



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

February 12, 2024

Management Division (6MD-CG)
United States Environment Protection Agency, Region 6
1445 Ross Ave, Suite 1200
Dallas, TX 75202-2733

Re: Signatures for Bundling

To Whom it May Concern:

Enclosed please find a new set of certification forms for bundling to be used as part of our future applications. We are requesting these forms remain valid until June 30, 2025. If additional information is required, please contact me at the below number.

Thank you for your assistance.

Sincerely,

DocuSigned by:

William Lane

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William Lane
Grant Section Manager
1190 St. Francis Drive, S-4101
Santa Fe, NM 87505
Office: 505-795-2391
William.Lane@env.nm.gov

ASSURANCES - NON-CONSTRUCTION PROGRAMS

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0040), Washington, DC 20503.

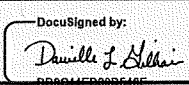
PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
8. Will comply, as applicable, with provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333), regarding labor standards for federally-assisted construction subagreements.
10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).
12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §469a-1 et seq.).
14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. §§2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.
16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.
17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."
18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.
19. Will comply with the requirements of Section 106(g) of the Trafficking Victims Protection Act (TVPA) of 2000, as amended (22 U.S.C. 7104) which prohibits grant award recipients or a sub-recipient from (1) Engaging in severe forms of trafficking in persons during the period of time that the award is in effect (2) Procuring a commercial sex act during the period of time that the award is in effect or (3) Using forced labor in the performance of the award or subawards under the award.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL 	TITLE Cabinet Secretary
APPLICANT ORGANIZATION New Mexico Environment Department	DATE SUBMITTED 02/12/2024



United States
ENVIRONMENTAL PROTECTION AGENCY
Washington, DC 20460

OMB Control No. 2021-11-11
Approval expires 06/30/2024

This collection of information is approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (OMB Control No. 2030-0020). Responses to this collection of information are required to obtain an assistance agreement (40 CFR Part 30, 40 CFR Part 31, and 40 CFR Part 33 for awards made prior to December 26, 2014, and 2 CFR 200, 2 CFR 1500, and 40 CFR Part 33 for awards made after December 26, 2014). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public reporting and recordkeeping burden for this collection of information is estimated to be 0.25 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the Regulatory Support Division Director, U.S. Environmental Protection Agency (2821T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.

MR1AJKF3QMF3

EPA Project Control Number

CERTIFICATION REGARDING LOBBYING

CERTIFICATION FOR CONTRACTS, GRANTS, LOANS AND COOPERATIVE AGREEMENTS

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including sub-contracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31 U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

James Kenney, Cabinet Secretary

Typed Name & Title of Authorized Representative

DocuSigned by:

Danielle L. Altman

Signature and Date of Authorized Representative

Preaward Compliance Review Report for All Applicants and Recipients Requesting EPA Financial Assistance

Note: Read Instructions before completing form.

This collection of information is approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (OMB Control No. 2030-0020). Responses to this collection of information are required to obtain an assistance agreement (40 CFR Part 30, 40 CFR Part 31, and 40 CFR Part 33 for awards made prior to December 26, 2014, and 2 CFR 200, 2 CFR 1500, and 40 CFR Part 33 for awards made after December 26, 2014). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public reporting and recordkeeping burden for this collection of information is estimated to be 0.5 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the Regulatory Support Division Director, U.S. Environmental Protection Agency (2821T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.

I. A. Applicant/Recipient (Name, Address, City, State, Zip Code)

Name:

Address:

City:

State: Zip Code:

B. Unique Entity Identifier (UEI):

C. Applicant/Recipient Point of Contact

Name: Phone: Email:

Title:

II. Is the applicant currently receiving EPA Assistance? ☒ Yes ☐ No

III. List all pending civil rights lawsuits and administrative complaints filed under federal law against the applicant/recipient that allege discrimination based on race, color, national origin, sex, age, or disability. (Do not include employment complaints, unless covered by 40 C.F.R. Parts 5 and 7.)

In 2017, NMED and EPA entered into an Informal Resolution Agreement (attached) to resolve Complaint No. [Exemption 6: PII](#). While the Complaint is not pending, the Informal Resolution Agreement has not yet been closed. Additionally, there was a complaint filed against NMED in 2021 regarding Associated Asphalt and Materials, LLC, Complaint No. [Exemption 6: PII](#)

IV. List all civil rights lawsuits and administrative complaints decided against the applicant/recipient within the last year that alleged discrimination under federal law based on race, color, national origin, sex, age, or disability and enclose a copy of all decisions. Please describe all corrective actions taken. (Do not include employment complaints, unless covered by 40 C.F.R. Parts 5 and 7.)

No lawsuits or complaints alleging discrimination have been decided against NMED within the last year.

V. List all civil rights compliance reviews of the applicant/recipient conducted under federal nondiscrimination laws by any federal agency within the last two years and enclose a copy of the review and any decisions, orders, or agreements based on the review. Please describe any corrective action taken. (40 C.F.R. § 7.80(c)(3))

In June 2019, a civil rights complaint was filed against NMED by CARD before EPA (EPA Complaint No. [Exemption 6: PII](#)). On December 18, 2019, EPA issued its decision, in which it held that there was insufficient evidence to conclude that NMED violated Title VI. The December decision is attached. Additionally, in 2021, a complaint was filed against NMED related to Associate Asphalt Materials, LLC (EPA Complaint No. [Exemption 6: PII](#)). The acceptance letter from EPA is attached, but this matter is still pending.

VI. Is the applicant requesting EPA assistance for new construction? If no, proceed to VII; if yes, answer (a) and/or (b) below.

☐ Yes ☒ No

a. If the grant is for new construction, will all new facilities or alterations to existing facilities be designed and constructed to be readily accessible to and usable by persons with disabilities? If yes, proceed to VII; if no, proceed to VI(b).

☐ Yes ☐ No

b. If the grant is for new construction and the new facilities or alterations to existing facilities will not be readily accessible to and usable by persons with disabilities, explain how a regulatory exception (40 C.F.R. 7.70) applies.

VII. Does the applicant/recipient provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, sex, age, or disability in its program or activities? (40 C.F.R. 5.140 and 7.95) ☒ Yes ☐ No

a. Do the methods of notice accommodate those with impaired vision or hearing? ☒ Yes ☐ No

b. Is the notice posted in a prominent place on the applicant's/recipient's website, in the offices or facilities or, for education programs and activities, in appropriate periodicals and other written communications? ☒ Yes ☐ No

c. Does the notice identify a designated civil rights coordinator? ☒ Yes ☐ No

- VII. Does the applicant/recipient maintain demographic data on the race, color, national origin, sex, age, or disability status of the population it serves? (40 C.F.R. 7.85(a)) ☒ Yes ☐ No
- VIII. Does the applicant/recipient have a policy/procedure for providing meaningful access to services for persons with limited English proficiency? (Title VI, 40 C.F.R. Part 7, *Lau v Nichols* 414 U.S. 563 (1974)) ☒ Yes ☐ No
- X. If the applicant is an education program or activity, or has 15 or more employees, has it designated an employee to coordinate its compliance with 40 C.F.R. Parts 5 and 7? Provide the name, title, position, mailing address, e-mail address, fax number, and telephone number of the designated coordinator.

Non-Discrimination Coordinator, New Mexico Environment Department, P.O. Box 5469, Santa Fe, NM 87502-5469, nd.coordinator@state.nm.us

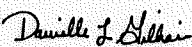
- XI. If the applicant is an education program or activity, or has 15 or more employees, has it adopted grievance procedures that assure the prompt and fair resolution of complaints that allege a violation of 40 C.F.R. Parts 5 and 7? Provide a legal citation or applicant's/recipient's website address for, or a copy of, the procedures.

Yes. <https://www.env.nm.gov/non-employee-discrimination-complaint-page/>

For the Applicant/Recipient

I certify that the statements I have made on this form and all attachments thereto are true, accurate and complete. I acknowledge that any knowingly false or misleading statement may be punishable by fine or imprisonment or both under applicable law. I assure that I will fully comply with all applicable civil rights statutes and EPA regulations.

A. Signature of Authorized Official

DocuSigned by:

BDE644E966B540E...

B. Title of Authorized Official

Cabinet Secretary, NM Environment Department

C. Date

02/12/2024

For the U.S. Environmental Protection Agency

I have reviewed the information provided by the applicant/recipient and hereby certify that the applicant/recipient has submitted all preaward compliance information required by 40 C.F.R. Parts 5 and 7; that based on the information submitted, this application satisfies the preaward provisions of 40 C.F.R. Parts 5 and 7; and that the applicant has given assurance that it will fully comply with all applicable civil rights statutes and EPA regulations.

A. Signature of Authorized EPA Official

B. Title of Authorized Official

C. Date

Instructions for EPA FORM 4700-4 (Rev. 04/2021)

General. Recipients of Federal financial assistance from the U.S. Environmental Protection Agency must comply with the following statutes and regulations.

Title VI of the Civil Rights Acts of 1964 provides that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. The Act goes on to explain that the statute shall not be construed to authorize action with respect to any employment practice of any employer, employment agency, or labor organization (except where the primary objective of the Federal financial assistance is to provide employment). Section 13 of the 1972 Amendments to the Federal Water Pollution Control Act provides that no person in the United States shall on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under the Federal Water Pollution Control Act, as amended. Employment discrimination on the basis of sex is prohibited in all such programs or activities. Section 504 of the Rehabilitation Act of 1973 provides that no otherwise qualified individual with a disability in the United States shall solely by reason of disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Employment discrimination on the basis of disability is prohibited in all such programs or activities. The Age Discrimination Act of 1975 provides that no person on the basis of age shall be excluded from participation under any program or activity receiving Federal financial assistance. Employment discrimination is not covered. Age discrimination in employment is prohibited by the Age Discrimination in Employment Act administered by the Equal Employment Opportunity Commission. Title IX of the Education Amendments of 1972 provides that no person in the United States on the basis of sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. Employment discrimination on the basis of sex is prohibited in all such education programs or activities. Note: an education program or activity is not limited to only those conducted by a formal institution. 40 C.F.R. Part 5 implements Title IX of the Education Amendments of 1972. 40 C.F.R. Part 7 implements Title VI of the Civil Rights Act of 1964, Section 13 of the 1972 Amendments to the Federal Water Pollution Control Act, and Section 504 of The Rehabilitation Act of 1973.

Items "Applicant" means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance. 40 C.F.R. §§ 5.105, 7.25. "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organizations, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 40 C.F.R. §§ 5.105, 7.25. "Civil rights lawsuits and administrative complaints" means any lawsuit or administrative complaint alleging discrimination on the basis of race, color, national origin, sex, age, or disability pending or decided against the applicant and/or entity which actually benefits from the grant, but excluding employment complaints not covered by 40 C.F.R. Parts 5 and 7. For example, if a city is the named applicant but the grant will actually benefit the Department of Sewage, civil rights lawsuits involving both the city and the Department of Sewage should be listed. "Civil rights compliance review" means: any federal agency-initiated investigation of a particular aspect of the applicant's and/or recipient's programs or activities to determine compliance with the federal non-discrimination laws. Submit this form with the original and required copies of applications, requests for extensions, requests for increase of funds, etc. Updates of information are all that are required after the initial application submission. If any item is not relevant to the project for which assistance is requested, write "NA" for "Not Applicable." In the event applicant is uncertain about how to answer any questions, EPA program officials should be contacted for clarification.

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



EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

December 18, 2019

Return Receipt Requested

Certified Mail#: 7015 3010 001 1267 2002

In Reply Refer to:

EPA Complaint No. [Exemption 6: PII](#)

James C. Kenney
Cabinet Secretary
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
Santa Fe, NM 87505

Re: Preliminary Findings and Closure of EPA Administrative Complaint No. [Exemption 6: PII](#)

Dear Secretary Kenney:

This letter is to notify you that, pursuant to 40 C.F.R. § 7.115(c)(1), the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is issuing preliminary findings within the 180-day regulatory timeframe and closing, as of the date of this letter, EPA Administrative Complaint No. [Exemption 6: PII](#), against the New Mexico Environment Department (NMED). The complaint generally alleged that NMED violated Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), and EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7. With respect to the specific issue accepted for investigation, ECRCO finds insufficient evidence to conclude that NMED violated Title VI and EPA's nondiscrimination regulation.

ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited-English proficiency), disability, sex, and age¹ in programs or activities that receive federal financial assistance from EPA. On June 27, 2019, ECRCO accepted for investigation the following issue:²

¹ Title VI of the Civil Rights Act of 1964, 42 United States Code §§ 2000d to 2000d-7 (Title VI); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 *et seq.*; Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251 (1972)); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 *et seq.*; 40 C.F.R. Parts 5 and 7.

² Letter from Lilian Dorka, ECRCO Director, EPA, to James C. Kenney, Secretary, NMED, Acceptance of Administrative Complaint 02NO-19-R6 (June 27, 2019).

Secretary Kenney

Whether NMED discriminated against the community in Eunice, New Mexico, that is predominantly of Hispanic and Mexican descent on the basis of national origin by issuing Groundwater Discharge Permit DP-1817 to Waste Control Specialists, LLC ("WCS") on December 5, 2018 that allegedly allows groundwater to go unprotected, in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

ECRCO specifically looked at whether NMED's approval and issuance of DP-1817 subjected the predominantly Hispanic and Mexican residents of Eunice to disparate treatment and whether the permit itself disparately impacts the predominantly Hispanic and Mexican³ residents of Eunice by failing to adequately protect groundwater from contamination. Based on its investigation, ECRCO finds insufficient evidence to support a finding of discrimination on the basis of national origin in violation of Title VI.

In reaching this decision, ECRCO reviewed NMED's regulations⁴ and New Mexico laws,⁵ NMED's publicly available documents regarding its permitting process,⁶ WCS's permitting documents for DP-1817, including draft permits, fact sheets, maps, and the Hearing Officer's Report⁷ from the WCS public hearings.⁸ ECRCO investigated the source of Eunice's drinking water⁹ and reviewed whether components of the final permit were in accordance with accepted practice in terms of the location, depth, and quantity of monitoring wells based on the geology and hydrology of the area surrounding the WCS facility.¹⁰ ECRCO further examined whether NMED followed its own procedures and state regulations and whether the final DP-1817 is protective of groundwater.

ECRCO also conducted interviews of the Complainants by telephone and examined maps and information submitted by the Complainants.¹¹ In addition, ECRCO requested and reviewed pertinent documents provided by NMED related to their monitoring and inspection procedures and interviewed members of NMED staff involved in the negotiation, drafting, and approval of DP-1817. Finally, ECRCO consulted with internal EPA experts who provided insight and

³ EJSCREEN ACS Summary Report (2012-2016 estimates), Point Center 3-mile radius from Eunice city center 55% Total Hispanic Population, 45% Non-Hispanic. NMED's Ground Water Quality Board utilized EJSCREEN to produce demographic information for three areas, which included sections of the cities of Eunice and Hobbs located in New Mexico and the city of Andrews, Texas. This report pulled 2011-2015 data for a 6-mile radius surrounding the WCS facility and showed that the demographics included a total population of 3,119 people with the total Hispanic population as 1,644 at 53% and the total non-Hispanic population as 1,474 at 46%. The Complainants used EJSCREEN to produce demographic information and provided the report EJSCREEN ACS Summary Report (2012-2016 estimates), Point Center 3-mile radius from Eunice city center 55% Total Hispanic Population, 45% Non-Hispanic. ECRCO confirmed the accuracy of the aforementioned reports.

⁴ New Mexico Ground and Surface Water Protection Regulations, (NMAC) 20.6.2.

⁵ New Mexico Water Quality Act, NMSA 1978 Sections 74-6-1 through 74-6-17.

⁶ Information pertaining to NMED's ground water quality requirements found at <https://www.env.nm.gov/gwqb/pps/>.

⁷ Hearing Officer's Report, In the Matter of Waste Control Specialists, LLC Discharge Permit, DP 1817.

⁸ The public hearings were held on October 2nd and 3rd, 2018.

⁹ <https://www.cityofeunice.org/DocumentCenter/View/219/2015-City-Water-Report-PDF>.

¹⁰ NMED does not have separate guidance documents related to permitting outside of the aforementioned statutory and regulatory authorities.

¹¹ The individual Complainant telephonic interviews were conducted with ^{Exemption 6: PII} [redacted] and ^{Exemption 6: PII} [redacted] on October 2, 2019, and the interview with ^{Exemption 6: PII} [redacted] was conducted on October 4, 2019.

Secretary Kenney

explanation of accepted scientific practices for discharge monitoring and the hydrology and geology of the area where the WCS facility is located.

I. Background

Approval and Issuance of DP-1817

NMED issued DP-1817 to WCS on December 5, 2018.¹² DP-1817 contains terms and conditions that are enforceable by NMED pursuant to 20.6.2.3104 NMAC and NMSA 1978 § 74-6-5 and § 74-6-10. NMED requested WCS apply for the groundwater permit and subsequently issued DP-1817 in order to monitor the discharge of water contaminants from the WCS facility in Andrews County, Texas into ground and surface water, with the goal of protecting the ground and surface water in New Mexico for present and potential future water supply uses and protecting public health.¹³

WCS Facility

The WCS facility is located in western Andrews County, Texas approximately six miles east of Eunice on a property that spans the New Mexico-Texas border. A portion of the WCS facility is located in Sections 28 and 33, Township 21 South, Range 38 East, Lea County, New Mexico.¹⁴ The licensed and permitted commercial waste management portion of the facility occupies approximately 1,338 acres in Texas and conducts the following commercial waste management operations within the Waste Management Facility: Hazardous Waste Facility (HWF) which is a permitted RCRA Subtitle C facility used to treat, store and dispose of hazardous waste; the Texas Compact Waste Disposal Facility; the Federal Waste Disposal Facility (FWDF) which is licensed to dispose of Class A, B and C and mixed low-level waste (MLLW); the Byproduct Material Disposal Facility (BMDF) which is licensed by Texas to dispose of uranium metal products, or byproducts, from the decommissioned Fernald nuclear arms facility; and WCS is licensed to store and process LLRW pursuant to a license issued by Texas.¹⁵ WCS is authorized for the receipt, processing and storage of radioactive waste, and for the non-thermal treatment of ignitable, corrosive, toxic, selective reactive, and non-hazardous wastes, liquids, sludges, solids, lab packs in approved containers, and liquids in bulk tankers.¹⁶

WCS and its New Mexico Outfalls

WCS is located in an arid environment with approximately 12 inches of rainfall annually and lies upon a geologic structure called the red bed ridge, and upon geological formations which include the Triassic Dockum Group and the Ogallala/Antlers/Gatuna (OAG) alluvium. The Dockum Group consists of a series of fluvial and lacustrine mudstone, siltstone, sandstone, and silty dolomite deposits. The Dockum Group is over 1,000 feet thick beneath the WCS. The upper

¹² Discharge Permit, Initial Issuance, DP-1817, Waste Control Specialists, p. 1 (Dec. 31, 2018).

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 1.

¹⁶ <http://www.wcstexas.com/facilities/treatment-and-storage/>

Secretary Kenney

part of the Dockum Group is described in boring logs as red to purple, dry, very firm to consolidated clay or claystone with very low permeability ranging from about 10^{-8} to 10^{-10} cm/s. The shallowest laterally continuous groundwater bearing zone below WCS is a siltstone/sandstone lens within the Dockum Group at a depth of approximately 225 feet below ground level (bgl).¹⁷

WCS is authorized by Texas to discharge water from the HWF and the BMDF under two Texas Pollutant Discharge Elimination System (TPDES) permits, 4038 and 4857.¹⁸ The HWF and the BMDF discharge includes: non-contaminated stormwater, stormwater associated with construction activities, non-contact industrial stormwater, non-contact cooling water, and landfill wastewaters and contaminated stormwater. TPDES 4038 regulates five Outfalls, including numbers 101, 001, 002, 003, and 004. The Outfalls that are identified as 001 and 002 are the locations where the non-contact stormwater and other water is last monitored before it enters the State of New Mexico. WCS has monitoring wells located in Texas and New Mexico. The monitoring wells in New Mexico are located at Section 28 and 33, Township 21 South, Range 38 East, Lea County, New Mexico. Under DP-1817, WCS is required to monitor shallow groundwater in monitoring well NM-1 at the interface between the Dockum claystone and the OAG alluvial material downgradient of Outfall 002. DP-1817 also requires WCS to collect groundwater samples and report the findings from monitoring well TP-62 which is east-northeast of Outfall 002.

NMED's Permit Process

Prior to the issuance of DP-1817, NMED issued public notices spanning from 2013 through 2018¹⁹ and held two public hearings on October 2nd and 3rd, 2018. During those hearings, three parties submitted notices of intent to present technical testimony, including WCS, NMED and the Citizens for Alternatives to Radioactive Dumping (CARD) and the Alliance for Environmental Strategies.²⁰ The Hearing Officer took technical evidence, comment, testimony on the draft permit and ultimately recommended that the Secretary of NMED approve the proposed DP-1817.²¹

Title VI Complaint

The Complainants, consisting of CARD, Concerned Citizens for Nuclear Safety (CCNS), Alliance for Environmental Strategies, and individuals [Exemption 6: PII](#) and [Exemption 6: PII](#), filed an administrative complaint with ECRCO on June 3, 2019. The Complainants provided supplemental information on June 6, 2019 and June 24, 2019. ECRCO has had ongoing correspondence with the Complainants via electronic mail and also received information from the Complainants through telephonic interviews. Complainants generally asserted that NMED's

¹⁷ Discharge Permit, Initial Issuance, DP-1817, Waste Control Specialists, p. 3 (Dec. 31, 2018).

¹⁸ *Id.* at 2.

¹⁹ NMED released public notices for DP-1817 on October 2, 2015, March 3, 2017, March 31, 2017, June 9, 2017, September 1, 2017, and November 17, 2017, August 2, 2018, and October 2, 2018.

²⁰ Hearing Officer's Report, In the Matter of Waste Control Specialists, LLC Discharge Permit, DP 1817, p. 1.

²¹ *Id.* at 16, 17.

Secretary Kenney

approval and issuance of the final version of DP-1817 amounted to disparate treatment of the majority-Hispanic and Mexican population in Eunice and that it also had the disparate adverse effect of leaving the population's groundwater without adequate protection from contamination.²²

II. Legal Standards

EPA's investigation was conducted under the authority of Title VI of the Civil Rights Act of 1964 and EPA's nondiscrimination regulation (40 C.F.R. Part 7) and consistent with EPA's Case Resolution Manual.²³ Federal civil rights laws and EPA's implementing regulation prohibit recipients from intentionally discriminating in their programs and activities based on race, color, or national origin, disability, sex or age. This is referred to as *disparate treatment*.²⁴ The regulation, at 40 C.F.R. § 7.35(a), states that "a recipient shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity."

A claim of intentional discrimination under Title VI alleges that a recipient intentionally treated individuals differently or otherwise knowingly caused them harm because of their race, color, or national origin. Intentional discrimination requires a showing that a "challenged action was motivated by an intent to discriminate."²⁵ Evidence of "bad faith, ill will or any evil motive on the part of the [recipient]" is not necessary.²⁶ Evidence in a disparate treatment case must generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.²⁷ EPA will evaluate the "totality of the relevant facts" to determine whether intentional discrimination has occurred.²⁸ Direct proof of discriminatory motive is often unavailable. However, EPA will consider both direct and circumstantial evidence of discriminatory intent.

EPA's regulation also prohibits disparate impact (or discriminatory effect) discrimination.²⁹ The

²² Title VI Complaint filed by Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#) and [Exemption 6: PII](#) (June 3, 2019). Title VI Supplemental Complaint received on June 24, 2019, from the Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#); and [Exemption 6: PII](#). The Complainants also raised concerns regarding NMED's public participation processes, specifically in regard to ensuring that NMED provided meaningful access to limited English proficient individuals. ECRCO rejected those allegations for investigation because those concerns are being addressed through the ongoing monitoring of the informal resolution agreement for Complaint [Exemption 6: PII](#).

