June 3, 2019)(Provided in a file as "Exhibit 40")

¹⁰⁶ LANL DP-1793 transcript, 332-333, November 8, 2018 (Exhibit 12)

Public Notice-2 for the Special Waste Disposal discharge permit and 22 other permits in the Ground Water Quality Bureau, this information was still not included in public notices.¹⁰⁷

Both PIPs include "Element 4 - Description of Community/Stakeholder Groups, but in fact, no stakeholder groups are described and NMED admits that this "description" does not come from contact with such groups or communities but is based on EJSCREEN. the Special Waste Disposal PIP says that appropriate public outreach was identifying if there were a combination of environmental and demographic factors that may impact public participation, yet no environmental factors are actually included. Only participation and translation needs are assessed in any PIPs. No other community concerns, needs, history or background are ever considered.

Even if NMED's PIPs were better, PIPs are not developed for each activity requiring public participation as is required in the Public Participation Policy. PIPs were not created for the LANL DP-1132 Radioactive Liquid Waste Treatment Facility discharge permit, or for the LANL DP-1793 discharge permit (land application of treated chromium /perchlorate/RDX waters). No PIP was created for the WCS DP-1817 discharge permit or for the Triassic Park hazardous waste permit. Sometimes NMED claims that it is too late to do a PIP as the permit process had been going on for years, yet the WIPP permit process had been ongoing for almost 20 years and NMED created a PIP for that. NMED claimed they didn't need to do a PIP for WCS as they already understood community concerns. But as was described above, they did not.

(c) Vital Documents

NMED refuses to define vital documents and translate them. Thus, translation is still greatly limited for all programs and actions and most vital information regarding permits and facilities that is readily available to the English speaking public continues to be unavailable to the LEP public in all permit hearings. This disparate treatment of LEP individuals has had the disparate effect of making it impossible for them to participate in a meaningful way in the permitting processes for all NMED-regulated facilities.

As an example, during the WIPP Volume Mod permit process only the two public notices were translated into Spanish, providing about 5 pages total of information in Spanish about the permit and the facility. Because the target area was limited in

¹⁰⁷ New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf (English)(last visited on June 3, 2019)(provided in a file as "Exhibit 44"); New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihhWG/G9XWEVlll5Urd3OtPXrBFMMZ504VjJdwLG1s0pLiQ=.pdf (Spanish)(last visited on June 3, 2019)(provided in a file as "Exhibit 45")

EJSCREEN to a 15 mile radius from WIPP instead of including NMED's program area, and it was determined that there was no need for Spanish translation,¹⁰⁸ a fact sheet was created for English speakers, but was never translated into Spanish. There was also no mention in the public notices that an interpreter/ translator was even available or that LEP persons could request an interpreter at the hearing. WIPP is a complex facility including both hazardous and radioactive waste, sited in a complex geological area and includes extensive facility transportation. It is sited near significant Spanish speaking populations and minority community members, many just a few miles beyond the 15 mile radius. There is also significant interest in the WIPP permit in LEP and minority communities across the state, especially when they are in close proximity to WIPP transportation routes. Again, English speakers had access to hundreds, if not thousands of pages of additional information including the fact sheet, the draft permit and the Administrative Record. The information in the five translated pages provided for Spanish speakers was far less than the information provided for English speakers and amounted to disparate treatment of LEP individuals. That disparate treatment resulted in the disparate effect that LEP persons could not inform themselves adequately to participate in the permitting process in a meaningful way.

Similarly, only public notices were translated in the two LANL groundwater discharge permits as well. No other vital documents or summaries of documents were translated. A PIP was not created for either public process so it's hard to understand how NMED came to the conclusion that no additional translation was needed, when LANL is surrounded by a high concentration of both Hispanic and Native New Mexicans. In fact LANL is surrounded by the highest or one of the highest concentrations of minority community members at any DOE site. Because of the different communities involved, both Spanish and Native language translations might have been needed to fully inform potentially affected communities. English speakers could read the permits themselves, the regulations and other documents in the Record, but LEP individuals only had the minimal information in the public notices. Again, this disparate treatment led to the disparate effect that minority community members could not participate equally and fully in the permit processes.

Finally, as described above, the WCS process only provided a few sentences and pages of information in Spanish until almost the end of the process. When forced to provide a more comprehensive fact sheet for DP-1817, NMED did not ensure that all vital information in the permit was accurately translated as required by the Resolution Agreement, but provided public notices and a fact sheet that were severely flawed, yet were the only information provided for non-English speakers. Both the quantity and the quality of information provided to LEP Spanish speakers was diminished compared to what was available for English speakers. Again, disparate treatment led to the same disparate effect that LEP persons could not participate equally in this permit process.

¹⁰⁸ New Mexico Environment Department, Hazardous Waste Bureau, WIPP Volume Mod PIP, July, 2018 (Exhibit 43)

(d) No Notification of LEP services or translated documents

NMED does not notify the LEP public of available language services and translated documents. NMED hired an interpreter/translator to provide language assistance in-office, by phone or by email but only noticed the availability of this interpreter for hearings when they were actually available to provide language assistance at any time. When NMED translated the WCS Record Index and the second fact sheet, the LEP community was never told of their availability. NMED has stated that it is not their responsibility to inform the public or the LEP public of the availability of corrected or changed documents, new documents, large revisions to the Record or translations. This is a program-wide informal policy. NMED does sometimes notice the availability of new documents or translations but provides such notice irregularly and in an arbitrary and capricious manner. Notification is critical as without notification of the availability of translated documents, an interpreter, etc., these documents and service are inaccessible to LEP individuals and might as well not exist.

