



**OFFICE OF EXTERNAL CIVIL RIGHTS COMPLIANCE**

WASHINGTON, D.C. 20460

July 30, 2024

**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  
Sante Fe, NM 87505  
[James.Kenney@env.nm.gov](mailto:James.Kenney@env.nm.gov)

**Re: Administrative Closure EPA Complaint No. 03NO-21-R6**

Dear Secretary Kenney:

This letter is to advise you that the U.S. Environmental Protection Agency (EPA), Office of Environmental Justice and External Civil Rights, Office of External Civil Rights Compliance (OECRC) is administratively closing its investigation of EPA Complaint No: 03NO-21-R6 (Complaint). The Complaint alleged that New Mexico Environment Department (NMED) discriminated on the basis of national origin, particularly, limited English proficiency (LEP), when NMED denied Complainant meaningful access to a virtual public hearing for the Associated Asphalt and Materials LLC air quality permit application, No. AQB 20-12. Specifically, the Complaint alleged that NMED failed to provide appropriate instructions to enable Spanish-speaking individuals with LEP to participate in the virtual hearing, failed to properly utilize Zoom to allow Spanish-speaking individuals with LEP to provide comments in Spanish, and that the Hearing Officer denied Complainant the opportunity to provide her comments in Spanish.

On November 2, 2021, after determining that the Complaint met the jurisdictional requirements, OECRC accepted the Complaint for investigation. The acceptance letter identified the following issue for investigation:

1. Whether 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.<sup>1</sup>

Section 2.5 of OECRC's Case Resolution Manual (CRM) provides that if, after accepting a complaint for investigation, OECRC obtains information leading OECRC to conclude that an investigation is not warranted for prudential reasons, OECRC may administratively close the complaint.<sup>2</sup> This would include when the issues are moot because OECRC obtains credible information indicating that the issues raised by the complaint have been resolved and there are no systemic issues.<sup>3</sup>

## Background

On November 26, 2019, Associated Asphalt and Materials LLC, filed an application for an air quality construction permit to consolidate an aggregate crushing and screening plant, an aggregate scalping screen plant, and two hot mix asphalt plants at its Sante Fe Facility.<sup>4</sup> The Sante Fe Facility is located at 86 Paseo de River Sante Fe, New Mexico 87507. In 2015, 19% of residents living in the zip code in which the Sante Fe Facility was located were Spanish-speaking LEP persons, meaning that they speak English less than very well.<sup>5</sup> In 2015, in New Mexico, 7.8% of residents were Spanish-speaking LEP persons.<sup>6</sup>

Between March 22-24, 2021, NMED conducted a virtual public hearing to take evidence on the Associated Asphalt and Materials LLC's air quality construction permit.<sup>7</sup> The notice for the

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<sup>1</sup> 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](https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf)).

<sup>2</sup> U.S. EPA, Office of External Civil Rights Compliance (formerly, External Civil Rights Compliance Office) Case Resolution Manual, Section 2.5, pp. 19-21, available at [https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual\\_.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf)

<sup>3</sup> *Id.* at 20.

<sup>4</sup> See In the Matter of the Application of Associated Asphalt & Materials, LLC, for an air quality construction permit for the Sante Fe Facility AQB 20-12 (P), Notice of Public Hearing, available at <https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2021/02/AQBP-ENGLISH-NOTICE-OF-03.22.21-PUBLIC-HEARING-8585.pdf>.

<sup>5</sup> The most recent data from the U.S. Bureau American Community Survey (ACS) 5-year estimates for the zip code, 87507, is from 2015. See U.S. Census Bureau, B16001 Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, 2015: ACS 5-Year Estimates Detailed Tables, available at <https://data.census.gov/table/ACSDT5Y2015.B16001?q=B16001&g=860XX00US87507>.

<sup>6</sup> See U.S. Census Bureau, B16001 Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over, 2015: ACS 5-Year Estimates Detailed Tables, available at <https://data.census.gov/table/ACSDT5Y2015.B16001?q=B16001&g=040XX00US35>.