²³ Case Resolution Manual (Jan. 2017), at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

²⁴ 40 C.F.R. § 7.35(a); *see, also*, *Alexander v. Choate*, 469 U.S. 287, 292-293 (1985); *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983).

²⁵ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

²⁶ *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

²⁷ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

²⁸ *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

²⁹ 40 C.F.R. § 7.35(b); *see, also*, *Guardians*, 463 U.S. at 593 (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. at 293 (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases have cited *Guardians* in recognizing the validity of Title VI disparate impact claims. *See, e.g.*

Secretary Kenney

regulation, at 40 C.F.R. § 7.35(b), states in relevant part, that “[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”

In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;³⁰
- (3) establish disparity;³¹ and
- (4) establish causation.³²

The focus here is on the consequences of the recipient’s policies or decisions, rather than the recipient’s intent.³³ The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as “standard operating procedure” by recipient’s employees. Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.³⁴

If the evidence establishes a *prima facie* case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a “substantial legitimate justification” for the challenged policy or practice.³⁵ “Substantial legitimate justification” in a disparate impact case is similar to the Title VII employment concept of “business necessity,”

Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995) (internal citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (internal citations omitted); *Larry P. v. Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984); see also U.S. EPA’s External Civil Rights Compliance Office Toolkit, p. 8 (Jan. 18, 2017).

https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

³⁰ Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm. U.S. EPA’s External Civil Rights Compliance Office Toolkit, at 18, fn. 41.

³¹ In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. See *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576-77 (2d Cir. 2003) (internal citations omitted).

³² See *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must “allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities”).

³³ *Lau v. Nichols*, 414 U.S. 563, 568 (1974)

³⁴ See, e.g., *Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient “failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services” and discriminatory conduct of detention officers was facilitated by “broad, unfettered discretion and lack of training and oversight” resulting in denial of access to important services).

³⁵ *Georgia State Conf.*, 775 F.2d at 1417. See also, *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (noting the framework for proof developed in civil rights cases), citing, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Secretary Kenney

which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.³⁶ The analysis requires balancing recipient's interests in implementing their policies with the substantial public interest in preventing discrimination.³⁷

If a recipient shows a substantial legitimate justification for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. Thus, even if a recipient demonstrates a substantial legitimate justification, the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that less discriminatory alternatives exist.³⁸

III. The Issue Investigated

Whether NMED discriminated against the community in Eunice, New Mexico, that is predominantly of Hispanic and Mexican descent on the basis of national origin by issuing Groundwater Discharge Permit DP-1817 to Waste Control Specialists, LLC ("WCS") on December 5, 2018 that allegedly allows groundwater to go unprotected, in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

In its investigation of the issue, ECRCO examined the "totality of the relevant facts"³⁹ and evidence relating to NMED's permit approval process and the final permit document. Specifically, ECRCO analyzed whether NMED's approval and issuance of DP-1817 amounted to disparate treatment of the community in Eunice, New Mexico, that is predominantly of Hispanic and Mexican descent; and whether, as approved, DP-1817 disparately and adversely impacted the community by failing to provide protection for the groundwater against contamination.⁴⁰ As a result of its investigation, ECRCO found insufficient evidence that NMED discriminated against the predominantly Hispanic and Mexican residents located in Eunice on the basis of national origin, under either a disparate treatment or impact standard, by approving and issuing DP-1817.

NMED's Approval and Issuance of DP-1817

³⁶ *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659-660 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The concept of "business necessity" does not transfer exactly to the Title VI context because "business necessity" does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. See *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

³⁷ See, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, <https://www.justice.gov/crt/fcs/T6Manual7#U>.

³⁸ *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). See U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 9-10.

³⁹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (discussing analysis of intentional discrimination generally).

⁴⁰ Letter from Lilian Dorka, ECRCO Director, EPA, to James C. Kenney, Secretary, NMED, Acceptance of Administrative Complaint 02NO-19-R6 (June 27, 2019).

Secretary Kenney

NMED issued DP-1817 to WCS pursuant to its authority under the New Mexico Water Quality Act (WQA), NMSA 1978 §§ 74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC, with the goal of protecting the ground and surface water in New Mexico for present and potential future water supply uses and protecting public health.⁴¹ However, Complainants assert the permit approval process, resulted in a “compromise permit” that did not comport with regulatory requirements.⁴² Accordingly, Complainants allege that DP-1817 contained terms and conditions that would not adequately protect groundwater – for example, by failing to require adequate monitoring, imposing insufficient contingency plan requirements and having weak corrective action provisions, among other things.⁴³

To support this claim, Complainants allege that the final approved version of DP-1817 contains conditions less protective of groundwater than the prior version. Specifically, Complainants stated that under the final version, WCS would not be required to dig a secondary monitoring well if NM-1 is dry. Complainants argued that NM-1 would inevitably be dry and contaminants would not be detected due to the inability of NMED to gather a sample from a dry well. Complainants also expressed concern that the final permit does not require precautions as it relates to a theoretical 100-year maximum discharge from Outfalls 001 and 002 of 170,500,00 gallons per day. Complainants further cited other examples (Bonito Valley Brewing Co. (DP-1877), Lake Meredith Salinity Control Project (DP-1054) and URENCO USA (DP-1132)) as evidence that NMED has issued permits that have far more protective conditions than DP-1817 to communities with smaller Hispanic populations than the Hispanic population of Eunice.⁴⁴ For these reasons, Complainants assert that they were subject to disparate treatment on the basis of national origin by NMED’s issuance and approval of DP-1817.

ECRCO’s Investigation

Despite the claim of a compromised permit, Complainants provided no evidence, nor did ECRCO find any evidence that the regulatory process was compromised when NMED approved and issued DP-1817. While Complainants assert that the final permit is less protective than previous versions, that is not dispositive as to whether the regulatory process was compromised and whether the permit contains sufficiently protective terms and conditions. Regarding Complainants’ concern about the permit’s monitoring conditions, NMED testified during the DP-1817 public hearing that looking for water in NM-1 during the sampling period is an

⁴¹ Discharge Permit, Initial Issuance, DP-1817, Waste Control Specialists, p. 1 (Dec. 31, 2018).

⁴² Title VI Supplemental complaint received on June 26, 2019, from the Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#); and [Exemption 7: DFOI](#), pp. 2-3.

⁴³ Title VI Supplemental Complaint received on June 24, 2019, from the Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#); and [Exemption 7: DFOI](#) (generally).

⁴⁴ The Complainants identified the Bonito Valley Brewing Company permit, DP-1877, The Lake Meredith Salinity Control Project, DP-1054 in the Title VI Supplemental complaint received on June 26, 2019, from the Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#); and [Exemption 6: PII](#) pages 8 and 9. URENCO USA permit DP-1132 email from Deborah Reade, CARD to Brittany Robinson, EPA ECRCO (Nov. 25, 2019).

Secretary Kenney

adequate form of monitoring, even if the well is dry. NMED stated that a dry well is indicative that there is no contaminant transport.⁴⁵ During the course of its investigation, ECRCO determined that NMED's explanation of its monitoring process and the lack of presence of contamination in a dry well comports with practices recognized as suitable by EPA experts on the issue.

To Complainants' concern about the permit's failure to account for a 100-year maximum discharge, NMED stated during the public hearing and in its response to ECRCO that the theoretical maximum has never occurred, and that one of the reasons DP-1817 does not limit discharge volume is that WCS is situated in a large drainage area where containment of all surface stormwater runoff is simply impossible.⁴⁶ NMED stated there is no regulatory benefit to specifying discharge volumes when groundwater can otherwise be adequately protected and monitored.⁴⁷ EPA reviewed the hydrology and geology of the sediment surrounding the WCS facility, the flow direction, and location of monitoring wells and finds insufficient evidence that New Mexico is unprepared for a theoretical maximum occurrence.

Finally, the other permit examples cited by Complainants are not dispositive of whether DP-1817 itself contains terms and conditions protective of groundwater. In particular, the other permit examples do not provide an "apples to apples" comparison due to the specific difference in the facts and circumstance underlying the approval and issuance of those permits and DP-1817, such as location of the discharge, quantity and quality of the discharge, flow characteristics of the discharge, and the hydrology and geology of the respective areas. ECRCO's review of DP-1817 indicates that the location of the WCS facility was chosen with distinct consideration of the climate, terrain, and ground sediment in the area surrounding the facility, specifically due to the impermeability of the surrounding ground sediment and the arid climate.⁴⁸ Furthermore, DP-1817 is different for the reason that it permits a groundwater discharge that occurs via surface water conveyances that are located and permitted in Texas, and accordingly, DP-1817 acknowledges and incorporates elements from the existing TCEQ permits. Notably, DP-1817 is designed not to control the discharge of WCS, but to monitor the discharge that potentially may cross state lines into New Mexico.

Analysis

As stated above, a claim of intentional discrimination under Title VI alleges that a recipient intentionally treated individuals differently or otherwise knowingly caused them harm because of their race, color, or national origin and requires a showing that a "challenged action was motivated by an intent to discriminate."⁴⁹ Additionally, evidence in a disparate treatment case must generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.⁵⁰ The Complainants allege that NMED issued a permit that compromised regulatory processes, with

⁴⁵ Hearing Officer's Report, In the Matter of Waste Control Specialists, LLC Discharge Permit, DP 1817, p. 12.

⁴⁶ *Id.* at 10, 11.

⁴⁷ *Id.*

⁴⁸ Discharge Permit, Initial Issuance, DP-1817, Waste Control Specialists, p. 1 (Dec. 31, 2018).

⁴⁹ *Elston*, 997 F.2d at 1406.

⁵⁰ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

Secretary Kenney

less protective terms and conditions, due, at least in part, to the national origin of the Eunice community, which is predominantly of Hispanic and Mexican descent.

Here, there is insufficient evidence, direct or circumstantial, that NMED intentionally discriminated against the predominantly Hispanic and Mexican residents of Eunice on the basis of national origin by approving and issuing DP-1817. Specifically, there is insufficient evidence to conclude that NMED “compromised” the regulatory process or “issued a compromised permit” based on a decision to treat the Eunice community differently or to otherwise knowingly cause them harm by failing to incorporate sufficient terms and conditions in DP-1817 that protected Eunice’s groundwater. Instead, the evidence shows that NMED required WCS to apply for a groundwater discharge permit due to the potential impact WCS’ outfall discharge could have on New Mexico groundwater⁵¹, and that the approval and issuance of DP-1817 was supported by specific groundwater conditions relative to the area, such as location of the discharge, quantity and quality of the discharge, flow characteristics of the discharge, and hydrology and geology. Accordingly, ECRCO has determined that there is insufficient evidence that NMED’s approval and issuance of DP-1817 discriminated against the Eunice Community in violation of Title VI.

DP-1817’s Protection of Groundwater

ECRCO also examined Complainants’ claim that the issued permit DP-1817 fails to protect groundwater, resulting in a disparate adverse impact against the predominantly Hispanic and Mexican population of Eunice. Specifically, Complainants allege: DP-1817 fails to protect groundwater flowing into Eunice, particularly into public and private wells; the location and depth of monitoring well NM-1 is inappropriate to protect groundwater; DP-1817 does not have the appropriate number of monitoring wells, particularly for Outfall 001; and there is almost no geological or hydrological data in the area surrounding the WCS discharge outfalls in New Mexico.⁵²

ECRCO’s Investigation

- *WCS Discharge and Potential for Contamination of Eunice Groundwater*

ECRCO confirmed during its investigation, that Eunice’s public drinking water source comes from six or more groundwater wells in the Ogallala Aquifer. The wells are located southwest of Hobbs, NM, which generally puts some of the wells north of Eunice⁵³. ECRCO further confirmed that Eunice has public and private wells used only for industrial and agricultural purposes.⁵⁴ However, Eunice is located a distance (six miles west) from the WCS facility.⁵⁵ As a

⁵¹ Hearing Officer’s Report, In the Matter of Waste Control Specialists, LLC Discharge Permit, DP 1817, p. 5.