(e) Inaccessible Phone System and Website

Participation in NMED's programs and activities is also limited by NMED's inaccessible phone system and website. There is no Spanish option in their phone menu, even for the non-discrimination coordinator's phone. The website is even more limited as most pages by far are in English. Even on the home page there is very little information in Spanish.¹⁰⁹ News releases on the Homepage are in English and Spanish and there are links in Spanish on how to file a non-employee discrimination complaint, how to request public information and how to report an environmental issue or incident. That's it. Everything else is in English including all information on Programs, Businesses, Tools & Maps, Regulatory Resources, and Boards & Commissions. Even the link to the Resolution Agreement and the three Policies is now only in English. When you click that link, the Resolution Agreement has been removed and English speakers have five documents available to them whereas Spanish speakers only have the three policy documents. The link to request public information also leads to three more documents in English than Spanish speakers have. Some other pages on the website have Spanish sections and some also have programs that will read the page for visually disabled visitors. The reading is awkward though understandable in English, but almost unintelligible in Spanish and reads all the numbers in the Spanish section in English.

The website is listed in PIPs as a primary outreach tool but clearly, because of the dearth of translated material, vital information regarding facilities and permits that is readily available to the public in English is not available to the non-English speaking public. This amounts to disparate treatment and has led to the disparate effect that Spanish and other non-English speakers cannot inform themselves to the same level that English speakers can and therefore cannot participate in NMED's programs and actions in an equal and meaningful way.

¹⁰⁹ NMED Homepage, <https://www.env.nm.gov> (last visited June 3, 2018)

(f) The need for translation and budgeting for language services is not analyzed at the programmatic or statewide level in conformance to federal guidelines

Many of the facilities we have been describing, and others in New Mexico, are controversial. There is statewide interest, including by LEP persons, in their permits and in how NMED is allowing development to change the state. When discharge permits are involved there is a great interest in how our groundwater is being protected as it is such a scarce resource in this state. Many regulated facilities like WIPP, Triassic Park, LANL etc. have facility transportation that can create a disparate effect in LEP and minority communities far from the facility site. For instance, according to information in the WIPP SEIS II and in Environmental Evaluation Group reports, the transportation phase of the WIPP project is responsible for almost all of the negative health effects of the entire WIPP project during normal operations. NMED's insistence on analyzing the need for translation and public participation only at the local or facility level instead of at the state or programmatic level has resulted in a lack of access to information for LEP individuals across the state for some of these permits. As examples above show, PIPs constantly describe having to limit translation and outreach because of budgetary concerns. NMED cannot issue permits to expand industry and the statewide effects that come with that while simultaneously limiting representation and invoking a cost argument to limit translation. Doing so has had a disparate effect on LEP persons and particularly on those who do not live within a short distance from the facility or discharge point.

(g) Limiting LEP and community needs because of low "historic participation" only increases the disparate effect on Hispanic and LEP individuals

The LEP Policy provides that NMED employees "...assess historical participation...to evaluate whether there was participation by LEP individuals in the past."¹¹⁰ This reasoning violates federal guidelines and the 2017 Resolution Agreement. Current guidelines require recipients like NMED to assess LEP community needs at a programmatic level instead of reviewing on a case by case level.¹¹¹ Limiting which Hispanic communities should have language and community services now because of low turnout in the past is really adding insult to injury considering how much NMED has historically obstructed public involvement by this segment of the public. Federal guidance says that "... involving the public early and often, is essential for the success of any permitting program" and encourages recipients to "...get feedback from as many members of the affected community as possible...",¹¹² but by the time NMED provides even minimal information to LEP communities, the process is often too far along for them to have any influence on the outcome.

Most public notices have only recently started to be translated into Spanish (except in the Solid Waste Bureau which seems to have had somewhat better outreach to LEP communities)¹¹³ Therefore, historically, it was almost impossible for LEP persons even to find out that a permitted facility or discharge was planned nearby. Even with

¹¹⁰ New Mexico Environment Department, LEP Policy, February 6, 2018 (Exhibit 11)

¹¹¹ EPA LEP Guidance, 69 Fed. Reg. at 35,606 (Exhibit 18)

¹¹² EPA Public Involvement Guidance, 71 Fed. Reg. at 14212 (Exhibit 19)

¹¹³ New Mexico Environment Department, Solid Waste Bureau, Lea County Landfill PIP, June 5, 2018 (Exhibit 42)

facilities that generate considerable public interest it is usually not possible for NMED to know what portion of that interest comes from LEP individuals.¹¹⁴ Further reducing public involvement by LEP communities by reducing language services will not help NMED meet their Title VI obligations and only increases the disparate effect that NMED's actions have had on LEP and minority communities who have been left out of the process in the past, making it even more difficult for them to participate in a meaningful way now or in the future.

(h) Insufficient non-discrimination training

Each of NMED's three policies requires training. These policies directly affect the LEP, minority and disabled public but those communities were not allowed to be involved in creating the curriculum for the non-discrimination training or to know what that curriculum is. That the training does not fully cover all important aspects of non-discrimination, however, is clear. The ruling in *In re Application of Rhino Env'tl. Services*¹¹⁵ made it clear that social concerns, including environmental justice and civil rights concerns must be considered in the permitting process. Yet about a month after going through the non-discrimination training, David Cobrain, project manager for the Triassic Park hazardous waste facility permit, stated during a pre-hearing conference that he didn't need to consider social or environmental justice concerns but only the technical requirements of RCRA in a permit process.¹¹⁶

During the DP-1793 permit hearing, NMED said the hearing was not the "forum" where Resolution Agreement requirements and civil rights concerns were "to be litigated," that the Resolution Agreement was "entirely outside of the scope of this discharge permit" and would not allow cross examination about civil rights and social concerns.¹¹⁷ During the WIPP Volume Mod hearing, NMED also claimed that problems with the PIP and questions about exposure information required by C.F.R. §270.10 (j) and possible disparate impacts were "not related to the [Volume Mod]," that similar civil rights issues were "not relevant" and that "...there is a process to submit public comment on the [PIPs]..."¹¹⁸ Clearly, the non-discrimination training has not impressed upon NMED employees that social and civil rights concerns are an important part of the permitting process.

