

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 )  
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**I. ADDITIONAL INFORMATION**

EPA has asked for additional information supporting claims of discrimination by NMED that are not covered by the current Resolution Agreement. Complainants will provides two additional instance that we believe are not covered by that Agreement: 1) NMED's approval of a permit for the WCS discharge that purports to be a monitoring permit that will protect New Mexico groundwater at the town of Eunice and beyond but that actually is incapable of fulfilling this purpose. Approval of this permit has resulted in discrimination against the nearby majority-Hispanic town of Eunice. The other instance is: 2) NMED's refusal to recognize civil rights issues or social concerns as part of the permitting process, specifically during the permit hearing.

Only enough information will be provided here to allow EPA to decide if these allegations can be accepted for investigation. If one or both are accepted, additional information, data, statistics etc. will be provided to support the various statements.

In addition, we will provide information to clarify some points that were raised during the recent phone call.

**A. NMED'S APPROVAL OF THE FINAL VERSION OF DP-1817 AMOUNTED TO DISPARATE TREATMENT OF THE MAJORITY-HISPANIC TOWN OF EUNICE AND HAD THE DISPARATE EFFECT OF LEAVING THEIR GROUNDWATER WITHOUT PROTECTION WHEN COMMUNITIES WITH SMALLER PERCENTAGES OF HISPANIC RESIDENTS RECEIVED FAR MORE PROTECTIVE PERMITS FROM NMED.**

1. Draft Permit 3, the approved draft permit, resulted from a legal compromise instead of from regulatory design. (See Exhibit 2, CARD/AFES Findings of Fact and Conclusions of Law.)

- a. **History**

In February 2017, WCS submitted a letter withdrawing their application to discharge (originally submitted in 2013). NMED responded by denying that request, stating the determination had been made that a discharge permit was required in 2012, and the WCS subsequent submittal of their application signified their concurrence. Many legal submissions, meetings and high level discussion finally resulted in WCS agreeing to fulfill the permit. WCS proposed (and NMED agreed to) a significant re-write from previous versions. The revised permit language was submitted by an attorney representing WCS and was agreed to by Michelle Hunter and the CEO/President of WCS. The language of the final draft (Draft 3) was the same as the submitted language. Within weeks of finalizing this language for Draft 3 (May 4, 2017), WCS cancelled their application withdrawal. The new draft was public noticed two weeks later (June 9, 2017).

- b. **Compromise Permit**

The first words spoken by WCS legal counsel Michael Woodward at the DP-1817 permit hearing described the final permit version as a "compromise permit." This was re-emphasized later in the hearing by WCS witness Sheila Parker when she testified that WCS was seeking a discharge permit from NMED as a matter of compromise to resolve whether an additional permit from New Mexico was even required. NMED also stated during and after the hearing that DP-1817 was simply something that would get them a "seat at the table" to discuss the WCS discharge since the site and therefore the origin of any discharge are in Texas.

Nevertheless, the 3rd Draft Permit states that "NMED's purpose in issuing this Discharge Permit, and in imposing the requirements and conditions specified herein, is to monitor the discharge of water contaminants from the WCS facility, in Andrews County, Texas into ground and surface water, so as to protect ground and surface water in New Mexico for present and potential future use as domestic and agricultural water supply and other uses and protect public health."

This is consistent with the regulations. What is not consistent is the concept of a "compromise permit." Either a permit is protective or it is not. There can be no compromise with regulatory requirements. Yet this permit, by everyone's admission, is exactly such a "compromise permit."

2. The approved permit (Draft 3) is less protective than the previous version of the permit (Draft 2).

- a. **Geology and hydrology**

Note that almost nothing is known about the discharge area in New Mexico as almost no geological or hydrological investigation has been done there. Hundreds of wells have been drilled in Texas and at other nearby facilities, but none of this exploration actually describes much of what is going on at the discharge area itself. This has allowed NMED to be confused about where the groundwater most likely to be affected by the discharge is situated; changing their mind three times, including during the hearing itself, about the location of that groundwater. It also allowed the WCS geologist to claim that (b) (6) Privacy well was not in the 225 foot level as (b) (6) Privacy had testified since the geologist claimed the 225 foot level was not contiguous across the New Mexico area—this despite evidence of multiple other water wells drilled to that level in the Eunice area.

Site geology consists of a relatively thin, surface layer of unconsolidated sands and gravels comprising the Ogallala/Antlers/Gatuña (“OAG”) Unit, sitting atop a thick, dense, claystone referred to as the Dockum Group. Shallow water exists in four units. From closest to surface downward, these units are described as (1) the interface between the OAG and the Dockum claystone at approximately 19 - 35 feet below ground level; (2) a discontinuous sandstone seam in the Dockum at approximately 80 feet; (3) a discontinuous sandstone seam in the Dockum at approximately 180 feet; and (4) the uppermost transmissive water-bearing zone measured to be between 10 to 30 feet thick, at approximately 225 feet.