⁵² Title VI Supplemental complaint received on June 26, 2019, from the Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [Exemption 6: PII](#); and [Exemption 7: FOIA](#)

⁵³ <https://www.cityofeunice.org/DocumentCenter/View/219/2015-City-Water-Report-PDF>.

⁵⁴ Interview with Complainants, October 2019.

⁵⁵ Discharge Permit, Initial Issuance, DP-1817, Waste Control Specialists, p. 1 (Dec. 31, 2018).

Secretary Kenney

result, given the location of the WCS facility from Eunice groundwater wells, a WCS discharge is unlikely to impact Eunice groundwater.

According to an EPA hydrogeologist, the slope of the Triassic age Dockum Group red beds most likely controls horizontal groundwater movement (if groundwater occurs at all) in shallow overlying permeable sediments near Outfalls 001, 002, and monitoring well NM-1. The slope of the red beds most likely also controls the horizontal movement of any groundwater that may occur beneath surface drainage channels leading to Outfalls 001 and 002. The red beds consist of fine-grained sediments that form a barrier to both horizontal and vertical groundwater flow and thus groundwater movement in overlying sediments is constrained to flowing along the surface of the red beds.⁵⁶

At Outfall 001, the red bed surface slopes south to southeast based on maps prepared by Lehman and Rainwater (2000) and Intera Inc. (2018). However, these maps lack detailed control in the Outfall 001 area and, like all contour maps, are interpretations of distributed data that are subject to variability based on the selected contouring methodology. Near Outfall 002, the red bed slope is to the southwest and more data points were used for map construction. Near NM-1, the contour maps suggest a southward slope (Lehman and Rainwater, 2000) to virtually no slope shown on the map by Intera Inc. (2018). Eunice is located due west of the WCS facility, whereas the slope of Outfall 001 is southeast, Outfall 002 is southwest, and NM-1 is south. As such, there is no evidence to support that potential discharge would flow in the direction of Eunice.

Moreover, groundwater also occurs deeper in the subsurface in a zone referred to as the 225-foot zone which is contained in the red beds. This groundwater is monitored as the uppermost aquifer at WCS.⁵⁷ The hydraulic conductivity (or K) of this material is very low and reported to be 10^{-8} to 10^{-9} cm/s. Hydraulic conductivity is a physical property concerning the ability of geologic material to transmit water. This low K means that groundwater velocity in the red beds is very low and has been estimated to be 0.0114 ft/yr with a facility wide average of 0.0067 ft/yr. The flow direction in the 225-ft zone appears to be approximately south to southwest at Outfall 001, Outfall 002, and NM-1. The reported maximum groundwater gradient is 0.048 ft/ft and averages 0.027 ft/ft (WCS, 2014).⁵⁸

Thus, discharge from WCS is unlikely to travel towards Eunice, because the discharge slope from Outfall 001 is southeast, and the discharge slope from Outfall 002 is southwest. Eunice is not in the potential pathway of either outfall point. Furthermore, the data shows that if the discharge travels, it would be at a very low velocity, at a facility wide average of .00067ft/yr. Accordingly, both Eunice's distance and direction away from the WCS discharge pathways makes it unlikely for Eunice groundwater to be impacted by the WCS facility.

- *NM-1 Location and Depth*

⁵⁶ Review and analysis provided by Scott Ellinger, Professional Geologist, EPA Region 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

Secretary Kenney

Complainants claim that the location and depth of NM-1 is inappropriate to properly monitor Outfall 002. According to an EPA expert, and based on the description of the groundwater flow areas and slope from Outfall 002, NM-1 is in the appropriate location and depth to monitor shallow groundwater from Outfall 002 and from additional areas in the northwestern part of WCS. Therefore, ECRCO finds insufficient evidence that DP-1817's designated monitoring well, NM-1, is improperly located or the inappropriate depth to properly monitor and protect groundwater.

- *Quantity of Monitoring Wells*

Complainant's claim that DP-1817 does not have the appropriate number of monitoring wells, specifically for Outfall 001. According to an EPA expert, NM-1 does not appear to be in the appropriate location and depth to monitor shallow groundwater from 001 because NM-1 appears to be upgradient or cross-gradient from the outfall. NM-1 is also not deep enough to monitor the 225-ft zone. However, the Lea County Landfill has two shallow monitoring wells near the southwestern corner of the WCS property and Outfall 001. These wells are B-101 and B-102. Both wells are 50 feet deep. B-101 is the closest to Outfall 001 and roughly 600-800 feet southwest of Outfall 001. B-102 is several hundred feet further to the southwest. According to our EPA expert, considering that the slope of the red beds and the shallow groundwater flow directions are likely the same, wells B-101 and B-102 do not appear to be downgradient from Outfall 001. As stated above, the red bed surface slopes south to southeast and therefore groundwater would not enter New Mexico from Outfall 001 or from the surface drainages leading to Outfall 001. B-101 and NM-1 seem to be at the right places and depths to monitor shallow groundwater that may move to the southwest from areas of WCS located north of Outfall 001. Monitoring wells at URENCO, consisting of two wells located on the eastern border of URENCO, could also detect shallow contamination from northern parts of WCS, but URENCO wells are about 3000 feet to the west. Considering all these monitoring wells together (NM-1, B-101, B-102, and URENCO wells), they are capable of intercepting shallow groundwater moving from the western and northern parts of WCS. As a result, ECRCO finds insufficient evidence to support the claim that Eunice's groundwater is not being protected due to the number of monitoring wells required by DP-1817.

- *Geological and Hydrological Data Surrounding the WCS Facility*

Complainants claim that there is almost no geological and hydrologic data surrounding the WCS facility to substantiate NMED's claims that potential discharge from Outfall 001 and 002 will not adversely impact Eunice. ECRCO finds insufficient evidence to support the Complainant's claim.

The evidence shows that geology and hydrology of the WCS site have been extensively investigated. WCS has conducted 24 geological studies or investigations and 18 hydrological

Secretary Kenney

studies; all of which were reviewed by regulators.⁵⁹ A well record and geologic log from the New Mexico Office of the State Engineer was provided by WCS to NMED in January 2017 for NM-1, also referred to as Beatrice-1 (located in New Mexico west of Outfalls 001 and 002 (32° 23' 53.1" N; 103° 4' 9.2" W). The log indicates that the subsurface geology consists of medium to fine sand and some gravel to a depth of 32 feet below land surface. At the 32-foot depth reddish-brown silty clay was encountered. The overlying sediments are probably the Gatuna Formation. A 2004 WCS geologic report prepared by Cook-Joyce Inc. and Intera Inc. describes the site-wide surface and shallow strata. This material is described, from the surface down, as windblown sands, unconsolidated and indurated caliche, sand and gravel. Below these materials are the Triassic red beds. Gravel, sand, silt, and clay are all particle size terms that reflect the physical properties of sediments and their ability to transmit groundwater. Larger sizes (gravel and sand) have the ability to transmit groundwater more quickly than smaller sizes (silt and clay). The interval above 32 feet is more likely to transmit water than the underlying clays if water exists. No groundwater was indicated as being present on the geologic log although a low moisture content was noted from the surface to 7 feet below land surface. EPA's expert relied on WCS's 2004 geological report, stating that the report follows standard industry practice and is a reliable interpretation of the area. As a result, ECRCO finds insufficient evidence to support Complainants' claim that there is a lack of data on which NMED could rely to make an assessment that DP-1817 would appropriately protect groundwater in New Mexico.

Analysis

As discussed above, EPA's regulation prohibits disparate impact (or discriminatory effects) discrimination.⁶⁰ In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. ECRCO's investigation found insufficient evidence to establish a prima facie case of disparate impact by NMED. Specifically, there is insufficient evidence to establish that the "facially neutral policy or practice" – here, DP-1817 as approved – resulted in harm to the predominantly Hispanic and Mexican residents of Eunice, given there is insufficient evidence that the permit fails to adequately protect the groundwater for the Eunice community from contamination.

Instead, the hydrological and geological studies show that New Mexico's arid climate, combined with the sediment surrounding the WCS facility are ideal to prevent the transport of contaminants. Also, WCS' geological study, corroborated by EPA experts show that potential

⁵⁹ Hearing Officer's Report, In the Matter of Waste Control Specialists, LLC Discharge Permit, DP 1817, p. 8.

⁶⁰ 40 C.F.R. §7.35(b); *see, also*, *Guardians*, 463 U.S. at 593 (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. at 293 (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases have cited *Guardians* in recognizing the validity of Title VI disparate impact claims. *See, e.g.* *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995) (internal citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (internal citations omitted); *Larry P. v. Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984); *see also* U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 8 (January 18, 2017). https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

Secretary Kenney

discharge has not traveled to, and is unlikely to travel, to Eunice. Furthermore, NMED's monitoring well scheme consisting of NM-1, B-101, B-102, and URENCO wells, are capable of intercepting shallow groundwater moving from the western and northern parts of WCS. As harm was not established and therefore, no prima facie case of disparate impact discrimination could be determined, ECRCO did not examine disparity or causation.

IV. Conclusion

Based on the foregoing, ECRCO finds insufficient evidence that NMED discriminated against the predominantly Hispanic and Mexican residents of Eunice on the basis of national origin in violation of Title VI and EPA's nondiscrimination regulation with respect to NMED's approval and issuance of DP-1817, and the groundwater protections afforded by DP-1817. This letter sets forth ECRCO's disposition of EPA File No. [Exemption 6: PII](#). This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. This letter and the preliminary findings herein do not affect NMED's continuing responsibility to comply with Title VI and other federal non-discrimination laws and EPA's regulation at 40 C.F.R. Parts 5 and 7, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



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

cc: Angelia Talbert-Duarte
Acting Associate General Counsel
Civil Rights & Finance Law Office

David Gray
Deputy Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region 6

Patricia Welton
Regional Counsel
U.S. EPA Region 6



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

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

January 19, 2017

Return Receipt Requested

Certified Mail# 70153010000112675195

In Reply Refer to:

EPA File No. [Exemption 6: PII](#)

Butch Tongate
Secretary-Designate
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
Santa Fe, NM 87505

Dear Secretary-Designate Tongate:

This letter is to inform you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving this complaint based on the enclosed Informal Resolution Agreement (Agreement) entered into between EPA and the New Mexico Environment Department (NMED). On June 27, 2005, EPA accepted complaint No. [Exemption 6: PII](#), which alleged discrimination based on race and national origin in violation of Title VI and EPA regulation at 40 C.F.R. Part 7 relating to NMED's issuance of a treatment, storage and disposal permit to Gandy-Marley, Inc. (GMI) on March 18, 2002. Specifically, the allegations accepted for investigation were:

- Whether NMED failed to require or perform a scientific investigation into possible disparate impacts;
- Whether NMED failed to ensure that limited-English proficient Spanish speaking residents were provided a meaningful opportunity for effective public participation (through use of notice of public hearings and interpretation and translation services) in the permitting process; and
- Whether NMED has a statewide pattern and practice of similar discriminatory permitting and lack of access for limited-English proficient residents to the public participation and permitting process.

During the course of EPA's investigation, NMED agreed to enter into an Informal Resolution Agreement in order to resolve this complaint.¹ The enclosed Agreement is entered into by the

¹ See ECRCO's Case Resolution Manual regarding informal resolution of complaints, at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_erm_january_11_2017.pdf.

NMED and the EPA pursuant to the authority granted to EPA under the federal nondiscrimination laws, including Title VI of the Civil Rights Act of 1964, and EPA regulation found at 40 C.F.R. Part 7. It resolves complaint No. [Exemption 6: PII](#) and additional concerns identified by EPA. It is understood that the Agreement does not constitute an admission by NMED or a finding by EPA of violations of 40 C.F.R. Part 7.

The enclosed Agreement does not affect NMED's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulation at 40 C.F.R. Part 7 nor does it affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement. This letter sets forth ECRCO's disposition of the complaint. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such.