Employee non-discrimination training that falls short and allows those employees to give incorrect information or even stop public participation relating to civil rights and social concerns amounts to disparate treatment and creates a disparate effect on LEP and minority persons and communities as it keeps their concerns and needs from

¹¹⁴ New Mexico Environment Department, Ground Water Quality Bureau, URENCO USA PIP, 9 (February 22, 2019)(Exhibit 41)

¹¹⁵ *In re Application of Rhino Env'tl. Services*, 2005-NMSC-024, ¶¶ 22-24.

¹¹⁶ Conversation between [REDACTED] and David Cobrain, Triassic Park Hazardous Waste Facility Permit Renewal, pre-hearing conference calls, summer 2018

¹¹⁷ LANL discharge permit hearing transcript (DP-1793), 329-334, November 8, 2018 (Exhibit 12)

¹¹⁸ WIPP Volume Mod transcript, 35, 27-29 and 41-44, October 25, 2018 (Exhibit 13)

being addressed and severely limits their ability to influence the outcome of the permit process.

(i) LEP individuals and the public at large were not involved in the creation, review or correction of Policies, PIPs, the definition of vital documents, summaries of vital information, fact sheets or translations.

The LEP and minority communities (and the disabled public) have not been allowed to have any involvement in creating the three policies that are supposed to implement the Resolution Agreement. This has resulted in severe shortcomings in all three policies that possibly could have been avoided. These communities are also prohibited from any involvement in creating the PIPs which also have multiple problems. Despite the policies and PIPs having been created to implement the requirements in the Resolution Agreement so that disparate treatment of these groups by NMED will cease, there is no formal process for these communities to review and correct either the policies or the PIPs. Instead, anyone can submit suggestions or comments to NMED's General Council. NMED is under no obligation to use these suggestions or even to let the writer know that the comments have been received. Indeed, when letters with suggestions or comments have been submitted to NMED— one signed by more than 20 environmental and environmental justice groups— NMED has not responded directly or let any of the writers know if their suggestions are planned to be incorporated or are even under consideration.

Because NMED has not yet shown that it can provide the LEP and minority public with accurate and timely translations and fulfill the provisions of the Resolution Agreement, it is imperative to have some type of timely and formal review/appeal process that is part of the permitting process itself, for NMED's decisions of what constitutes a vital document, what is an "important" permit, summaries of vital documents, fact sheets and translations. Each of these is an element in providing the information needed by LEP, minority and disabled individuals to inform themselves and make sure their needs and concerns are included. The WCS permit process is an example of how the quality of information can be diminished for LEP individuals in relationship to information available to English speakers when these individuals or their representatives are not able to review and correct documents before they are published. The second hearing fact sheet was created specifically to provide LEP persons with all vital information included in the permit, but it was riddled with inaccuracies and omissions which were never reviewed or corrected before it was translated and published. LEP individuals *only* had this flawed summary of the permit available to them while English speakers could read the permit itself.

Not allowing any involvement by the LEP and minority communities (or the disabled community) in the creation of Policies and PIPs and having no formal way for these communities to review and correct inaccurate or insufficient policies, PIPs, summaries, fact sheets, translations or to help define which documents are vital documents and which permits are "important," goes against the very purpose of the Resolution Agreement and allows these communities to be shortchanged with limited and sometimes inaccurate information. Without such a review process, LEP

individuals and communities, as well as their allies and advocates, have no way to appeal decisions that leave them with less than a fully meaningful opportunity to participate in the permit process.

- (j) NMED is not ensuring that all hazardous waste permit applications contain all necessary components required by 40 C.F.R. §270.10(j)—exposure information**
In the Resolution Agreement NMED committed to ensuring that *all* hazardous waste permit applications contain all the information required by 40 C.F.R. §270.10(j) for exposures from hazardous waste facilities and their facility transportation during normal operations and during accidents. In New Mexico, most of these facilities and much of their facility transportation is in geographic proximity to significant minority populations. For hazardous waste facility permitting not to be discriminatory, it must be clear that there will be no disparate impacts on potentially affected LEP or minority communities. Without obtaining accurate exposure information about these facilities and their transportation it is impossible to figure any potential disparate impacts.

Despite NMED's commitment to "Section (j)" in the Resolution Agreement, during the Triassic Park hazardous waste permit pre-hearing conference calls in summer of 2018, Dave Cobrain, the project manager said that exposure studies weren't necessary for Triassic Park because all the RCRA waste at the facility had to meet Land Disposal Standards and thus was enclosed in containers. This, however, was disingenuous because Mr. Cobrain well knew that not all of the waste was regulated by RCRA and that the daily cover for the hazardous and toxic landfill was planned to consist of loose PCB-contaminated soils that were to be sprayed with contaminated leachate for dust suppression. Combined with the area's high winds, this was a recipe for exposure. When confronted with the complete facts, he shifted to say that the permit provisions were so protective that they *were* the study. When this argument was challenged, Mr. Cobrain simply started reading sections of the permit on loading and unloading.

Mr. Cobrain had made the same statement (that all the RCRA waste was enclosed), to the public during a previous October 2016 information meeting in Roswell, where he also used the argument that they couldn't study effects from facility transportation because the facility hadn't been built yet. Clearly no effects studies had been done or were contemplated for the Triassic Park renewal application despite NMED "confirming" in the Resolution agreement that for the Triassic Park facility it had "...carefully reviewed the pending permit application and determined that the application contains all necessary components of permit applications as required by 40 C.F.R. §270.10 including Section (j) related to 'exposure information,' and any necessary follow-up has and will be taken to ensure protection of human health and the environment."¹¹⁹ Since the 2018 calls, NMED has not said if it has changed its position that exposure information isn't necessary for the Triassic Park application,

¹¹⁹ Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, 5-7 (Jan. 19, 2017)(Exhibit 1)

has not said if exposure studies are being undertaken, or if they are even contemplated for the future.