Two deeper groundwater-bearing sandstone formations in the Dockum Group have been identified below the WCS facility in Texas. The approximately 100-foot thick Trujillo Formation sandstone is at about 600 feet and the approximately 250-foot thick Santa Rosa Formation sandstone at the base of the Dockum Group is at about 1,140 feet. The Santa Rosa Formation sandstone is considered the best aquifer within the Dockum Group in terms of water quantity.

Water in the 19 - 35 foot zone at the interface of the OAG and the Dockum consists of discontinuous pockets of water. In fact this zone is really a "vadose" or dry zone. Nevertheless, all three versions of the permit have said that water in this zone is the groundwater most likely to be affected by the discharge. In the Fact Sheet provided and translated before the hearing, however, NMED stated the water in this zone does not meet the regulatory definition of groundwater. Despite this, they have placed the only groundwater monitoring well that could result in a cleanup action, NM-1, in this vadose zone.

**b. Statement of purpose**

Even in its statement of purpose right at the beginning of the permit, Draft 3 is already less protective than both Draft 2 and Draft 1 as it intends only to "... *monitor* the discharge of water contaminants from the WCS facility, in Andrews County, Texas into ground and surface water, so as to protect ground and surface water in New Mexico ..." whereas the previous two versions intended to "... *control* the discharge of water contaminants ..." In Draft 3, NMED has given over regulation and control to WCS and Texas.

**c. Monitoring points have been reduced from 9 to 2**

Draft 3 only requires semi-annual monitoring at two locations. Only one of these monitoring wells, NM-1, is downgradient from discharge outfall 002. (Monitoring wells must be downgradient of the discharge to find contamination coming from the discharge.) The other monitoring well, TP-62, is upgradient. Only contamination found from sampling NM-1 can lead to actions that could require cleanup or sampling other groundwater zones. No actions are required under the permit if contamination is found in TP-62 or any other well. There is no monitoring well downgradient of the other discharge outfall, 001. There is no monitoring well required in the 225 foot uppermost aquifer zone.

Draft 2 required semi-annual monitoring for a total of eight wells in the OAG and the deeper intervals, including two downgradient monitoring wells in the 225 foot zone. It also required monitoring in Baker Spring when water was present. None of these monitoring points was prohibited from leading to corrective actions required under the permit if contamination is found there.

**d. NMED can no longer require a new monitoring well be drilled if NM-1 is dry**

Draft 2 allowed NMED to require a new well if a monitoring well were "...dry for two consecutive sampling events" or more. NMED gave up this option in Draft 3 during negotiations. Draft 2 also allowed NMED to require a new well if a monitoring well were not "... located hydrologically downgradient of the discharge location it is intended to monitor." That has been given up as well. Now NMED can only require a new well when "...a monitoring well is not located in the groundwater horizon it is intended to monitor," or in other words, if it misses the depth of the groundwater zone it should be monitoring, completely.

**e. The contingency plan in Draft 3 is insufficient**

The contingency plan in Draft 2 (which is also part of the closure and post-closure plans) requires that within 60 days of confirming a finding of contamination in monitored groundwater, "... the permittee shall propose measures to ensure that the exceedance of the standard or the presence of a toxic pollutant will be mitigated by submitting a corrective action plan to NMED for approval." Historical background limits are assumed already to be known in Draft 2.

The contingency plan in Draft 3 is not so straightforward or protective. Instead of going directly to a corrective action plan within 60 days, WCS is allowed first to create a workplan in order to establish "existing conditions" for the constituents listed in Appendix A that have exceeded the standards. (If background levels of a constituent have previously been high in the groundwater because they are naturally occurring or because someone else has created the contamination, WCS would not have to create a corrective action plan or perform additional monitoring.)

WCS could choose to provide historical data to prove background levels but they can also choose only to "sample a sufficient number of existing and saturated wells located in the OAG over a sufficient amount of time in order to establish existing conditions for constituents ..." that exceed specified standards. In other words, take as long as they wish just to figure out background levels that would have already been established through historical data in Draft 2.

NMED's use of the word "existing" when they say WCS can "... establish *existing* conditions for constituents listed on Appendix A ..." opens up the possibility that WCS could find existing conditions of contamination that they created in "existing and saturated wells located in the OAG" and claim those "existing conditions" are actually "background conditions." This would make any contamination exceedances exempt from requiring any further action by WCS. This problem does not exist in Draft 2 which is clear in language and time requirements.

