

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

November 2, 2021

In Reply Refer to:

EPA Complaint No. 03NO-21-R6

James C. Kenney
Secretary
New Mexico Environment Department
Office of Public Facilitation
1190 St. Francis Drive
Suite N4050
Santa Fe, NM 87505
james.kenney@state.nm.gov

Re: Acceptance of Administrative Complaint

Dear Secretary Kenney:

The U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office (ECRCO), is accepting for investigation an administrative complaint filed against the New Mexico Environment Department (NMED) and received by the EPA on September 16, 2021. The complaint alleges that NMED discriminated on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation at 40 C.F.R. Part 7, when NMED conducted a virtual meeting on March 22 and 23, 2021 to discuss the Associated Asphalt and Materials LLC, Santa Fe, New Mexico, asphalt plant construction permit (permit NO. 8585) and failed to provide meaningful access, including effective interpretation services, to the Complainant and other persons with limited English proficiency.

Pursuant to EPA's nondiscrimination regulation, ECRCO conducts a preliminary review of administrative complaints to determine acceptance, rejection, or referral to the appropriate Federal agency. *See* 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulation. First, the complaint must be in writing. *See* 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulation (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 days of the alleged discriminatory act, unless ECRCO waives the time limit for good cause. *See* 40 C.F.R. § 7.120(b)(2). Finally, the complaint must be filed against an applicant for, or recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15.

After careful consideration, ECRCO has determined that the complaint meets the jurisdictional requirements stated above. First, the allegation is in writing. Second, it alleges that discrimination occurred in violation of EPA's nondiscrimination regulation. Third, the alleged discriminatory act occurred within 180 days of filing this complaint. Finally, it alleges a discriminatory act by NMED, which is a recipient of EPA financial assistance.

Accordingly, ECRCO will investigate the following issue:

Whether the New Mexico Environment Department (NMED) discriminated on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964 and EPA's implementing regulation at 40 C.F.R. Part 7, when NMED failed to provide persons with limited English proficiency meaningful access to the public participation process in connection with the air quality permit application submitted by Associated Asphalt and Materials LLC.¹

The initiation of an investigation of the issue above is not a decision on the merits. ECRCO is a neutral fact finder and will begin its process to gather the relevant information, discuss the matter further with the Complainant and NMED, and determine next steps utilizing ECRCO's internal procedures. Generally, the investigation and resolution options and procedures identified in EPA's nondiscrimination regulation and ECRCO's Case Resolution Manual (CRM) will be utilized for the complaint investigation process. We invite you to review ECRCO's Case Resolution Manual for a more detailed explanation of ECRCO's complaint resolution process, available at https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.

ECRCO is providing NMED with an opportunity to make a written submission responding to, rebutting, or denying the issue that has been accepted for investigation within thirty (30) calendar days of receiving a copy of this letter notifying NMED of the acceptance of Administrative Complaint 03NO-21-R6. *See* 40 C.F.R. § 7.120(d)(1) (ii-iii).

EPA's nondiscrimination regulation provides that ECRCO shall attempt to resolve complaints informally whenever possible. *See* 40 C.F.R. § 7.120(d)(2). Accordingly, ECRCO will contact NMED and the Complainant within 10 days of the date of this letter to provide information about ECRCO's complaint process, and to offer and discuss the alternative dispute resolution (ADR)²

¹ *See* Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). *See also* U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

² EPA ECRCO's Alternative Dispute Resolution (ADR) process involves the formal mediation of a complaint or

and informal resolution agreement³ processes as potential options for resolution of the issue, which ECRCO has accepted for investigation.⁴ If NMED (and the Complainant with respect to ADR) agrees to engage in either of these potential resolution processes, ECRCO will suspend its formal complaint investigation. In the event that either of these potential resolution processes fails to result in an agreement, ECRCO will notify NMED as well as the Complainant that ECRCO has resumed its complaint investigation and will issue preliminary findings within 180 days of the start of the investigation – excluding any days spent in either of these potential resolution processes.⁵

Please be advised that a copy of the redacted complaint is enclosed, consistent with 40 C.F.R. § 7.120(e). ECRCO is releasing the complaint with appropriate redactions consistent with the Freedom of Information Act (FOIA) and the Privacy Act and will only release identifying information to the extent necessary to comply with 40 C.F.R. Parts 5 and 7.⁶

The EPA regulation prohibits applicants, recipients, and others persons from intimidating, threatening, coercing, or engaging in other discriminatory conduct against anyone because they have either taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. *See* 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint with ECRCO.

If you have questions about this letter, please feel free to contact me by email at dorka.lilian@epa.gov or at (202) 564-9649, or Waleska Nieves-Muñoz, Case Manager at (202) 564-7103 or by email at waleska.nieves-munoz@epa.gov.

Sincerely,



Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

Enclosure: Via Email, Redacted Copy of Complaint

complaint allegations between the complainant and recipient, through the use of a professionally trained mediator. *See* U.S. EPA, ECRCO Case Resolution Manual, Section 3.3, at page 24.

³ Informal Resolution Agreement occurs between ECRCO and the recipient. *See* Case Resolution Manual, Section 3.1, at page p. 21.

⁴ EPA has an existing informal resolution agreement (IRA) with NMED for EPA Complaint No. 09R-02-R6, which addresses meaningful access for persons with limited-English proficiency. ECRCO will determine appropriate next steps for resolving this complaint, which could include a modification of that IRA.

⁵ *See* 40 C.F.R. § 7.115(c).

⁶ Freedom of Information Act, 5 U.S.C. § 552(b)(6) and (7)(c) and the Privacy Act of 1974, 5 U.S.C. § 552a.

cc: Ariadne Goerke
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