During the WIPP Volume Mod hearing, when asked about whether exposure information had been gathered for the modification (which increased waste volume at WIPP by about 30% and increased facility transportation of mixed transuranic waste to WIPP by about 12,000 shipments), NMED said that exposure information was not "relevant" to the modification, that it wasn't necessary to do such effects studies for modifications, and that such exposure information was already part of the original application (more than 20 years old).¹²⁰

NMED is clearly not making sure that *all* hazardous waste permit applications include Section (j) exposure information. NMED does not see the need to understand how exposures coming from NMED permitted facilities affect minority communities, to limit the density of such facilities, or to see if any of these facilities, discharges and facility transportation, singly or together, are having a disparate effect on LEP individuals or on minority communities. Yet the highest cancer mortality rate in the state is concentrated in southeast/south central New Mexico—and only there—in an area with a high percentage of individuals of Hispanic and Mexican descent, a heavy density of permitted and unpermitted facilities and discharges, and a huge amount of hazardous, radioactive and toxic transportation. Both the WIPP and Triassic Park hazardous waste facilities are in southeastern New Mexico.

(k) Southeastern/south central New Mexico, an area with a high percentage of individuals of Hispanic and Mexican descent, already has disproportionately high pollution exposures, is dense with polluting facilities and has the highest cancer mortality in the state

A look at the *Southeast New Mexico Threats Map* shows a multitude of polluting facilities, including oil and gas development and many radioactive and hazardous sites in southeast and parts of south central New Mexico. A close-up view would show even more. The area is heavily polluted. Soil is contaminated with radioactive particles released from the WIPP explosion and the Trinity atomic bomb test and is polluted from petroleum spills and its own naturally high level of arsenic. Air is polluted from oil refineries and methane from the enormous oil and gas industry development and from the radioactive and hazardous particles that are continually suspended and re-suspended by the high winds and frequent tornados in the area. Even many of the rivers are contaminated along with some of the groundwater that is polluted with superfund plumes, fracking chemicals, PFAS and other pollutants.¹²¹

The cancer mortality rate in southeast New Mexico is the highest in the state and life expectancies are low. This cancer mortality rate exists *only* in this area

¹²⁰ WIPP Volume Mod transcript, 40-41, October 25, 2018 (Exhibit 13)

¹²¹ *Southeast New Mexico Threats Map*, [REDACTED] Design, LLC, 2019 (Exhibit 35)

of the state—no where else.¹²² Yet NMED continues to permit and to renew permits for un-built facilities in this area while allowing groundwater sometimes to go unprotected as it is with the WCS discharge permit. (No other New Mexico groundwater permit for an "important" facility allows for no monitoring, sampling, and analysis *at all* that can trigger a cleanup action.) No attention is paid to the disparate impacts that exist in this highly polluted part of the state that has poor access to health care, low life expectancies, and large numbers of Hispanic and Mexican residents. As seen above, NMED is not seeking to do even legally required effects studies, let alone disparate impact studies. Other government and private entities are also trying to bring every spent fuel rod in the country to shallow storage (and maybe permanent disposal) in this same area. There is a large social concern among minority communities in southeastern New Mexico that the area already has a reputation as a "national sacrifice area" and a "radioactive corridor."¹²³

NMED is supposed to understand and address community concerns but they have never acknowledged the health and social concerns minority communities have with all of these facilities and wells—some of them intertwined into residential areas, as in Eunice.¹²⁴ Despite comments, maps and statistics that have been given to them, NMED seems oblivious to the poor health and the massive death rate in the area. The social concern that the southeastern New Mexico is becoming seen as only useful as a garbage dump is also never acknowledged as NMED continues to claim that minority community social concerns need not be considered as part of the permitting process. Yet this and health concerns are central concerns for many affected LEP and minority individuals in the area. Environmental and health impacts are already significant but NMED has never discussed them nor considered bringing facility density and public health criteria into their siting and permitting analyses for the area. Nor are they trying to avoid net increases of pollution in these communities. Until NMED does this, the poor health, short life expectancies and high death rate in this area will only continue or increase. Not looking to see if there are disparate effects doesn't mean they aren't there. Many poor health outcomes described above are linked to being Hispanic and/or having low English proficiency. Much of the disparate effect on these communities is occurring because of NMED's policies. Because NMED has not looked at the history, background, needs and concerns of LEP and minority communities in southeastern New Mexico, these policies have resulted in death

¹²² *Id.*

¹²³ CIS Development Project: Eddy-Lea Energy Alliance LLC, *Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility*, 5 (May 11, 2017)(provided in a file as "Exhibit 46")

¹²⁴ Satellite map of the Eunice, New Mexico Community Center and nearby blocks showing pumpjacks, (the WCS DP-1817 hearing was held at the Community Center) Google Maps, May, 2018 (provided in a file as "Exhibit 47;" Satellite map of the Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018 (provided in a file as "Exhibit 48")

and discrimination for the high concentration of residents of Hispanic and Mexican descent in this area.

IV. SUMMARY AND CONCLUSION

A. NMED's DP-1817 Permitting Process Violated Title VI

NMED's process of permitting the WCS facility discharge amounted to disparate treatment of LEP New Mexicans by not providing them equal access to NMED's protections, programs and activities compared to that provided English speakers. This had a disparate effect on LEP individuals in that they were prevented from participating fully and equally in the public process for this discharge permit.

Vital documents were never defined, documents were translated late and/or not noticed, translated documents were not provided to the local information repository, and public notices and the summary of the permit were created and translated with multiple omissions and mistakes. Thus, not only was the quantity of the information available to LEP persons throughout the permitting process dramatically less than what English speakers could access, but the quality of that information was diminished as well. Though English speakers could read the actual draft permits and other documents in the Record and regulations to correct these deficiencies, for the most part LEP Spanish speakers could not. An important issue for DP-1817 was that the final Draft 3 Permit was far less protective than the Draft 2 Permit had been. But LEP persons were never able to read Draft 2 or any of the public notices about it and had available only a misrepresentation of Draft 3. It was impossible for them to compare the two drafts. Vital information that was readily available to the public in English was not available in any way to the LEP public.