3. Because of its deficiencies, the approved "monitoring" permit can never provide any sampling and analysis leading to any protective action during the life of the permit or during and after closure.

- a. **No data**

- No monitoring leading to sampling and analysis is possible under this permit. Thus the collection of any data about possible contamination in New Mexico groundwater is also impossible.

- NM-1, which is intended to provide monitoring downgradient of Outfall 002, was completed in the vadose zone. It is dry and will always be dry. No groundwater sample has ever been collected or analyzed from this monitoring well. NMED claims going out to the dry hole twice a year to see if there's water in it that can be sampled is a "form of monitoring" even though this can yield no data on whether there is or is not any contamination there from the WCS discharge.

- WCS was allowed to site and complete this well, the only monitoring well that can lead to corrective action, without any supervision by NMED. WCS knew the well would most likely be a dry hole as they had frequently told NMED

throughout the permitting process that there was no water in the OAG. NMED cannot require WCS to drill a new monitoring well even though NM-1 is dry because they gave up this ability in the final version of the permit.

Even though the vadose zone is dry, it is possible to monitor that zone with "vadose zone monitoring." This is the proper form of monitoring for this hydrological zone and is required in at least one other NMED permit, the Triassic Park Hazardous Waste Facility permit. Nevertheless, NMED never considered requiring this kind of monitoring. At the permit hearing, Michelle Hunter, Chief of the Ground Water Quality Bureau stated under cross examination that vadose zone monitoring was "difficult and very expensive." Expensive for the Permittees, especially when compared to just sending someone out twice a year to look at the dry hole that is NM-1.

b. **No corrective action**

Even if NMED changed to a form of monitoring that could find contamination, the contingency plan in Draft 3 makes it possible for WCS never to be required to do anything about that contamination. As described above, they can choose to sample existing wells, take as long as they want to do that and possibly use contamination they caused as a measuring stick for "existing" levels.

4. The final permit version of DP-1817 is deficient in other ways beyond the problem of not being able to find contamination in New Mexico groundwater

a. **100-year storm event**

The Permit provides no protection for effects from a 100-year storm event even though information about such an event is required to be included by the regulations. 100-year storm conditions, for instance, could create discharge as great as 150,000,000 gallons per day through Outfall 001, which now has had little or no discharge for some time.

Both NMED and WCS appear to be participating in magical thinking that such an event will never occur; both have said that discharge at those levels has never been seen at WCS despite the facility only existing for about 20 years. The WCS geologist admitted at the hearing that if such an event occurred, discharge could reach flow areas they claim would always remain dry. Despite contaminant exceedances that occurred in the WCS discharge during a much smaller storm event, the permit requires no requirements or precautions to be taken to avoid such exceedances during a 100-year storm event.

b. **WCS Texas permits no longer meet New Mexico standards**

The discharge permits issued by the Texas Commission on Environmental Quality (TCEQ) no longer require WCS to meet New Mexico water quality standards as they did before NMED began the permit process with WCS. Public comments by Complainant CARD and others requested that DP-1817 should require that WCS

meet New Mexico's water quality standards as a condition of receiving the permit. With an unprotective permit, the people in Eunice are even worse off than they were before when these New Mexico standards were at least included as part of WCS Texas water quality permits.

c. **Keeping Texas discharge in Texas**

NMED has never considered requiring WCS to discharge back into Texas where the facility is located instead of into New Mexico as CARD and others have also requested in their comments. WCS could create a wastewater system that discharges in Texas only—including during maximum precipitation events – on the east side of their Facility. This would eliminate much of the danger to New Mexico and Eunice's groundwater.

5. DP-1817 purports to protect groundwater in and near Eunice, a majority Hispanic community that is close to the discharge outfalls when in fact it leaves this community's water almost wholly unprotected. Other similar communities with smaller Hispanic populations have permits that are far more protective. A summary of statistics about Eunice includes:

- a. Eunice, New Mexico is the closest community to the WCS discharge, being approximately 4.5 miles from the discharge points at Outfalls 001 and 002. Eunice is a majority Hispanic community with 54% of community members being of Hispanic or Mexican descent. 45% of the community speak Spanish in the home. Eunice is a poor town with 68% of students eligible for reduced or free lunches.
- b. The people of Eunice are also already subjected to multiple polluting facilities including the WCS facility itself, and even closer to the town are URENCO USA a uranium enrichment facility, Sundance Services Parabo Disposal Facility, an oilfield waste disposal facility (landfarm), a second, newer landfarm right next to the town itself, and the Lea County Landfill. There is a refinery owned by Navajo Refinery about 40 miles away near Lovington. Eunice is surrounded by oil and gas development, even having pumpjacks in the town itself next to the high school, the community center and elsewhere. The extensive oil and gas development has also massively increased traffic and the diesel trucks used in that industry, around and in Eunice, subjecting town residents not only to methane but also to increased diesel fumes. Many of the polluting facilities mentioned above also have facility transportation through and near Eunice, also increasing the exposure of Hispanic residents to these fumes.
- c. Although it is difficult to find health statistics specific to Eunice itself, the town is in Lea County which has a cancer mortality rate that is among the highest in the state and has one of the lowest life expectancies in the state. In Exhibit 53, *Health Highlight Report for Lea County*, there are descriptions for various health statistics throughout the report where being of Hispanic or Mexican descent, or