<sup>7</sup> See In the Matter of the Application of Associated Asphalt & Materials, LLC, for an air quality construction permit for the Sante Fe Facility AQB 20-12 (P), Notice of Public Hearing, available at <https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2021/02/AQBP-ENGLISH-NOTICE-OF-03.22.21-PUBLIC-HEARING-8585.pdf>.

virtual public hearing announced in English that a Spanish interpreter would be present for the virtual hearing.<sup>8</sup> Two Spanish interpreters were present for the virtual public hearing conducted on Zoom.<sup>9</sup> Public comment was provided on the first and second day of the hearing.<sup>10</sup>

At the beginning of the first day of the hearing, the Hearing Officer (HO) announced that public comment would be taken in English and Spanish and that two Spanish interpreters had already been sworn in.<sup>11</sup> When the Complainant attempted to provide her comment in Spanish, the HO experienced technological difficulties in utilizing the Spanish interpretation channel on Zoom.<sup>12</sup> After a member of the public explained to the HO and the court reporter how to switch interpretation channels, the HO was able to swear in the Complainant using the Spanish interpretation channel.<sup>13</sup> The Complainant attempted to proceed with her comments in Spanish, but the HO and court reporter were unable to understand her testimony because of confusion with the interpreter and Complainant being heard at the same time.<sup>14</sup> The Complainant ultimately stated that she could proceed with her comments in English.<sup>15</sup>

The Complainant did not feel comfortable speaking in English on the first day of the hearing, but felt obligated to speak in English in the moment because she felt vulnerable and anxious.<sup>16</sup> The Complainant also believes that other Spanish-speaking community members did not want to speak on the first day of the hearing after the difficulty she experienced using the Spanish interpretation system.<sup>17</sup>

On the second day of the hearing, the HO displayed brief instructions for using the Spanish interpretation channel on Zoom before the hearing began.<sup>18</sup> Before the cross-examination, using the English language, the HO attempted to instruct the Complainant on the use of the Spanish interpretation channel on Zoom and told her, “I think you speak English well enough that you can understand at least some instruction here.”<sup>19</sup> The Complainant then explained to the HO that she thought the problem was that the HO was not switching to the English channel on Zoom so that he could understand her questions spoken in Spanish and stated that the HO

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<sup>8</sup> *Id.*

<sup>9</sup> See In the Matter of the Application of Associated Asphalt & Materials, LLC, for an air quality construction permit for a facility in Santa Fe, New Mexico, Transcript of Proceedings (Mar. 22, 2021) (“Day 1 Transcript”), available at <https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2021/04/AQBP-Associated Asphalt and Materials-FullSize-Day1.pdf>; see also In the Matter of the Application of Associated Asphalt & Materials, LLC, for an air quality construction permit for a facility in Santa Fe, New Mexico, Transcript of Proceedings (Mar. 23, 2021) (“Day 2 Transcript”), available at <https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2021/04/AQBP-Associated Asphalt and Materials-FullSize-Day2.pdf>.

<sup>10</sup> See Day 1 Transcript; see also Day 2 Transcript.

<sup>11</sup> See Day 1 Transcript, at pp. 19-22.

<sup>12</sup> See *id.* at pp. 46-50.

<sup>13</sup> See Day 1 Transcript, at pp. 47-49.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at pp. 50-52.

<sup>16</sup> OECRC Interview with Complainant, April 26, 2022.

<sup>17</sup> *Id.*

<sup>18</sup> Day 2 Transcript, at p. 284.

<sup>19</sup> *Id.* at p. 287.

needed to switch channels.<sup>20</sup> The HO stated that he would switch channels and that the Complainant could try speaking in Spanish.<sup>21</sup> The Complainant was able to cross-examine a witness in Spanish using the Spanish interpretation channel on Zoom.<sup>22</sup> Later in the hearing, another member of the community successfully provided public comment in Spanish using the Spanish interpretation channel on Zoom.<sup>23</sup>

### **Complaint Investigation and Resolution**

OECRC investigated the complaint pursuant to its authority under 40 C.F.R. Part 7. OECRC gathered facts from the Complainant, witnesses, and NMED, and reviewed relevant documents, including the transcripts of the virtual public hearings for the Associated Asphalt permit application.