NMED also never let the community know that a Spanish interpreter was available to help with Spanish language access outside of the hearing itself, their phone system was English-only, and their website had minimal information in Spanish. Thus, it was impossible for LEP New Mexicans to inform themselves adequately about the WCS facility, discharge, permit or the geology and hydrology of the discharge area. Without such information, they could not participate in any meaningful way in the public process for DP-1817.

In addition to translation problems, NMED never inquired about the history, background, concerns or needs of the LEP and minority affected communities—even though their concerns were many—and thus had no plan to address those concerns or incorporate this information into the permitting process. No PIP was even created. Somehow, without involving the community, NMED believed they did understand community concerns, but they did not. (For instance, despite comments on the subject, NMED appeared surprised when they were told that a significant number of CARD, AFES and CCNS members didn't want *any* New Mexico discharge permit but wanted WCS to re-route its discharge back into Texas instead.)

All of this created a perfect storm of disparate treatment that had a disparate effect on the ability of LEP and individuals of Hispanic or Mexican descent to make their needs and concerns known and to participate fully and equally in the permitting process for DP-1817.

B. NMED continues to have a statewide pattern and practice of discriminatory permitting and lack of access for LEP residents to the public participation and permitting process for all of NMED's permit

The problems described for the DP-1817 public process are repeated throughout the public processes for virtually all of NMED's permits. NMED continues to avoid LEP and minority community involvement on every level—Policies, PIPs, input and review. No matter how often NMED is provided comments or letters asking for such involvement and pointing out federal guidance that describes involvement by these communities as a cornerstone of non-discrimination, it continues to keep LEP and minority communities at arms length. Thus, NMED has ended up with a system that continues to discriminate.

Many of the provisions in the three Policies, that are supposed to make NMED's programs and actions more inclusive, actually amount to disparate treatment and even have a chilling effect on public participation by LEP and minority individuals. Determining language assistance and budgeting needs locally instead of programmatically, for instance, leaves out interested and potentially affected LEP and minority individuals throughout the state and limits the amount of language assistance and outreach provided locally as well. PIPs that say NMED "... *will strive* to make public participation efforts as inclusive as possible *within the Bureau's budget and time limitation*" [emphasis added],¹²⁵ do not bode well for ending disparate treatment of LEP individuals or increasing their participation in the public process. Basing the level of services to communities on their level of past involvement also will only increase disparate treatment and discourage participation. Keeping the determination of services at the programmatic level helps to build up and encourage public participation by LEP community members—something NMED desperately needs to do.

Throughout its programs and actions, NMED continues to obstruct public participation by LEP persons by severely limiting their access to vital information that is readily available to English speakers—even for "important" facilities. NMED and its bureaus refuse to define and translate virtually any vital documents or to provide regular notice of the availability of translated information, making this information inaccessible to LEP persons. Throughout all of NMED's permitting processes, no permit has ever been defined as "vital" and only one primary document out of all permits' Administrative Records has been translated—the WCS Record Index. Despite well-intentioned statements in some PIPs that public notices will include information about the availability of an in-house translator/interpreter, this

¹²⁵ NMED, Public Involvement Plan (PIP) for URENCO USA (DP-1481) 5, February 22, 2019 (Exhibit 41)

information is still not being included. NMED's phone system still has no Spanish option and the amount of information available to the Spanish-speaking public is still far less than that available to English speakers.

NMED and its bureaus also continue not to investigate the history, background, needs or concerns of minority communities potentially affected by NMED's permitting decisions and are not creating plans or taking steps to address those needs and concerns. Again, NMED avoids contact with the LEP and minority public and instead turns to limited tools like EJSCREEN to try to find answers. The Department appears unaware that there is a large interest in many of NMED's "important" permitted facilities among the minority and LEP public throughout the state and that many of these individuals could be disparately impacted by facility transportation from a facility even though that facility is not just next door. NMED seems to have forgotten that there can be significant effects "downstream" and "downwind" from a facility beyond the four mile radius around a facility that it thinks should be the boundary containing any affected communities. These misunderstandings have led to NMED's decision to analyze translation, budget and other needs locally instead of programmatically or state-wide, leaving the concerns of large numbers of LEP and minority New Mexicans out of the permitting process completely. This disparate treatment is compounded by NMED's seeming unawareness that some areas of New Mexico, that have high concentrations of minority residents, are overburdened with polluting facilities and already have severe public health problems. Yet, in order to avoid creating disparate impacts on minority communities in New Mexico and to meet their Title VI obligations, it is critical that NMED and its bureaus understand the history, background, needs and concerns of the LEP and minority communities into which they are siting polluting facilities, and that they understand the effects that NMED's policies and decisions are having on these communities.

The news is not all bad. NMED has made some progress since 2002. Most or all public notices are translated at least into Spanish. Some are translated into other Native languages as well, particularly in the Solid Waste Bureau.¹²⁶ NMED does provide a small amount of information in Spanish on their website as well as reading assistance for visually disabled people. Public notices also usually include information on assistance for the disabled, sometimes provide information on how to request language assistance, and NMED sometimes provides "enhanced" notification that is beyond the minimum required in the regulations.