ECRCO is committed to working with NMED as it implements the provisions of the Agreement. ECRCO appreciates NMED's cooperation in this matter and its efforts to ensure that NMED has in place the appropriate foundational elements of a non-discrimination program. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



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

Cc:

Elise Packard
Associate General Counsel Civil Rights & Finance Law Office
U.S. EPA Office of General Counsel

Samuel Coleman, P.E.
Deputy Regional Administrator and Deputy Civil Rights Official
U.S. EPA Region 6

Enclosure



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

**EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL**

**INFORMAL RESOLUTION AGREEMENT
between the
NEW MEXICO ENVIRONMENT DEPARTMENT
and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ECRCO Complaint No. [Exemption 6: PII](#)**

I. PURPOSE AND JURISDICTION

- A.** Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), and United States Environmental Protection Agency's (EPA) regulations at 40 C.F.R. Part 7 prohibit discrimination on the basis of race, color, or national origin in any programs or activities receiving federal financial assistance. The New Mexico Environmental Department (NMED) is a recipient¹ of federal financial assistance from the EPA and is subject to the provisions of Title VI and 40 C.F.R. Part 7.
- B.** On June 27, 2005, EPA accepted complaint No. [Exemption 6: PII](#), brought under Title VI and EPA's regulations at 40 C.F.R. Part 7 that alleged discrimination based on race and national origin in violation of Title VI. In response to the complaint, EPA began an investigation of NMED's compliance with Title VI and EPA regulations. During the course of EPA's investigation, NMED agreed to enter into this Informal Resolution Agreement (Agreement) in order to resolve this complaint.
- C.** This Agreement is entered into by NMED and the EPA's External Civil Rights Compliance Office (ECRCO).
- D.** This Agreement is entered into pursuant to the authority granted to EPA under the federal nondiscrimination laws, including Title VI of the Civil Rights Act of 1964, and EPA regulations found at 40 C.F.R. Part 7. It resolves complaint No. [Exemption 6: PII](#), and additional concerns identified by EPA. It is understood that this Agreement does not constitute an admission by NMED or a finding by EPA of violations of 40 C.F.R. Part 7.
- E.** NMED is committed to carrying out its responsibilities in a nondiscriminatory manner, in accordance with the requirements of Title VI and the other federal non-discrimination laws enforced by EPA regulation at 40 C.F.R. Part 7. The activities

¹ Throughout this Informal Resolution Agreement, "Recipient" refers to NMED.

detailed in Section III of this Agreement, which NMED has voluntarily agreed to undertake and implement, are in furtherance of this commitment.

II. BACKGROUND

- A. On June 27, 2005, EPA accepted complaint No. ¹Exemption 6: PII, that alleged discrimination based on race and national origin in violation of Title VI and EPA regulation at 40 C.F.R. Part 7 relating to the issuance of a treatment, storage and disposal (TSD) permit to Gandy-Marley, Inc. (GMI) on March 18, 2002. The complaint alleged that NMED failed to require or perform a scientific investigation into possible disparate impacts; failed to ensure that limited-English proficient Spanish speaking residents were provided a meaningful opportunity for effective public participation (through use of notice of public hearings and interpretation and translation services) in the permitting process; and has a statewide pattern and practice of similar discriminatory permitting and lack of access for limited-English proficient residents to the public participation and permitting process.
- B. In response to this complaint, EPA initiated an investigation of NMED's compliance with Title VI and EPA regulations at 40 C.F.R. Part 7.
- C. In addition, during the course of the investigation, EPA reviewed the requirements of 40 C.F.R. Part 7, Subpart D that are foundational elements of a recipient's non-discrimination program and are required for all recipient programs and activities. These include: the designation of at least one person to coordinate its efforts to comply with its non-discrimination obligations under 40 C.F.R. § 7.85(g); adoption of grievance procedures that assure the prompt and fair resolution of complaints alleging civil rights violations under 40 C.F.R. § 7.90; and, continuing notice of non-discrimination under 40 C.F.R. § 7.95.
- D. Consistent with the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 et seq., the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 to -14, and the associated Hazardous Waste Management regulations, 20.4.1 NMAC, incorporate by reference, among other things, the RCRA implementing federal regulations found at 40 CFR Part 270 – EPA Administered Permit Programs: the Hazardous Waste Permit Program. NMED adheres to the permitting process contained within RCRA, correlated federal regulations, the HWA and the Hazardous Waste Management regulations.
- E. On March 18, 2002, NMED issued for the first time a Hazardous Waste Facility Permit to GMI, (RCRA Permit No NM0001002484), for the storage, treatment, and disposal of hazardous waste at its proposed facility in southeastern New Mexico. The proposed facility was to be located on approximately 480 acres of land in Chaves County.² The Triassic Park Waste Disposal Facility was not constructed under this permit.³

² NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (May 10, 2016).

³ <https://www.env.nm.gov/HWB/documents/TriassicPark-PublicNoticeofReceiptofApplication11-29-2011.pdf>.

- F.** On October 17, 2011, GMI submitted to NMED a hazardous waste permit renewal application for the Triassic Park Waste Disposal Facility (Facility). The renewal application proposes a significantly scaled back facility, removing the storage and treatment component of the existing permit, but retaining the ability to dispose of hazardous waste in the proposed hazardous waste landfill. On November 29, 2011, GMI published in major local newspapers that the October 17, 2011 hazardous waste permit renewal application had been submitted to NMED and that it was available for public review. The notice explained that no action or decision was proposed by NMED at that time regarding the permit renewal application.
- G.** NMED issued a letter to GMI on March 14, 2012, indicating that the permit application was determined to be administratively incomplete. On April 30, 2012, GMI submitted a revised permit application to address deficiencies in the NMED Notice of Administrative Incompleteness letter. On May 17, 2012, NMED determined the application to be administratively complete.
- H.** On February 5, 2013, NMED issued a Disapproval Letter to the Permittee on the Part A and B Renewal Application. On July 5, 2013, GMI submitted a revised permit application to address deficiencies in the NMED February 5, 2013 Notice of Disapproval Letter.⁴
- I.** On June 12, 2016, NMED issued Public Notice 16-07, "Notice of Public Comment Period and Opportunity to Request a Public Hearing on a Draft Hazardous Waste Permit for Triassic Park Waste Disposal Facility, EPA ID Number: NM0001002484." The notice stated NMED's intent to issue a Hazardous Waste Permit to GMI as the owner and operator of the Facility to dispose of hazardous waste under RCRA and the HWA. The 60-day comment period was to run from June 15, 2016, through August 14, 2016. During the comment period, any person could submit a request for a public hearing.⁵
- J.** On August 1, 2016, after communications with ECRCO, NMED agreed to extend the public comment period and translate the Fact Sheet into Spanish.
- K.** On August 12, 2016, NMED issued Public Notice 16-10, "Notice of Extended Public Comment Period on a Draft Hazardous Waste Permit for Triassic Park Waste Disposal Facility, EPA ID Number: NM0001002484." This notice extended the period for public comment or to request a public hearing to November 18, 2016. The notice also stated that NMED would issue a future notice announcing a public meeting to be held during the extended comment period.⁶ Public Notice 16-10 was sent out in English and Spanish to NMED's mailing list for the Permit; posted in local newspapers (Roswell Daily Record, Albuquerque Journal and the Carlsbad Current

⁴ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html>

⁵ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (August, 16 2016)

⁶ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (August, 16 2016)

Argus) in both English and Spanish; read on KUNM radio station in both English and Spanish; and posted in 25 locations in 7 communities.

- L. Also, NMED posted the permit Fact Sheet in Spanish on NMED's website and made it available for review in the Roswell Field Office (1914 W. Second, Roswell, NM 88201), Phone (575) 624-6046). NMED also provided a copy directly to Citizens for Alternatives to Radioactive Dumping (CARD).
- M. NMED held an informational public meeting on the permit on October 22, 2016 in Roswell, NM. At this meeting, members of the community were able to discuss their concerns regarding the permitting of the facility. NMED provided simultaneous interpretation in Spanish for the entire meeting. Hard copies of the presentation, the Fact Sheet (English and Spanish versions), the Administrative Record Index and the Public Notice (English and Spanish versions) were provided to meeting participants.
- N. NMED posted a copy of the presentation from the October 22, 2016 Public Information meeting on its website.⁷
- O. On November 1, 2016, after communications with ECRCO, NMED agreed to extend the public comment period for an additional 60 days, post the Fact Sheets (English and Spanish versions) at 23 different locations, announce the public notice on several radio stations identified by Complainants, and publish the notice in the local newspapers.
- P. The extended comment period will end on January 20, 2017 at 5:00 PM. NMED sent a third Public Notice in English and Spanish to the Hazardous Waste Bureau's notification list for Triassic Park notifying stakeholders of the extension.
- Q. NMED posted the third Public Notice and Fact Sheet (English and Spanish versions) at the locations identified in *Posting Locations for Triassic Park Permit Notices* (See attachment)⁸ as well as NMED's district office in Roswell (1914 W. Second Street, Roswell, NM 88201/Phone (575) 624-6046) and the Roswell Public Library located at 301 N. Pennsylvania Ave., Roswell, New Mexico.

⁷ <https://www.env.nm.gov/TIWB/documents/PublicMeetingpresentationonTriassicPark10-22-2016.pdf>.

⁸ With the following exceptions:

- a. The Artesia Post Office wouldn't allow NMED to post the Public Notices and Fact Sheet. However, post office staff accepted the documents in case the Post Master made an exception.
- b. The Tatum post Office wouldn't allow NMED to post the Public Notices and Fact Sheet. Previously, the office was unmanned and so NMED was able to leave copies of the Public Notices and Fact Sheet. However, this time NMED was not granted permission to post the documents.
- c. The Roswell post offices wouldn't allow NMED to post the Public Notices and Fact Sheet, but NMED was able to leave copies at the warehouse building.
- d. The Cumberland Cooperative Water Users Association on Hobson Road is now closed, so NMED was unable to post the Public Notices or Fact Sheet at this location.

- R. NMED sent the third Public Notice (Spanish and English versions) to KENW 89.5⁹, KBIM 94.9, and KALN 96.1 radio stations to be read as a public service announcement (PSA).
- S. NMED subsequently purchased 25 spots on KBIM 94.9. A commercial will run during the following time periods: 10 spots - between 11/28 - 12/6; 7 spots - between 12/30 - 1/5; 8 spots - between 1/14-1/20.¹⁰
- T. On November 17, 2016, NMED published¹¹ the third Public Notice in three newspapers¹²: Albuquerque Journal, Roswell Daily Record, and Carlsbad Current Argus.¹³
- U. In addition, NMED clarified that, as stated in Section 2.5.2 (Prohibited Waste Streams) of the Triassic Park Disposal Facility draft permit, radioactive wastes¹⁴ are prohibited from disposal at the facility.
- V. NMED stated that an exposure evaluation was conducted for Triassic Park Waste Disposal Facility EPA ID Number: NM0001002484 as required by 40 C.F.R. §270.10 (j). Also, NMED clarified that Triassic Park Waste Disposal Facility's permit application contains the necessary components in accordance with the HWA and correlated Hazardous Waste Management regulations, which incorporate the federal RCRA regulations.

III. SPECIFIC NMED COMMITMENTS

A. Specific Actions Related to Hazardous Waste Permits

Triassic Facility

1. NMED has confirmed that it has carefully reviewed the pending permit application and determined that the application contains all necessary

⁹ NMED requested to purchase radio spots on KENW 89.5. However; KENW, does not sell advertising because they are a public radio station. NMED stated that KENW 89.5 did agree to run the PSA on their Community Calendar which runs each day near the noon hour. KENW 89.5 also committed to running the PSA on their television station and would do their best to "work the announcement into various parts of their broadcast day" until January 20th. NMED stated that KENW 89.5 declined to broadcast the PSA in Spanish because: 1) KENW doesn't broadcast in Spanish and 2) "that's not their audience" (see attached email chain between NMED's Communications Director and the radio station).

¹⁰ NMED attempted to purchase spots on KALN 96.1, but did not receive a response from the station.