In accordance with 40 C.F.R. § 7.120, which directs OECRC to resolve complaints informally, OECRC expressed concern to NMED about the technological difficulties with the Spanish interpretation channel during the virtual hearing and NMED's resulting inability to use the Spanish interpretation channel effectively on the first day of the virtual hearing.

Between May and October 2022, OECRC provided NMED with technical assistance to develop internal instructions for NMED officials to utilize when conducting virtual hearings that require simultaneous interpretation in Spanish.<sup>24</sup> OECRC also helped NMED develop a language access PowerPoint slide that provides instructions for Spanish-speaking members of the public to access the simultaneous interpretation channel on Zoom during virtual hearings. OECRC believes that the internal instructions for NMED officials will ensure that NMED officials are trained on how to utilize the Spanish interpretation channel for virtual meetings and thus prevent a reoccurrence of the issue experienced by the Complainant during the virtual hearing for the Associated Asphalt and Materials LLC facility air quality construction permit application.

Additionally, NMED has a Limited English Proficiency Accessibility and Outreach Policy (LEP Policy) that provides that all NMED employees shall be trained on the LEP Policy when substantive changes are made to the policy, when new employees begin employment with NMED and at three-year intervals for all NMED employees.<sup>25</sup> OECRC encourages NMED to incorporate training on the use of the Spanish interpretation channel on Zoom during virtual

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<sup>20</sup> *Id.* at pp. 287-88.

<sup>21</sup> *Id.* at p. 288.

<sup>22</sup> *Id.* at pp. 289-94.

<sup>23</sup> *Id.* at p. 355-57.

<sup>24</sup> On November 24, 2021, NMED informed OECRC that NMED agreed to engage in informal resolution negotiations toward the execution of an Informal Resolution Agreement (IRA). The Complainant and Recipient were informed by letter on February 14, 2022, that the 180-day timeframe for issuing Preliminary Findings (40 C.F.R. § 7.115(c)(1)) would be tolled as of November 24, 2021, for the duration of the IRA process. As part of discussions to informally resolve the Complaint, OECRC provided technical assistance to NMED.

<sup>25</sup> Limited English Proficiency ("LEP") Accessibility and Outreach Policy, at p. 8, available at <https://www.env.nm.gov/general/wp-content/uploads/sites/21/2022/10/2022-10-04-Policy-07-11-Limited-English-Proficiency-LEP.pdf>.

hearings into training on the LEP Policy. OECRC also encourages NMED memorialize in its LEP Policy its commitment to using the internal instructions and the language access PowerPoint slide for using the Spanish interpretation channel during virtual hearings and commitment to train NMED employees on the same.

Since the Complaint was filed in 2021, OECRC has been in contact with the Complainant about additional information concerning the Complaint. The Complainant has not shared any ongoing concerns regarding interpretation for LEP persons at virtual hearings conducted by NMED.

## **Conclusion**

Based on the information discussed above, OECRC is administratively closing the Complaint issues because OECRC has obtained credible information indicating that the issues raised by the Complaint have been resolved and there are no systemic issues.<sup>26</sup> With the technical assistance of OECRC, NMED has taken steps to remedy the issue raised in the Complaint so that the issue will not reoccur.

If you have questions, please feel free to contact me at (202) 564-3357, or by email at [wilson.adam@epa.gov](mailto:wilson.adam@epa.gov).

Sincerely,

Adam Wilson  
Acting Deputy Director  
Office of External Civil Rights Compliance  
Office of Environmental Justice &  
External Civil Rights

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<sup>26</sup> See CRM Section 2.5, available at [https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual\\_.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

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