Yet the big issues—involving the LEP and minority communities in creating a culture of non-discrimination at NMED, providing access for them to the same vital information regarding permits and permitting that is readily available to English speakers, incorporating the communities' needs and concerns into the permitting process, and proactively partnering with communities and a variety of community stakeholders to increase public participation by LEP and minority community members—have improved little or not at all. The 2002 Title

¹²⁶ New Mexico Environment Department, Solid Waste Bureau, PIP for the Lea County Landfill, June 5, 2018 (Exhibit 42)

VI complaint listed the same or similar problems that are listed in this complaint 17 years later: that the LEP public was obstructed from participating in the public participation process for the facility, was denied access to vital documents, and that NMED refused to consider social and discrimination concerns in its permitting process. The older complaint also alleged that NMED had a statewide pattern and practice of similar discriminatory permitting and lack of access for LEP individuals. All of these problems continue today. The result of these major deficiencies in NMED's public process is that LEP persons and persons of Hispanic or Mexican descent still have no real meaningful access to the public participation process for any NMED permits

Despite a Resolution Agreement in place, NMED's cumulative decisions have undermined the public permitting process for all their permits to such an extent that their actions and policies amount to disparate treatment and have had a disparate effect on the LEP public in New Mexico by preventing them from having meaningful involvement in the permitting process and some influence on the decisions about just how much contamination they should be subjected to. NMED's decisions and policies also continue to have a disparate effect on minority communities throughout the state by not addressing their needs and concerns and not incorporating those concerns into the permitting process. NMED has an affirmative responsibility not to discriminate. By not honoring the Resolution Agreement through its statewide policies, by diverging radically from federal guidance on public participation and by not providing equal access to its programs and activities, NMED continues to have a pattern and practice of discrimination against LEP and minority New Mexicans because of their race, color or national origin.¹²⁷

V. PRAYER FOR RELIEF

Complainants believe that NMED needs further supervision by and more help from EPA to bring their programs and actions into compliance with Title VI and federal guidance. NMED does not yet have a culture of non-discrimination and needs close, effective and vigorous monitoring to ensure that the commitments it made in the Resolution Agreement are implemented. Increasing involvement by the LEP and the minority public in the permitting process after they have been prevented from participating for so long is, admittedly, not easy and EPA could be invaluable in providing guidance and help to NMED in that area as well.

Complainants' requests for improvements fall into four main categories, that NMED:

1. Proactively involve LEP and minority communities in creating a culture of non-discrimination at NMED
2. Provide access to the same vital information for LEP individuals that is readily available to English speakers
3. Consider and incorporate LEP and minority community background, history, needs and concerns in the permitting process

¹²⁷ 40 C.F.R. §7.35

4. Proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members

Actions in support of each category include:

1. Proactively involve LEP and minority communities in creating a culture of non-discrimination at NMED
 - a. Incorporate public involvement by LEP and minority communities into revising the three Policies in order to bring them into conformance with federal guidance.
 - b. Incorporate public involvement by LEP and minority communities into creating Public Involvement Plans that are in conformance with federal guidance.
 - c. Incorporate public involvement by LEP and minority communities into revising the curriculum for employee training and extend that training to include contractors.
 - d. Create a short, formal review and appeal process for the three Policies
 - e. Create a short, formal and timely review and appeal process for PIPs
2. Provide access to the same vital information for LEP individuals that is readily available to English speakers, particularly for "important" permits
 - a. If a need for language assistance has been identified, define and identify "vital" documents; then translate, or summarize and translate, those documents.
 - b. Identify needed language services and budget for those services on a programmatic level as well as on a local level.
 - c. Include the availability of language services, translated documents, and disability services in all public notices
 - d. Create a short, formal, and timely review process for NMED's decisions about permit "importance," the need for translation, and the definitions of "vital" documents
 - e. Create a short, formal, and timely review and appeal process for the content of summaries of vital documents, the content of fact sheets, and the accuracy of translations.
 - f. Continue to increase and improve Spanish content and disability options on the website so that all members of the public have access to the same important information that is readily available to English speakers
 - g. Include a Spanish option on the phone system
3. Consider and incorporate LEP and minority community background, history, needs and concerns in the permitting process
 - a. In consultation with a variety of LEP and minority community stakeholders, include community history, background, needs and concerns—beyond language access and public participation—in each PIP.
 - b. Incorporate permitted and unpermitted facility and discharge density, public health, and social concerns into siting and permitting analyses with the goal to avoid net increases of pollution in minority communities that have disproportionately high exposures or that already host a number of facilities.
 - c. Make sure that the requirements of 40 C.F.R. §270.10(j) for exposure studies are met for *all* hazardous waste facility permit applications and that any previous studies are brought up to date for permit modifications or renewals.

- d. Extend exposure studies performed under Section (j) to see if exposures from the facility or facility transportation could cause disparate impacts on affected minority communities.
 - e. Contract for a comprehensive public health study to understand why the cancer mortality rate in southeastern New Mexico, an area with high numbers of individuals of Hispanic or Mexican descent, is the highest of anywhere in the state and why life expectancy is so low. While there are high levels of pollution and a density of facilities in the area, it appears that other social factors, including factors related to LEP or minority membership, are also involved.
4. Proactively partner with LEP and minority communities and a variety of such community stakeholders to increase public participation by these community members
 - a. Consult with stakeholders and such communities directly to understand what methods would work best to engage community members
 - b. Offer more services, not less, to LEP and minority affected or potentially affected communities that have had low historical participation, especially if the permit involves an "important" facility
 - c. Contract for a "marketing" study to improve on NMED's efforts to inform and engage the LEP and minority public and to increase their participation in NMED's programs and activities. Legally required public outreach like public notices has not been effective. Even enhanced publication of notices, fact sheets and radio spots has been ineffective in engaging the LEP and minority public. NMED must be pro-active in engaging these communities, but must first understand the best ways to encourage their participation.

VI. NOTE

Complainants would be open to any reasonable request from EPA to extend the amount of time to investigate this complaint beyond 180 days, particularly if that request involves asking Complainants for additional information.