being a LEP Spanish speaker are tied to increased risk or increased health effects. Because of the lack of access to health care in the local area, these negative health effects are increased. The burden is definitely greater for Hispanic residents.

- d. Some town drinking water is pumped from groundwater to the north of Eunice. However, residents also have drinking water and particularly agricultural water wells in Eunice itself—mostly drilled into the 225 foot level. Complainant (b) (6) Privacy, (b) (7)(C) a bilingual Hispanic resident of Eunice has an agricultural water well drilled to this level.
- e. Although (b) (6) Privacy, (b) (7)(C) Entorosa is bilingual and could read all drafts of the permit, other LEP Eunice residents could not and therefore would have no idea that the Draft 2 version of the permit was actually protective of their groundwater. They would not be able to understand how deficient Draft 3 is in comparison, since neither the Draft 2 permit, any fact sheet nor any public notice about Draft 2 was ever translated into Spanish. Draft 3 was also not translated and the public notices and fact sheets provided and translated were incomplete and incorrect and did not actually explain the vital information in the Draft 3 permit. This left LEP residents of Eunice with no way to understand the disparate effects from this "phony" permit to which they are being subjected.
- f. Because of deficiencies in the version of the DP-1817 permit that was approved by NMED, (b) (6) Privacy, (b) (7)(C) Entorosa well and those of other Hispanic residents of Eunice are at risk since if contamination should reach these wells, they would never know. NM-1, the monitoring well that NMED claims would be a "sentinel well" or an "early warning system" to protect more potable water at 225 feet and below, is useless for this purpose. Under the approved permit, contamination could be occurring in the vadose zone or at 225 feet but no one would know. Even if Eunice well owners sampled their own wells and found contamination, no cleanup of that contamination by WCS would be required because of the way the permit's contingency plan is written.
- g. Other permits for discharges in or near towns with smaller Hispanic percentages in their population are far more protective of their groundwater than DP-1817. Requirements for monitoring, their purposes and their contingency plans resemble the Draft 2 version of DP-1817 far more than they do the final approved version.

Both examples here are, unfortunately, communities that are quite a bit smaller than Eunice. It is difficult to find copies of permits that do not have current public notices—especially over a weekend. With more time we believe examples closer to the size of Eunice could easily be found.

- i. **The Bonito Valley Brewing Company permit, DP-1877**

This permit was published on April 3, 2019. The facility and its discharge are located in Lincoln, New Mexico in Lincoln County. This small town has a population of 140 people of which 59% are non-Hispanic Whites



and 38% are Hispanic. Only 20% of the population speaks a language other than English in the home. Though this town is much smaller than Eunice, the percentages of White v Hispanic is virtually reversed with Lincoln being 59% White and Eunice being 54% Hispanic. The percentage speaking Spanish in the home is also vastly different with 20% speaking Spanish in Lincoln and more than double that, or 45% speaking Spanish in the home in Eunice.

The Bonito Valley Brewing Company permit is a "general" discharge permit for discharge to a septic tank followed by a leachfield. Nevertheless, despite its simplicity, it is still far more protective than the DP-1817.

The purpose of this permit, as in WCS drafts 1 and 2, is stated as being to *control* the discharge of water contaminants from the facility, not simply to *monitor* that discharge. And unlike DP-1817, a volume of 350 gallons per day of discharge is actually authorized by this permit. No volume is authorized to be discharged in the DP-1817 permit.

Sampling of wastewater from the septic tank is required to be collected and analyzed once a year. There is no problem or question of using incorrect sampling methods or never actually collecting a sample, as proper septic tank monitoring methods are incorporated into the permit conditions.

The Contingency Plan is far more robust in this general permit as well. In the event of failure of the wastewater system, or if one of the groundwater quality standards is found during groundwater analysis to have been exceeded as a result of the discharge, the Permittee is required to submit a corrective action plan to NMED within 15 days following the discovered failure or exceedance. The plan must include a schedule for completion of the corrective actions.