¹¹ Albuquerque Journal (<http://legals.abqjournal.com/legals/show/377233>); Roswell Daily Record (http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3099/11172016_23787235.htm); Carlsbad Current Argus (http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3036/11172016_23786824.htm) - English only

¹² NMED was unable to find a Spanish-only periodical near the proposed facility.

¹³ Public Notices usually appear in the classified section of these newspapers on the day of issuance.

¹⁴ RCRA Permit Number: NM0001002484 NMED: Radioactive/nuclear materials regulated by the NMED and defined in 20.3.14.7 NMAC; or other naturally occurring materials which contain radioactivity concentrations above the concentration levels regulated under 20.3.14 NMAC, as specified in Permit Attachment F1, Rationale for Analytical Parameter Section; or materials regulated under the Atomic Energy Act of 1954, as amended (including source, special nuclear materials, and byproduct materials as defined in 10 CFR § 20.1003). Page 25

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.

2. At the close of the public comment period on January 20, 2017, NMED will review all public comments and will consider holding a public hearing prior to reaching a final decision regarding issuance of the permit. NMED will respond to comments at a public hearing, if a public hearing is held, and, if the permit is issued, at the time of issuance through a formal "Response to Comments."
3. NMED will continue to notify Complainants, in English and in Spanish, about opportunities for public comment and other important actions related to the permitting and operations of the Triassic Park Waste Disposal Facility.
4. NMED will make any changes it deems necessary to the draft permit based upon the public comments received.

Future Modifications to Permit

1. If the current permit is issued, NMED will ensure that the permittee follows the modification requirements established under 40CFR 270.42 for any changes to the permit necessary before the next permit renewal period. This includes any modifications found to be necessary by the permittee to begin actual construction or operation of the facility that are not included in the existing permit at the time of the modification. NMED will ensure that any public notice and public participation requirements associated with a particular modification are adhered to by both the permittee and NMED.
2. NMED will continue to monitor the construction and operation of the Facility to ensure GMI adheres to state and federal rules and any correlated permit issued by NMED.
3. NMED acknowledges that any future actions/decisions regarding whether to issue or deny Triassic Park Facility permit modifications, renewals or other permit decisions, when applicable, must be made on the record after public notice, and opportunity must be given for public comment and the requesting of a public hearing, and in compliance with all applicable state and federal regulations, including civil rights and language access laws and regulations.

B. Access to Vital Information Related to Triassic Facility

1. NMED will make all reasonable efforts to ensure that all "vital" ¹⁵ information related to the Triassic Facility Permit Process is accessible to LEP persons in a language they can understand. If it is not reasonable to translate an entire document, NMED must ensure that any vital information contained within such a document will be translated. For the current permitting action, this information may be added to the existing Triassic Park Facility Fact Sheet, translated into Spanish and redistributed to all appropriate facilities as previously identified. (See Section II. (Q) above.)
2. Any vital information regarding the Facility that is readily available to the public in English, whether in written form or orally, will, at a minimum, be available to the non-English speaking public through a qualified interpreter or through translation, depending on the circumstances. NMED is not required to translate all documents posted on its Facility-specific website or in the administrative record.
3. NMED commits to having technical staff available to answer questions from the public about this permit via phone or e-mail and will answer any questions regarding this permit in a language other than English through the timely use of a qualified interpreter provided by NMED. The contact information for such staff will be placed on NMED's facility-specific webpage, and on all public notices and fact sheets.

C. Hazardous Waste Permits in General

- a) NMED will ensure that all permit applications contain necessary components as required by 40 C.F.R. §270.10, including Section (j) related to "exposure information", and necessary follow-up will be taken to ensure protection of human health and the environment.

Non-Discrimination Procedural Safeguards

NMED is in the process of reviewing its non-discrimination procedural safeguards and taking steps to bring its program into compliance within the timeframe set forth below.

D. Notice of Non-Discrimination under the Federal Non-Discrimination Statutes

1. NMED will post a notice of non-discrimination on the NMED website and in general publications that are distributed to the public. In order to ensure effective communication with the public, NMED will ensure that its notice of non-discrimination is accessible to limited-English proficient individuals and individuals with disabilities.

¹⁵ Whether or not a document (or the information it disseminates or solicits) is "vital" may depend upon the importance of the program, information, encounter, or service involved, and the consequence to individual with the LEP if the information in question is not provided accurately or in a timely manner. (See EPA's 2004 *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Individuals* at <http://www.gpo.gov/fdsys/pkg/FR-2004-06-25/pdf/04-14464.pdf>.)

2. The notice will contain, at a minimum, the following statements:

- a) NMED does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of its programs or activities, as required by applicable laws and regulations.
- b) NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7 (Non-discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes).
- c) If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact:
 - i. [Insert name and title of Non-Discrimination Coordinator]
 - ii. New Mexico Environmental Department Address Line 1
 - iii. Address Line 2
 - iv. Address Line 3
 - v. Phone number
 - vi. Email address
- d) If you believe that you have been discriminated against with respect to a NMED program or activity, you may contact the [insert title of Non-Discrimination Coordinator] identified above or visit our website at [insert] to learn how and where to file a complaint of discrimination.

3. Within 30 days of the effective date of this Agreement, NMED will publish its notice of non-discrimination on its website as specified above.

E. Grievance Procedures for Complaints filed under the Federal Non-Discrimination Statutes

- 1. NMED will ensure that it has widely and prominently published in print and on-line its grievance procedures to process discrimination complaints filed under federal non-discrimination statutes. NMED will review the grievance procedures on an annual basis (for both in-print and online materials), and revise as necessary, to allow for prompt and appropriate handling of discrimination complaints.
- 2. The grievance procedures will at a minimum address the following:

- a. Clearly identify the Non-Discrimination Coordinator, including contact information;
 - b. Explain the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the grievance procedures;
 - c. State who may file a complaint under the procedures;
 - d. Describe which formal and informal process(es) are available, and the options for complainants in pursuing either;
 - e. Explain that an appropriate, prompt and impartial investigation of any allegations filed under federal non-discrimination statutes will be conducted. (Whether ECRCO considers complaint investigations and resolutions to be "prompt" will vary depending on the complexity of the investigation and the severity and extent of the alleged discrimination. For example, the investigation and resolution of a complaint involving multiple allegations and multiple complainants likely would take longer than one involving a single allegation of discrimination and a single complainant.)
 - f. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;
 - g. Contain assurances that retaliation is prohibited and that claims of retaliation will be handled promptly;
 - h. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.
3. Within 90 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its grievance procedures for review. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

F. Designation of a Non-Discrimination Coordinator

1. NMED will ensure that it has designated at least one Non-Discrimination Coordinator to ensure NMED's compliance with the federal non-discrimination statutes).
2. NMED will ensure that its notice and grievance procedures that it has widely published in print and on-line include the title, email address, telephone number, and other contact information of the Non-Discrimination Coordinator. NMED will explain the responsibilities of the Non-Discrimination Coordinator in its grievance procedures adopted pursuant to Section III, Paragraph c of this Agreement.

3. NMED will ensure that the Non-Discrimination Coordinator's responsibilities include the following:
- a) Providing information to individuals internally and externally regarding their right to services, aids, benefits, and participation in any NMED program or activity without regard to their race, national origin, color, sex, disability, age or prior opposition to discrimination;
 - b) Providing notice of NMED's formal and informal grievance processes and the ability to file a discrimination complaint with NMED;
 - c) Establishing grievance policies and procedures or mechanisms (e.g., an investigation manual) to ensure that all discrimination complaints filed with NMED under federal non-discrimination statutes are processed promptly and appropriately. One element of any policy and procedure or mechanism must include meaningful access for limited-English proficient individuals and individuals with disabilities to NMED programs and activities;
 - d) Ensuring the tracking of all discrimination complaints filed with NMED under federal non-discrimination statutes, including any patterns or systemic problems;
 - e) Conducting a semiannual review of all formal and informal discrimination complaints filed with the NMED Non-Discrimination Coordinator under federal non-discrimination statutes and/or any other complaints independently investigated by NMED in order to identify and address any patterns or systemic problems;
 - f) Informing and advising NMED staff regarding NMED's obligations to comply with federal non-discrimination statutes and serve as a resource on such issues;
 - g) Ensuring that complainants are updated on the progress of their discrimination complaints filed with NMED under federal non-discrimination statutes and are promptly informed as to any determinations made;
 - h) Periodically evaluating the efficacy of NMED's efforts to provide services, aids, benefits, and participation in any NMED program or activity without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination;
 - i) Ensuring appropriate training in the formal and informal processes available to resolve complaints filed under federal non-discrimination statutes; and,

- j) Providing or procuring appropriate services to ensure NMED employees are appropriately trained on NMED non-discrimination policies and procedures, as well as the nature of the federal non-discrimination obligations.
- 4. The Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (e.g., serving as the Non-Discrimination Coordinator as well as NMED legal advisor or representative on civil rights issues);
- 5. Within 30 days of the effective date of this Agreement, NMED will have designated a Non-Discrimination Coordinator and provided appropriate public notice of such as specified above.
- 6. Within 30 days of appointment of a Non-Discrimination Coordinator, NMED will forward to ECRCO proof that the responsibilities have been included in the incumbent's statement of duties and that the incumbent has accepted the duties.

G. Public Participation

- 1. NMED understands that meaningful public involvement consists of informing, consulting and working with potentially affected and affected communities at various stages of the environmental decision-making process to address their needs. See EPA's ECRCO's Public Participation Guidance found at 71 FR 14,207, 14,210 (March 21, 2006). Therefore, NMED will ensure its public involvement process is available to all persons regardless of race, color, national origin (including limited-English proficiency), age, disability, and sex.
- 2. NMED will develop and implement a public participation policy that will require NMED to create and/or carry out each step listed in (a) – (i), below, each time they engage in an action that triggers the public participation process.
 - a) An overview of the Recipient's plan of action for addressing the community's needs and concerns;
 - b) A description of the community¹⁶ (including demographics, history, and background);
 - c) A contact list of agency officials with phone numbers and email addresses to allow the public to communicate via phone or internet;

¹⁶ In order to identify stakeholders in the affected community, the recipient will make a concerted effort to create partnerships with private and public entities to share information in addition to efforts to share information on its website and through standard media outlets. Such information sharing should include communities in the relevant geographic area to the permitted activity; those who have previously expressed an interest in environmental decision making activities; environment and environmental justice organizations; religious institutions and organizations; public administration, environmental, law and health departments or colleges and universities; tribal governments; and relevant community service organizations.

- d) A detailed plan of action (outreach activities) Recipient will take to address concerns;
 - e) A contingency plan for unexpected events;
 - f) Location(s) where public meetings will be held (consider the availability and schedules of public transportation);
 - g) Contact names for obtaining language assistance services for limited-English proficient persons, including translation of documents and/or interpreters for meetings;
 - h) Appropriate local media contacts (based on the culture and linguistic needs of the community); and
 - i) Location of the information repository.
3. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its public participation process/procedures for review. EPA will review the draft process/procedures and provide any comments within 60 days of receipt.

H. NMED Plan to Ensure Access for Persons with Limited-English Proficiency

- 1. NMED will develop, publish, and implement written procedures to ensure meaningful access to all of NMED's programs and activities by all persons, including access by limited-English proficient individuals and individuals with disabilities at no cost to those individuals.
- 2. NMED will conduct the appropriate analysis described in EPA's LEP Guidance found at 69 FR 35602 (June 25, 2004) and <http://www.lep.gov> to determine what language services it may need to provide to ensure that limited-English proficient individuals can meaningfully participate in the process. NMED should develop a language access plan consistent with the details found in ECRCO's training module for LEP. <http://www.epa.gov/civilrights/lepaccess.htm>
- 3. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its written procedures to ensure meaningful access to all of NMED's programs and activities by all persons, including access by limited-English proficient individuals and individuals with disabilities. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

I. NMED Plan to Ensure Access for Persons with Disabilities:

- 1. NMED will provide at no cost appropriate auxiliary aids and services including, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals as necessary to ensure effective communication or an

equal opportunity to participate fully in the benefits, activities, programs and services provided by NMED in a timely manner and in such a way as to protect the privacy and independence of the individual.

2. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its written procedures to ensure meaningful access to all of NMED's programs and activities by individuals with disabilities. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

H. Training

- i. Within 120 days after the effective date of the deliverables identified in this Agreement, including fulfilling the requirements for a Non-Discrimination Coordinator, Non-Discrimination Notice, Grievance Procedures, and Public Participation Process/Procedures, NMED will certify that all appropriate staff have been trained on these processes and procedures and on the nature of the federal non-discrimination obligations.
- ii. Within 90 days after execution of this Agreement, NMED will forward to ECRCO the plan that NMED will put in place to ensure that such training is a routine part of annual or refresher training to appropriate staff.

IV. GENERAL

- A. In consideration of NMED's implementation of commitments and actions described in Section III of this Agreement, EPA will end its investigation of the complaint No. [Exemption 6: PII](#) and not issue a decision containing findings on the merits of the complaint.
- B. EPA will, upon request, provide technical assistance to NMED regarding any of the civil rights obligations previously referenced.
- C. EPA will review and provide feedback about any documentation submitted by NMED demonstrating completion of each commitment (e.g., evidence of publication of the designation of the Non-Discrimination Coordinator) and will provide an assessment as to whether the documentation satisfies the commitment.
- D. NMED will report the completion of each commitment identified under Section III consistent with the timeframes in Section III by certified mail to the Director, EPA External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460, within 30 days of the completion by NMED of each commitment.
- E. EPA will monitor the implementation of the commitments in this Agreement to ensure they are fully implemented. Once the terms of this Agreement are satisfied,

EPA will issue a letter documenting closure of its monitoring actions in complaint No. Exemption 6: PII and closure of the complaint as of the date of that letter.

V. COMPUTATION OF TIME AND NOTICE

- A.* As used in this Agreement, "day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- B.* Service of any documents required by this Agreement shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.
- C.* Documents submitted by NMED to EPA shall be sent to the Director, U.S. EPA External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460.
- D.* Documents submitted by EPA to NMED shall be sent to the Cabinet Secretary, State of New Mexico Environment Department, Harold Runnels Building, 1190 St. Francis Dr., Suite N4050, Santa Fe, NM, 87505, or for U.S. Postal Service, Cabinet Secretary, New Mexico Environment Department, P.O. Box 5469, Santa Fe, New Mexico 87502.

VI. EFFECT OF THE AGREEMENT

- A.* NMED understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, NMED understands that during the monitoring of this Agreement, if necessary, EPA may visit NMED, interview staff, and request such additional reports or data as are necessary for EPA to determine whether NMED has fulfilled the terms of this Agreement and is in compliance with EPA regulations implementing the federal non-discrimination requirements in 40 C.F.R Part 7, which were at issue in this case.
- B.* NMED understands that EPA will close its monitoring of this Agreement when EPA determines that NMED has fully implemented this Agreement and that a failure to satisfy any term in this agreement may result in EPA re-opening the investigation.
- C.* If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to NMED's program or authorities, or for other good cause, the Party seeking a modification shall promptly notify the other in writing, setting forth the facts and circumstance justifying the proposed modification. Any modification(s) to this Agreement shall take effect only upon written agreement by the Director of NMED and the Director of EPA.

- D. This Agreement constitutes the entire Agreement between NMED and EPA regarding the matters addressed herein, and no other statement, promise, or agreement, made by any other person shall be construed to change any commitment or term of this Agreement, except as specifically agreed to by NMED and EPA in accordance with the provisions of Section VI. Paragraph c above.**
- E. This Agreement does not affect NMED's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulations at 40 CFR Part 7, including § 7.85, nor does it affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement.**
- F. The effective date of this Agreement is the date by which both Parties have signed the Agreement. This Agreement may be signed in counterparts. The Cabinet Secretary, in his capacity as an official of NMED, has the authority to enter into this Agreement for purposes of carrying out the activities listed in these paragraphs. The Director of ECRCO has the authority to enter into this Agreement.**

On behalf of the New Mexico Environmental Department,


Butch Tongate
Secretary-Designate

1/19/17
(Date)

On behalf of the U.S. Environmental Protection Agency,


Lilian S. Dorka

January 19, 2017
(Date)

Director
External Civil Rights Compliance Office
Office of General Counsel

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. [Exemption 6: PII](#)

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.

James C. Kenney, Secretary

Page 2

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 [Exemption 6: PII](#) 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

James C. Kenney, Secretary

Page 3

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. [Exemption 6: PII](#), 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.

James C. Kenney, Secretary

Page 4

cc: Ariadne Goerke
Deputy Associate General Counsel
Civil Rights & Finance Law Office

David W. Gray
Acting Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region 6

James McGuire
Regional Counsel
U.S. EPA Region 6

NMED Non-Employee Discrimination Complaint Form

Page 1 of 3



New Mexico Environment Department
Non-Discrimination Coordinator
Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469

Before the New Mexico Environment Department ("NMED") proceeds with a review, all complaints regarding alleged unlawful discrimination shall be documented in writing on this complaint form. The completed form must be signed, or authorized via electronic mail, by the complainant or that person's authorized representative. The signed or authorized form must be received by NMED within ninety (90) calendar days of when the alleged unlawful discriminatory act occurred.

If you are not able to submit a written complaint, arrangements can be made for an NMED employee to assist you in converting the verbal complaint into the written complaint form. To submit a verbal complaint, call NMED's main office phone number: 505-827-2855.

The completed and signed form should either be mailed by U.S. Postal Service to the NMED Non-Discrimination Coordinator at the address above, or an authorized (electronically-signed) copy may be sent via email to: nd.coordinator@state.nm.us

NMED will notify the complainant in writing its determination as to whether NMED has jurisdiction or authority to investigate the complaint and whether NMED finds merit to the allegations to investigate the complaint within fifteen (15) working days from when the Coordinator received the signed complaint. Within 180-days of NMED's acceptance to investigate a complaint, the Secretary of Environment will issue a written decision approving or disapproving, in whole or in part, the recommendations in the investigative fact-finding report, unless it is determined that based upon the complexity of the complaint that additional time is needed. If it is determined that additional time is needed for the issuance of the written decision, the specified number of days by which the complaint evaluation will be extended will be conveyed in writing to the complainant. The written decision shall be provided to the complainant.

1) Date the alleged unlawful discriminatory act occurred:

_____/_____/_____
Month Day Year

NMED Non-Employee Discrimination Complaint Form

Page 2 of 3

2) Complainant Contact Information:

First Name

Last Name

Address

City, State and Zip Code

Phone Number

Email Address

3) Does the complainant have a representative? Circle: Yes or No. If yes, provide representative's contact information below:

First Name

Last Name

Address

City, State and Zip Code

Phone Number

Email Address

4) Identify the protected classification upon which the alleged violation is based:

☐ Race

☐ Disability

☐ Color

☐ Age

☐ National Origin (including Limited
English Proficiency)

☐ Gender

☐ Retaliation

5) Provide a specific and detailed description of the decision(s) or action(s) including the date (or date range) which is alleged to have constituted unlawful discrimination in violation of 40 C.F.R. Parts 5 and 7; Title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; or section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500. Attach additional page(s) as necessary.

NMED Non-Employee Discrimination Complaint Form**Page 3 of 3**

6) Describe the harm alleged to have occurred, or which will occur, because of the alleged discrimination:

7) Identify the parties alleged to be subjected to, or potentially impacted by, the alleged discrimination:

8) Complainant's (or representative's) signature and date:

Signature

Date

For NMED Use Only		
Date Complaint Received by NMED	_____/_____/_____ Month Day Year	Check <input checked="" type="checkbox"/> Form ONLY <input type="checkbox"/> Additional Pages <input type="checkbox"/> Verbal <input type="checkbox"/>
Date of Alleged Unlawful Discrimination	_____/_____/_____ Month Day Year	
Notification Letter Date	_____/_____/_____ Month Day Year	Check <input checked="" type="checkbox"/> Decline <input type="checkbox"/> Accept <input type="checkbox"/> Requires More Information <input type="checkbox"/>

NEW MEXICO ENVIRONMENT DEPARTMENT



Office of the Secretary

POLICY AND PROCEDURE 07-09

- SUBJECT:** Non-Employee Discrimination Complaint.
- PURPOSE:** To provide guidance and clarification to non-employees ("complainant(s)") who have a good faith belief that they have been unlawfully discriminated against by the New Mexico Environment Department ("NMED" or the "Department") on the basis of race, color, national origin, disability, age or sex regarding decisions made by an NMED program as prescribed by 40 C.F.R. Parts 5 and 7, and including: 1) Title VI of the Civil Rights Act of 1964, as amended; 2) section 504 of the Rehabilitation Act of 1973, as amended; 3) the Age Discrimination Act of 1975, as amended; and 4) section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 (Hereinafter referred to collectively as the "Acts").
- POLICY:** This policy contains step-by-step procedures for non-employees who have a good faith belief that they have been unlawfully discriminated against by NMED on the basis of race, color, national origin, disability, age or sex to submit detailed and timely complaints to NMED's Non-discrimination Coordinator (or "Coordinator"). This policy also describes the process that will be used to investigate and resolve such complaints. These procedures shall neither prevent, unduly hinder nor disrupt NMED from carrying out its administrative or regulatory duties including, but not limited to, permitting, rulemaking or enforcement operations. This policy also does not apply to departmental hiring decisions or actions. This policy does not replace or function in lieu of statutory rights of appeal provided for in NMED's controlling statutes.
- REVISIONS:** This policy supersedes any previous versions of NMED Policy 07-09.
- APPLICABILITY:** This policy applies to non-employees affected by decisions made by NMED programs. NMED employees shall follow NMED Policy 01-04, Non-Discrimination and NMED Policy 02-70, Conflict Resolution and Grievances regarding internal NMED complaints alleging unlawful discrimination on the basis of race, ethnicity, national origin, disability, age, or gender.

REFERENCES: 40 C.F.R. Parts 5 and 7; Title VI of the Civil Rights Act of 1964, as amended; Title IX of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500; NMED policy 01-04, Non-Discrimination; and NMED policy 01-70, Conflict Resolution and Grievances.

PROCEDURES:

- 1.0 Scope
- 2.0 Role of the Non-discrimination coordinator
- 3.0 Submission of Complaint
- 4.0 Investigation
- 5.0 Preponderance of the Evidence
- 6.0 Disposition of Complaints
- 7.0 Alternative to Submission of Complaint
- 8.0 Retaliation

APPROVAL: *Butch Tongate* DATE: 8/18/17
Butch Tongate
Cabinet Secretary

Non-employee Discrimination Complaint

1.0 SCOPE

1.1 Pursuant to 40 C.F.R Parts 5 and 7, and the Acts, NMED prohibits unlawful discriminatory practices in its departmental proceedings. NMED does not condone, tolerate, practice, or engage in unlawful discrimination against any external individual, party or parties. NMED employees shall not retaliate, intimidate, threaten, coerce, or discriminate against an individual or group for the purpose of interfering with any right or privilege granted by the Acts, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation under this policy or has opposed any practice made unlawful by the Acts.

1.2 NMED shall execute a prompt and impartial investigation of any discrimination complaint submitted by a non-employee, if the complaint meets the requirements specified herein.

2.0 ROLE OF THE NON-DISCRIMINATION COORDINATOR

2.1 NMED's Non-Discrimination Coordinator is responsible for making information available to non-employees regarding rights to services, aides, benefits, and participation without regard to race, national origin, ethnicity, gender, disability, age or prior opposition to discrimination. NMED's Non-Discrimination Coordinator will periodically evaluate the effectiveness of NMED's efforts to offer such services, aids, benefits and participation opportunities when feasible.

2.2 NMED's Non-Discrimination Coordinator shall coordinate or facilitate training efforts for NMED staff regarding the Department's obligations to comply with non-discrimination statutes, and policies and procedure.