Complainants actually have always hoped to work *with* NMED to improve public participation and access for all New Mexicans and to protect and improve our environment and public health. Too often both sides are instead in an adversarial relationship. However, it is difficult to work with NMED when they keep the public and especially the LEP and minority public, at arms length. However, we are hoping to meet soon with NMED to discuss problems and solutions both for LEP and minority communities and for public participation in general. If these discussions are productive and enough of the areas of concern described above are addressed in a meaningful way, Complainants would like nothing better than to withdraw this complaint at that time.

Respectfully Submitted by:

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy

[Redacted Signature]

6-3-19

Date

for Citizens for Alternatives to Radioactive Dumping (CARD)

Approved for signature by (b) (6) Privacy *telephonically on May 31, 2019 /s/* (b) (6) Privacy
(b) (6) Privacy Concerned Citizens for Nuclear Safety (CCNS)

Approved for signature by (b) (6) Privacy *telephonically on May 31, 2019 /s/* (b) (6) Privacy
(b) (6) Privacy individually and for the Alliance for Environmental Strategies (AFES)

Approved for signature by (b) (6) Privacy *telephonically on June 2, 2019 /s/* (b) (6) Privacy
(b) (6) Privacy individually

Attachment A: Contact Information for Complainants

(b) (6) Privacy

Research Director, CARD

(b) (6) Privacy

Santa Fe NM 87501 **(b) (6) Privacy**

(b) (6) Privacy (voice and fax)

(b) (6) Privacy

(b) (6) Privacy

Executive Director, CCNS

(b) (6) Privacy

Santa Fe NM 87594

(b) (6) Privacy

(b) (6) Privacy

(b) (6) Privacy

Individually and for AFES

(b) (6) Privacy

(b) (6) Privacy

Individually

(b) (6) Privacy

Eunice NM 88231

(b) (6) Privacy

Attachment B: Exhibits

Exhibit 1: Informal Resolution Agreement, New Mexico Environment Department and the U.S. EPA, Jan. 19, 2017 (EPA File No. 09R-02-R6)

Exhibit 2: Findings of Fact and Conclusions of Law submitted by CARD and AFES in the matter of the Application of WCS for a Groundwater Discharge Permit, GWB-18-11(P), October 19, 2018

Exhibit 3: New Mexico Environment Department, Public Participation Policy 07-13, February 6, 2018, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-13.pdf>

Exhibit 4: Public Involvement Plan, Waste Isolation Pilot Plant (WIPP) Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July 2018, (EPA ID#: NM4890139088)

Exhibit 5: Affidavit of (b) (6) Privacy in the Matter of the Application of Waste Control Specialists LLC for a Groundwater Discharge Permit (DP-1817) for the Waste Control Specialists LLC Facility, GWB-18-11(P), September 17, 2018

Exhibit 6: Contents of NMED binder for English and Spanish DP-1817 documents, located at the Eunice Public Library (photos taken by (b) (6) Privacy on October 4, 2018 after the last day of the hearing)

Exhibit 7: New Mexico Environment Department's Response to CARD's and AFES' Opposed Motion, in the Matter of the Application of Waste Control Specialists LLC Discharge Permit (DP-1817) [No. GWB-18-11(P)] for continuance of the September 21, 2018 Deadline and of the October 2, 2018 Public Hearing, September 28, 2018

Exhibit 8: Ground Water Quality Bureau, Notice of Public Hearing, Waste Control Specialists, LLC (DP-1817) Fact Sheet Available, issued by email 7-9-2018 (not entered into the Administrative Record)

Exhibit 9: In re Application of Rhino Env'tl. Services, 2005-NMSC-024, ¶¶ 22-24, 138 N.M. 133, 139-40, 117 P.3d 939, 945-46

Exhibit 10: U. S. Environmental Protection Agency EJSscreen Fact Sheet (August 14, 2018) https://www.epa.gov/sites/production/files/2018-08/documents/2018_ejscreen_fact_sheet_8-14-18.pdf

Exhibit 11: New Mexico Environment Department, Limited English Proficiency ("LEP") Accessibility and Outreach Policy 07-11, February 6, 2018, <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-11.pdf>

Exhibit 12: Transcript of the Proceedings, In the Matter of Los Alamos National Laboratory's Groundwater Discharge Permit, DP-1793, November 8, 2018, Volume 2, 234-341 (Cross-Examination by (b) (6) Privacy of NMED witness (b) (6) Privacy)

Exhibit 13: Transcript of the Proceedings, In the Matter of the Waste Isolation Pilot Plant's Hazardous Waste Facility Permit, October 25, 2018, (EPA ID NO. NM4890139088)(Cross-Examination by (b) (6) Privacy of NMED witness Paul Maestas)

Exhibit 14: Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, October 2, 2015 (1st Draft Permit)

Exhibit 15: Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, March 3, 2017 (2nd Draft Permit)

Exhibit 16: Ground Water Discharge Permit Waste Control Specialists LLC, DP-1817 Draft, Jun. 9, 2017, (3rd and final Draft Permit) http://nuclearactive.org/wp-content/uploads/2017/08/d_WCS_GWDP_1817_060917.pdf

Exhibit 17: Letter from Andrea Kock, Deputy Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission to Rod Baltzer, President and CEO, Waste Control Specialists LLC, January 18, 2017

Exhibit 18: Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. (Jun. 25, 2004) (EPA LEP Guidance) <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf>

Exhibit 19: Title VI Public Involvement Guidance for Environmental Protection Agency Assistance Recipients Administering Environmental Permitting Programs, 71 Fed. Reg. (Mar. 21, 2006) (EPA Public Participation Guidance) https://www.epa.gov/sites/production/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf

Exhibit 20: Letter from the Environmental Justice Clinic, Yale Law School to Lilian Dorka, ECRCO EPA, Re: NMED Limited English Proficiency & Public Participation Policies Following the Resolution Agreement in EPA Case No. 09R-02-R6, March 12, 2018

Exhibit 21: Email from Lara Katz, NMED to (b) (6) Privacy June 4, 2018

Exhibit 22: New Mexico Environment Department, Disability Accessibility and Outreach policy 07-10 (February 6, 2018), <https://www.env.nm.gov/wp-content/uploads/2018/02/NMED-Policy-and-Procedure-07-10.pdf>