In contrast with the approved DP-1817 discharge permit, even this simple general permit guarantees that any contamination will be found and that corrective actions will quickly be applied.

ii. **The Lake Meredith Salinity Control Project, DP-1054**

The PIP for this project states that it is located one mile south of Logan, New Mexico in Quay County, and gives a population from 2012 to 2016 of 899 persons within a four mile radius of the facility. (Note that some 2017 data sources give the population of Logan itself as 924.) 75% of the population is non-Hispanic White and 21% is Hispanic. 90% speak only English at home with 10% speaking Spanish. All of the 10% who speak Spanish at home are also fluent in English.

The permit for this project covers pumping saline groundwater from the lower portion of the Trujillo Formation into a holding tank where it is treated and discharged (injected) into another formation. WCS also pumps contact water into holding tanks under DP-1817, where it is treated before being discharged through outfalls into New Mexico.

The purpose of the Lake Meredith permit, again, is stated as being to *control* the discharge of water contaminants from the facility, not simply to *monitor* that discharge. And also unlike DP-1817, a volume of 648,000 gallons per day of discharge is authorized by this permit.

In addition, this permit states that "...NMED reserves the right to require a Discharge Permit Modification in the event NMED determines that the requirements of 20.62 NMAC are being *or may be* violated or the standards of Section 20.62.3103 NMAC are being *or may be* violated." This permit is proactive as it anticipates possible violations and allows the permit to be modified to prevent such an occurrence. The DP-1817 permit has removed the words in italics from the statement and so must wait until a violation has already occurred before the permit can be modified under this condition.

Monitoring is also far more extensive and more frequent than monitoring in the DP-1817 permit, where it is virtually non-existent. Monitoring of system performance and shallow groundwater quality is sometimes done continuously, monthly, or quarterly. Sampling and analysis is done biannually. There are seventeen monitoring wells providing data so sampling and analysis is comprehensive.

Also unlike DP-1817, if a well is not constructed properly, contains "...insufficient water to effectively monitor groundwater quality," is not protective of groundwater quality or is not hydrologically downgradient of the discharge location it is intended to monitor, the Permittee is required to install a replacement well. And again, unlike what happened with WCS monitoring well NM-1, NMED must approve the location of any replacement wells.

Finally, the contingency plan for this permit is again, far more robust and clear than that for DP-1817. If groundwater monitoring shows that a standard has been exceeded, a confirmatory sample must be taken within 15 days. Within 60 days of confirmation, the permittee is required to submit a Corrective Action Plan proposing, at a minimum, source control measures and an implementation schedule. And if the standard continues to be violated 180 days after confirmation, the permittee may be required to abate the water pollution. The corrective action plan is implemented far before the contingency plan for DP-1817 even requires that a workplan for figuring out background conditions must be submitted. Then WCS could

take whatever amount of time it deems necessary to collect that data. Under the DP-1817 contingency plan it could be years or never before a corrective action plan is implemented.

iii. **NMED's approval of the final version of DP-1817 amounted to disparate treatment of the majority-Hispanic town of Eunice and had the disparate effect of leaving their groundwater without protection from contamination.**

The two examples provided show that NMED is providing permits that are far more protective than the DP-1817 permit to communities with smaller Hispanic populations than the Hispanic population of Eunice. It appears that NMED was so eager to get a "seat at the table" with WCS that they compromised away all true protective conditions in the permit, leaving only copies of reports, mostly about monitoring in Texas, to be provided to NMED. None of the reports can lead to a corrective action plan being required of WCS. NMED has even made it impossible to have any real monitoring under this monitoring permit. DP-1817 is truly a compromised permit. Though it has some of the form of a discharge permit under the regulations, it has almost none of the content.

It is difficult enough to try to maintain traditional, agricultural values in a small Hispanic community like Eunice where the very air is toxic and the town neighbors on several polluting facilities. Agricultural land cannot be irrigated or watered with city water that comes from another "clean" area farther north. Instead, local wells must be used. Without real and effective groundwater monitoring, those wells can become contaminated and contamination could increase for years or decades in that groundwater, disparately poisoning those in the community trying to maintain a traditional agricultural life in the middle of one of the most polluted areas of the state—or even of the country.

This type of treatment is not occurring as a result of the two permits in Lincoln and Quay counties where groundwater in communities that have far smaller percentages of residents of Hispanic and Mexican descent and far fewer LEP Spanish speakers is being adequately monitored and protected, even in one of them, pro-actively.

Meanwhile, the few translated materials that NMED has provided have led LEP Spanish speakers in Eunice to believe that protections are in place in the DP-1817 permit (which they are not), that adequate monitoring is continuing (which it is not), and that the Contingency Plan is far more robust than it actually is.

**B. NMED HAS REFUSED TO ALLOW INTRODUCTION OF DOCUMENTS ABOUT CIVIL RIGHTS OR CROSS EXAMINATION OF THEIR WITNESSES ABOUT CIVIL RIGHTS AND HOW THOSE RIGHTS AND THE RESOLUTION AGREEMENT RELATE TO THE PERMIT PROCESS IN THE WIPP VOR PMR (VOLUME MOD) PERMIT MODIFICATION HEARING.**

1. NMED facilitated the public hearing for the WIPP Volume Mod from October 23, through October 25, 2018. Post hearing submissions continued through December 2018. During the hearing process, NMED refused to allow Complainant CCNS to introduce documents into the hearing about the Resolution Agreement, the three implementing policies or EPA guidance and refused to allow CCNS to cross examine NMED witnesses about anything to do with Civil Rights. NMED also claimed that effects studies under 40 CFR 270.10 (j) were not required, that disparate impacts were irrelevant, and that deficiencies in EJSCREEN and the PIP were unimportant despite resulting in no translation of the Fact Sheet and no offer to include a translator at the hearing. (See Exhibit 13-WIPP Volume Mod Transcript.)

The Secretary's final order approving the DP-1817 Permit was issued on December 21 2018. Therefore, NMED's discriminatory acts continued at least until that date when NMED ended the public participation process and approved the permit. The WCS Title VI complaint is therefore timely for these WIPP issues as well.

- a. NMED refused to allow documents and cross examination on any civil rights issues during the hearing because they claimed that CCNS and CARD had threatened civil rights litigation which according to NMED should prohibit them from introducing anything or cross examining any NMED witness about any aspect of civil rights. In fact, neither group has ever threatened such litigation and CCNS stated that at the hearing. Nevertheless, the hearing officer refused to allow CCNS to introduce or discuss any civil rights issues.

When asked for evidence of the supposed threats, Jennifer Hower, NMED's lead counsel provided CCNS with a list of CCNS and CARD's comments and letters but revised her claims of our "threats" to say that CARD had sent NMED "... actual and implied threats of additional civil rights complaints/litigation ..." (Exhibit 61) Though CARD had made it clear that we were working on an additional complaint, again, CARD never threatened directly or indirectly to initiate civil rights litigation. Thus, instead of taking our letters and comments about NMED Civil Rights obligations as something to study and perhaps incorporate into their programs, NMED evidently saw our efforts only as threats.

- b. NMED and the hearing officer also would not allow questions or discussions on requirements in CFR 270.10 (j) to include effects studies of facility operations and facility transportation during normal operations and accidents, saying it had not been established that such studies were required. This particular issue was a part of the Resolution Agreement where NMED agreed to include the section (j) studies in all hazardous waste facility permits. Yet, here it is NMED that is seemingly threatening not to comply unless Complainants actually do litigate.

Related to this issue of Section (j) studies were questions posed about any disparate impact studies for the Volume Mod permit. Again, NMED and the hearing officer claimed such studies were not relevant and had nothing to do with the permit hearing. The same thing was argued during the Triassic Park hearing. Yet it was determined years ago in *In re Application of Rhino Env'tl. Services* (Exhibit 9) that social concerns, environmental justice/civil rights concerns and disparate impacts were all part of the permitting process.

- c. This attempt to remove all mention or discussion of civil rights, environmental justice or social concerns from consideration during the permit hearing essentially is saying that civil rights have no place in the permitting process since the permit hearing is part of that process. That this is not a one-time prohibition, just for the WIPP Volume Mod hearing, is shown by similar arguments in the hearing for LANL discharge permit DP-1793 that took place in November of 2018. This permit process continues to be ongoing so perhaps can only be considered as supporting documentation. However, the Hearing Officer's Report and Final Order were filed on March 8, 2019 and supported the prohibition of introduction and discussion of civil rights documents and issues. Perhaps that can be seen as the last discriminatory act, in which case the DP-1793 issues would be timely as well.

Again, in the transcript for DP-1793 (Exhibit 12), NMED refuses to allow Complainant CCNS to cross examine NMED's witness about the Resolution Agreement or even about the WIPP PIP. And again, they state that this is because they expect CCNS to litigate on these civil rights issues saying, "... the Department expects that this matter will be litigated in the future between the Department and CCNS. That is something we fully anticipate to happen ... this is not the forum for that to be litigated. We expect that to be litigated in future forums." They also say that they believe the Resolution Agreement is "... entirely outside the scope of this discharge permit." In fact, again, it seems to be NMED, not CCNS or CARD that is threatening litigation.

2. NMED also refused to allow introduction of information about civil rights and environmental justice issues during the Triassic Park hearing and this was described in the original Triassic park Title VI Complaint. However, nothing in the Resolution Agreement actually addresses the issue of NMED refusing to recognize that civil rights and social concerns are an integral part of the permitting process; nothing in the Agreement provides clarification on these issues or guidance on how to make sure NMED understands that civil rights are an integral part of every permit process.