Exhibit 23: New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2, 2018 (2nd hearing fact sheet-English)

Exhibit 24: New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) August 2, 2018 (2nd hearing fact sheet-Spanish)

Exhibit 25: New Mexico Environment Department Fact Sheet re: Intent to Issue a Discharge Permit Under the New Mexico Water Quality Act to Waste Control Specialists LLC (DP-1817) June 5, 2018 (1st hearing fact sheet-English)

Exhibit 26: New Mexico Environment Department's Statement of Intent to Present Technical Testimony, in the Matter of Waste Control Specialists LLC (DP-1817)[GWB 18-11 (P)]
Technical Testimony of Stephen Pullen, September 21, 2018

Exhibit 27: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017, Administrative Record 02024 to 02027 (English)

Exhibit 28: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, September 1, 2017 (Spanish)

Exhibit 29: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017, Administrative Record 02322 to 02323 (English)

Exhibit 30: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Waste Control Specialists LLC, November 17, 2017 (Spanish)

Exhibit 31: New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018, Administrative Record 02407 to 02413 (first hearing notice-English)

Exhibit 32: New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, June 5, 2018 (first hearing notice-Spanish)

Exhibit 33: New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (second hearing notice-English)

Exhibit 34: New Mexico Environment Department, Ground Water Quality Bureau, Hearing Notice for Waste Control Specialists LLC, August 2, 2018 (second hearing notice-Spanish)

Exhibit 35: Southeast New Mexico Threats Map, (b) (6) Privacy Design, LLC, 2019

Exhibit 36: Satellite map of Eunice, New Mexico and the surrounding area, Google Maps, 2018

Exhibit 37: Comments on the June 2018 Fact Sheet & Suggestions for Translation and Information Inclusion in the Permit Summary Fact Sheet, July 17, 2018

Exhibit 38: Email from (b) (6) Privacy to Lara Katz, NMED, Re-Comments and Suggestions for Information Inclusion in the New Fact Sheet, July 17, 2018

Exhibit 39: Letter from the UNM School of Law Natural Resources and Environmental Law Clinic and 21 groups to Jennifer Hower, General Counsel, New Mexico Environment Department, Re: Second Request for Community Input on NMED's Public Participation and Limited English Proficiency Policies, December 17, 2018

Exhibit 40: New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for Special Waste Disposal, Inc. (DP-1012) November 13, 2018, https://cloud.env.nm.gov/water/resources/_translator.php/sv5kXkHMN0qJjuZvBPd+Pjq3arcmv

EnPifHL17JgmnMlvAjEKX0PtHBHI8Tt2Gz6gvthyvye9cL/s9PNSLbas3+51zLY/gty6Z1W1OfqwU=.pdf

Exhibit 41: New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for URENCO USA (DP-1481) February 22, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/7IFzxx/tEqyLuZE/AuGSiIz7T1GuJdorZUbzSVQGgzPcDtLgBBGRzghnxhOgXMH6U4KGqgMcb9FXUh8wDimK7gDgtal1PR8Hj7lxEdg6iCI=.pdf

Exhibit 42: New Mexico Environment Department, Solid Waste Bureau, Public Involvement Plan (PIP) for the Lea County Landfill, June 5, 2018, https://www.env.nm.gov/wp-content/uploads/2018/04/SWB_PIP-6-miles-LCLF-June-12-2018-FINAL.pdf

Exhibit 43: New Mexico Environment Department, Hazardous Waste Bureau, Public Involvement Plan (PIP) for the WIPP Draft Permit to Incorporate the Class 3 Permit Modification to Distinguish TRU Mixed Waste Disposal Volume Reporting, July, 2018, <https://www.env.nm.gov/wp-content/uploads/2016/05/FINAL-PIP-WIPP-Class-3-VOR-7-26-2018.pdf>

Exhibit 44: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSuc5+qFQDhUkAiQiAs/jST8KxTkj1BfdAQV7Ju0LwCIQfSa662EYK5/JUU0XMnfly0=.pdf (English)

Exhibit 45: New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Special Waste Disposal, Inc. (and 22 other facilities), May 24, 2019, https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSt2yW+oyABm9ZpdXuwmihnWG/G9XWEVIII5Urd3OtPXrBFMMZ504VjJdwLG1s0pLiQ=.pdf (Spanish)

Exhibit 46: CIS Development Project: Eddy-Lea Energy Alliance LLC, Holtec & ELEA, LLC's Vision for a Centralized Interim Storage Facility, (May 11, 2017)

Exhibit 47: Satellite map of Eunice, New Mexico community center and nearby blocks showing pumpjacks, Google Maps, May, 2018

Exhibit 48: Satellite map of Eunice, New Mexico High School and nearby blocks showing pumpjacks, Google Maps, May, 2018

Exhibit 49: New Mexico Department of Health, State Center for Health Statistics, Bureau of Vital Records and Health Statistics, Epidemiology and Response Division, New Mexico Selected Health Statistics, Annual Report 2017, <https://nmhealth.org/data/vital>

Exhibit 50: Instituto Cervantes at FAS - Harvard University, Hispanic Map of the United States 2017, November 2017, http://cervantesobservatorio.fas.harvard.edu/sites/default/files/hispanic_map_2017en.pdf

Exhibit 51: New Mexico Department of Workforce Solutions, Rachel Moskowitz, Bureau Chief, Economic Research & Analysis Bureau, Poverty in New Mexico, 2019,
https://www.dws.state.nm.us/Portals/0/DM/LMI/Poverty_in_NM.pdf

Exhibit 52: New Mexico Department of Health, Epidemiology and Response Division, 2018
The State of Health in New Mexico, April 2018,
<https://ibis.health.state.nm.us/report/soh/Introduction.html>