These issues which, except for the Section (j) studies, are not covered in the Resolution Agreement, could be handled as part of a new complaint or perhaps the Agreement could be modified to include a way to deal with the problems.

## **B. CLARIFICATION**

Besides the above discussion of issues in addition to those covered by the Resolution Agreement, some questions came up during the phone call discussion that we would like to clarify here.

### **1. ONLY "IMPORTANT" SITES NEED AN APPEAL PROCESS**

During the phone conversation it appeared that we had not been clear in the complaint while describing our request to have some kind of appeal process for translations, summaries of vital information, definitions of which documents are vital documents, etc. Because of NMED's history of omissions and mistakes in their fact sheets, their lack of inclusion of vital information in translated documents or even a single definition of any vital document, a timely way to correct these deficiencies so that LEP Spanish speakers have access to all vital information available to English speakers when a comment period or permit period begins, is desperately needed.

It is not enough to send comments or letters to NMED with requests to correct deficiencies as meanwhile permits are proceeding as always, without accurate and timely vital information being provided to LEP persons. Also, NMED does not respond to or even acknowledge our attempts to have input.

However, we never had any intention that this process should apply to every permit. Even though every permit in a permit process may be a vital document, not every permit needs translation or even summary and translation. NMED makes a distinction between "important" and "unimportant" permits. We would only expect this process to be in place for "important" permits. However, "important" facilities are all either complex, dangerous, the subject of interest across the state or all three. Therefore it is critical that LEP Spanish speakers receive full, accurate, and timely vital information for important permits or they cannot participate fully and meaningfully. Until NMED understands how to provide this information in a timely way and creates a culture of non-discrimination in the Department, such a formal appeal process is necessary to prevent discrimination.

### **2. THE WCS COMPLAINT SUBMITTED TO EPA IS DIFFERENT FROM THE COMPLAINT SUBMITTED TO NMED**

I was asked during the phone call how the Title VI complaint differed from the complaint submitted to NMED. The difference is primarily one of time, though the Title VI complaint also goes into far more detail and discusses more issues than the NMED complaint. The complaint submitted to NMED was submitted when the DP-1817 permit was in the public comment stage of the permitting process. There had not yet been any fact sheets or hearing notices provided and translated. No hearing had taken place. The total amount of information translated at the time consisted of just 10 sentences, some of which were incorrect, while English speakers at the same time had access to thousands of pages of information. Yet NMED stated they felt those 10 sentences were adequate for LEP persons to participate meaningfully and later ruled that no discrimination had occurred.

The complaint submitted to EPA covers a far longer period of time, expanding on the public notices described in the NMED complaint and following the DP-1817 permitting process through two (three) more hearing notices, two fact sheets, the hearing itself, post

hearing submissions and final approval of the permit by the Secretary. Though never generous with translated information, NMED did eventually provide about 17 pages of translated information about the permit and the discharge plus they translated the Index to the Administrative Record. The Title VI complaint also included discussion of several letters and comments sent to NMED with suggestions to improve NMED's compliance with the Resolution Agreement, including discussions about NMED's lack of including the LEP and Disabled public at any stage of the permitting process. Far more was covered in the Title VI complaint and far more examples were given than in the NMED complaint.

**3. COMPLAINANTS REQUEST THAT EPA INCREASE THEIR INVOLVEMENT IN MONITORING NMED'S COMPLIANCE WITH THE RESOLUTION AGREEMENT**

The Case Resolution Manual states that effective and vigorous case resolution monitoring with close monitoring of the recipient's implementation of the informal resolution agreement is essential to ensuring compliance with civil rights laws. Complainants agree but believe that NMED needs more monitoring than is now occurring. NMED is not meeting its Title VI and Resolution Agreement obligations. EPA stated during the phone call that the issues raised in the complaint fell under monitoring of the Resolution Agreement. If that is so, the descriptions in the WCS Title VI complaint show how much NMED is avoiding implementing the Agreement.

In the past, when EPA has taken a closer interest in NMED's compliance, NMED's compliance has improved. Currently, NMED appears to be resisting implementing the the Resolution Agreement in any meaningful way. Like the WCS permit, there's a lot on paper but almost no real content or change. Until NMED can create some kind of culture of non-discrimination, closer monitoring and more active guidance by EPA is necessary and we look forward to whatever assistance EPA can provide.

## ADDITIONAL EXHIBITS

**Exhibit 54:** CARD's comments on DP-1817 Draft 2, January 16, 2018

**Exhibit 55:** New Mexico Environment Department, Ground Water Quality Bureau, PN-2 for Bonito Valley Brewing Company, DP-1877, Lake Meredith Salinity Control Project, DP-1054 and 21 other permits, May 24, 2019,  
[https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSv6zGyvGglq9FCCe0Q5RKWzIBtO9q6nWrv5RtdynIN6U97d/S8kHhnp8N+sDNEQF7g=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpSv6zGyvGglq9FCCe0Q5RKWzIBtO9q6nWrv5RtdynIN6U97d/S8kHhnp8N+sDNEQF7g=.pdf)

**Exhibit 56:** New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for Bonito Valley Brewing Company, DP-1877, April 3, 2019,  
[https://cloud.env.nm.gov/water/resources/\\_translator.php/UVI+zsVD8ARU/CDldLy9+n4WVBOWeLzHGMrCdMB5MwXEhVIF7PE4CSKTUYIkx2UEHOpdYPJ0cNqSAU1Dy1Rmjbr0HDnXnbn4wevel8DocY=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/UVI+zsVD8ARU/CDldLy9+n4WVBOWeLzHGMrCdMB5MwXEhVIF7PE4CSKTUYIkx2UEHOpdYPJ0cNqSAU1Dy1Rmjbr0HDnXnbn4wevel8DocY=.pdf)

**Exhibit 57:** New Mexico Environment Department, Ground Water Quality Bureau, General Discharge Permit for Bonito Valley Brewing Company DP-1817, draft, undated,  
[https://cloud.env.nm.gov/water/resources/\\_translator.php/P92MI0v37m/VfLqOxK3mbunwplKZ3DWWg+E8UPjm8kHtbYQtGryzoD5LV+XO4qjge3A18jYp9XTHQwacPjmaGIF3vTsZ9Vn4BV5iz5tkk4c=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/P92MI0v37m/VfLqOxK3mbunwplKZ3DWWg+E8UPjm8kHtbYQtGryzoD5LV+XO4qjge3A18jYp9XTHQwacPjmaGIF3vTsZ9Vn4BV5iz5tkk4c=.pdf)

**Exhibit 58:** New Mexico Environment Department, Ground Water Quality Bureau, Public Involvement Plan (PIP) for the Lake Meredith Salinity Control Project, DP-1054, February 4, 2019,  
[https://cloud.env.nm.gov/water/resources/\\_translator.php/qKWCIP+gn5utfHskJPTI4e/9jAlWJTZBO/MA65hu0WePk7gkg1Co29nOHLqDQkG6LScoeylw/S/qd4u2j3dVI3+7q1D2tn30fVEgPumUmAw=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/qKWCIP+gn5utfHskJPTI4e/9jAlWJTZBO/MA65hu0WePk7gkg1Co29nOHLqDQkG6LScoeylw/S/qd4u2j3dVI3+7q1D2tn30fVEgPumUmAw=.pdf)

**Exhibit 59:** New Mexico Environment Department, Ground Water Quality Bureau, Discharge Permit for the Lake Meredith Salinity Control Project, DP-1054, April 8, 2019,  
[https://cloud.env.nm.gov/water/resources/\\_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpStWlvemkPPsGswxe/Qyavkp/Nn8TEVJzcy36NFvAzXupcEce7bk0TnZrIe7BmDxPnU=.pdf](https://cloud.env.nm.gov/water/resources/_translator.php/3wdGf2YvWP7JR8htsQErkMxbvE56mnoqDRp2BQAIXXbigeEtSCEhgT9cBlqLEUu1Bu05rtzHpStWlvemkPPsGswxe/Qyavkp/Nn8TEVJzcy36NFvAzXupcEce7bk0TnZrIe7BmDxPnU=.pdf)

**Exhibit 60:** New Mexico Environment Department, Hazardous Waste Bureau, TRU Mixed Waste Disposal Volume Reporting Permit Modification to the WIPP Hazardous Waste Facility Permit, No. HWB 18-19 (P), Secretary's Order approving Draft Permit, December 21, 2018,  
<https://www.env.nm.gov/wp-content/uploads/2016/05/HWB-18-19-P-Secretarys-Order-Approving-Draft-Permit.pdf>

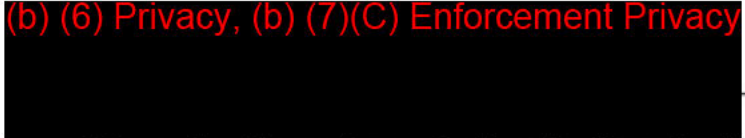
**Exhibit 61:** Email from Jennifer Hower, New Mexico Environment Department General Counsel to (b) (6) Privacy Executive Director of CCNS



Title VI Complaint, June 3, 2019

Respectfully Submitted by:

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



6/24/19

Date

Citizens for Alternatives to Radioactive Dumping (CARD)