2.3 NMED's Non-Discrimination Coordinator shall track all complaints filed against NMED under this policy or with the U.S. Environmental Protection Agency ("U.S. EPA") and shall review all complaints on a semi-annual basis to identify and address any patterns or systemic problems. NMED's Non-Discrimination Coordinator shall also ensure that complainants are updated on the progress of their discrimination complaints filed with NMED, if requested. NMED's Non-Discrimination Coordinator shall promptly inform the complainant as to any determinations made.

2.4 NMED's Non-Discrimination Coordinator is responsible for providing notice of this policy and carrying out the process, as prescribed by this policy, of the investigation of non-employee complaints. NMED's Non-Discrimination Coordinator may delegate an investigation to another investigator or designee, if necessary, on a case-by-case basis.

3.0 SUBMISSION OF COMPLAINT

3.1 Filing Complaints of Alleged Discrimination.

A. The complainant(s), using NMED's non-employee discrimination complaint form ("complaint form" or "complaint"), may submit written discrimination complaints to

Non-employee Discrimination Complaint

NMED's Non-Discrimination Coordinator at: Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Drive, P.O. Box 5469, Santa Fe, New Mexico 87502-5469 or via electronic mail to nd.coordinator@state.nm.us.

B. In instances where a complainant is unable to submit a written complaint, either by U.S. Postal Service or electronic mail, or requires assistance filing a complaint due to limited English proficiency or disability, but requests that NMED investigate allegedly unlawful discrimination, the complainant may submit a verbal complaint to NMED's Non-discrimination coordinator by calling NMED's main office phone number: 505-827-2855. An NMED employee may assist the complainant to convert the verbal complaint to written form using the complaint form. Once completed, the complainant or that person's representative must sign the complaint form or authorize the form via electronic mail.

C. Complaints must be submitted to NMED's Non-Discrimination Coordinator within ninety (90) calendar days of when the alleged unlawful discriminatory act occurred. NMED may waive the 90-day deadline to submit a complaint. However, NMED will only consider waiving the deadline if the complainant demonstrates that the failure to submit a timely complaint was due to "good cause." Good cause for the purposes of this policy includes any circumstance(s) which would explain and reasonably justify why the complainant could not have submitted a complaint by the deadline. If a complainant requests a waiver of the deadline, the complainant or that person's representative shall submit a complete and written explanation to the coordinator explaining why the complainant failed to file the complaint within ninety (90) days of the allegedly unlawful discrimination.

D. Anonymous complaints shall not be accepted or investigated.

3.2 Complaint Format.

A. All complaints shall be documented on the complaint form and signed or authorized via electronic mail by the complainant or that person's representative before NMED proceeds with its review. Complaints shall include:

- 1) the date the complaint was submitted to the coordinator;
- 2) the complainant's contact information including first and last name, address, city, state, zip code, phone number and email address (as appropriate);
- 3) whether the complainant has a representative and if so, the representative's contact information including first and last name, address, city, state, zip code, phone number and email address (as appropriate);
- 4) identity of the protected classification upon which the alleged violation is based (i.e., Race, Ethnicity, National Origin, Disability, Age or Gender);
- 5) a specific and detailed description of the decision(s) or action(s) (including the date or date range) which is alleged to have constituted unlawful discrimination in violation of 40 C.F.R. Parts 5 and 7;
- 6) a specific description of any adverse impact alleged to have occurred or which will occur; and
- 7) identity of parties alleged to be subjected to, or potentially impacted by

Non-employee Discrimination Complaint

the alleged discrimination.

B. NMED shall acknowledge within five (5) working days its receipt of the complaint in writing to the complainant.

3.3 Preliminary Determination of Jurisdiction, Authority, and Merit.

A. The Non-Discrimination Coordinator shall consult with NMED's Office of General Counsel ("OGC") to determine whether NMED has jurisdiction or authority to pursue the matter and whether an investigation is warranted. NMED will notify the complainant in writing its determination as to whether NMED has jurisdiction or authority to investigate the complaint and whether NMED finds merit to the allegations to investigate the complaint within fifteen (15) working days from when the coordinator received the signed complaint. A complaint will warrant investigation unless:

- 1) it is regarding a hiring decision or action;
- 2) it attempts to replace or function in lieu of statutory rights of appeal provided for in NMED's controlling statutes;
- 3) it appears frivolous or trivial;
- 4) within fifteen (15) working days after the receipt of the complaint, NMED voluntarily concedes non-compliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant;
- 5) within fifteen (15) working days after the receipt of the complaint, the complainant withdraws the complaint; or
- 6) the complaint is not timely submitted and there is no "good cause" to waive the 90-day requirement.

4.0 INVESTIGATION

4.1 Accepting and Investigating a Valid Complaint. If NMED's Non-Discrimination Coordinator accepts the complaint, the Coordinator or a designee will investigate the allegation(s). The Coordinator or designee will investigate, using, as may be appropriate, interviews, statements, or other gathered evidence.

4.2 Request for Additional Information. NMED's Non-Discrimination Coordinator or designee may request from the complainant additional information, evidence, or documentation. The complainant must submit the information requested within thirty (30) working days. If the complainant fails to submit additional information as requested, the Coordinator may consider whether there is sufficient evidence to continue, or whether good cause for a determination of no investigative merit exists.

4.3 Request for Information Involving Third Party Entities. In the case of a complaint which involves or which implicates a third party(s), e.g. a sub-recipient, permit applicant or permittee, NMED will notify the third party(s) of the complaint as soon as possible after receipt of the complaint. NMED's Non-Discrimination Coordinator may request that the third party(s) provide information to NMED to investigate the complaint. NMED may use that information as needed to resolve the complaint.

Non-employee Discrimination Complaint

4.4 Investigative Fact Finding Report. After examining all information pursuant to 40 C.F.R. Parts 5 and 7, the coordinator will consult with OGC and draft and submit an investigative fact finding report, to include a summary of findings and recommendations, and present it to NMED's Office of the Secretary ("OOTS").

5.0 PREPONDERANCE OF THE EVIDENCE

"Preponderance of the Evidence" is the standard by which non-employee complaints must be proved. This standard requires that, for a finding of discrimination, the evidence and testimony must show that it is more likely than not (that is, more than 50% likely) that NMED caused harm due to a discriminatory action.

6.0 DISPOSITION OF COMPLAINTS

Within 180-days of accepting the complaint, unless it is determined that based upon the complexity of the complaint that additional time is needed, NMED's OOTS will issue a written decision, which shall be provided in writing to the complainant, approving or disapproving, in whole or in part, the recommendations within the investigative fact finding report. If it is determined that additional time is needed for the issuance of the written decision, the specified number of days in which the complaint evaluation will be extended will be provided in writing to the complainant. NMED shall implement any recommendations approved by the OOTS.

7.0 ALTERNATIVE TO SUBMISSION OF COMPLAINT WITH NMED

In lieu of filing a complaint with NMED, complaints may be filed in accordance with 40 C.F.R. Parts 5 and 7 with the U.S. EPA addressed to External Civil Rights Complaint Office, U.S. Environmental Protection Agency, Mail Code 2310A, 1200 Pennsylvania Ave. NW, Washington D.C. 20460, or via electronic mail to Title_VI_Complaints@epa.gov.

8.0 RETALIATION

NMED employees shall not retaliate, intimidate, threaten, coerce, or discriminate against an individual or group for the purpose of interfering with any right or privilege granted by the Acts, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation under this policy or has opposed any practice made unlawful by the Acts, nor will NMED tolerate such actions. Retaliation is a serious violation of this policy and must be reported to the Non-Discrimination Coordinator immediately.

Formulario de quejas por discriminación de no empleado del NMED

Página 1 de 3



New Mexico Environment Department
(Departamento del Medio Ambiente de Nuevo México)
Non-Discrimination Coordinator
(Coordinador de No Discriminación)
Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469

Antes de que el Departamento del Medio Ambiente de Nuevo México ("NMED", por su sigla en inglés) proceda con una revisión, todas las quejas relativas a discriminación ilegal alegada se documentarán por escrito en este formulario de quejas. El formulario completo debe estar firmado o autorizado por correo electrónico por el reclamante o el representante autorizado de esa persona. El NMED debe recibir el formulario firmado o autorizado dentro de los noventa (90) días calendario posteriores a la fecha en que haya ocurrido el acto de discriminación ilegal alegada.

Si usted no puede presentar una queja escrita, se pueden hacer los arreglos necesarios para que un empleado del NMED le ayude a volcar la queja verbal en el formulario de quejas por escrito. Para presentar una queja verbal, llame a la oficina central del NMED: 505-827-2855.

El formulario lleno y firmado debe enviarse al Coordinador de No Discriminación del NMED, ya sea por correo postal de los Estados Unidos a la dirección antes indicada o bien como copia autorizada (firmada electrónicamente) por correo electrónico a: nd.coordinator@state.nm.us

Dentro de los quince (15) días laborales posteriores a la fecha en que el coordinador reciba la queja firmada, el NMED notificará al reclamante por escrito sobre su determinación acerca de si el NMED tiene jurisdicción o autoridad para investigar la queja y si el NMED encuentra que existe fundamento en las alegaciones para investigar la queja. Dentro de los 180 días posteriores a la aceptación del NMED para investigar una queja, el Secretario del Medio Ambiente emitirá una decisión por escrito que apruebe o desapruebe, en su totalidad o en parte, las recomendaciones del informe investigativo de determinación de hechos, a menos que se determine que se necesita tiempo adicional debido a la complejidad de la queja. Si se determinara la necesidad de tiempo adicional para emitir la decisión escrita, se comunicará por escrito al reclamante el número especificado de días que se prolongará la evaluación de la queja. Se proporcionará la decisión escrita al reclamante.

1) Fecha en que ocurriera el acto de discriminación ilegal alegado:

_____/_____/_____
Mes Día Año

Formulario de quejas por discriminación de no empleado del NMED

Página 2 de 3

2) Información de contacto del reclamante:

Nombre

Apellido

Dirección

Ciudad, Estado y Código Postal

Número de teléfono

Dirección de correo electrónico

3) ¿Tiene representante el reclamante? Marque con un círculo: Sí o No. Si responde Sí, proporcione a continuación la información de contacto del representante:

Nombre

Apellido

Dirección

Ciudad, Estado y Código Postal

Número de teléfono

Dirección de correo electrónico

4) Identifique la clasificación protegida en la que se basa la contravención alegada:

☐ Raza

☐ Discapacidad

☐ Color

☐ Edad

☐ Origen nacional (incluido el dominio limitado del inglés)

☐ Género

☐ Represalias

5) Proporcione una descripción específica y detallada de la/s decisión/decisiones o de la/s acción/acciones, incluida la fecha (o el intervalo de fechas), que se alega ha/n constituido discriminación ilegal en contravención de 40 C.F.R. Partes 5 y 7; el Título VI de la Ley de Derechos Civiles de 1964, como fuera enmendado; la Sección 504 de la Ley de Rehabilitación de 1973, como fuera enmendada; la Ley de Discriminación por Edad de 1975, como fuera enmendada; o la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972, Ley Pública 92-500. Adjunte páginas adicionales si fuera necesario.

Formulario de quejas por discriminación de no empleado del NMED**Página 3 de 3****6) Describa el daño que se alega ha ocurrido o que ocurrirá debido a la alegada discriminación:**

7) Identifique a las partes que se alega fueron sometidas a la discriminación alegada o que potencialmente estarían afectadas por la misma:

8) Firma del reclamante (o del representante) y fecha:**Firma****Fecha**

For NMED Use Only / Para uso del NMED solamente		
<i>Date Complaint Received by NMED</i> Fecha en que el NMED recibió la queja	_____ / _____ / _____ <i>Month/Mes Day/Día Year/Año</i>	<i>Check / Marcar</i> <input checked="" type="checkbox"/> <i>Form ONLY/</i> SOLO formulario <input type="checkbox"/> <i>Additional Pages/</i> Páginas adicionales <input type="checkbox"/> Verbal <input type="checkbox"/>
<i>Date of Alleged Unlawful Discrimination</i> Fecha de la discriminación ilegal alegada	_____ / _____ / _____ <i>Month/Mes Day/Día Year/Año</i>	
<i>Notification Letter Date</i> Fecha de la carta de notificación	_____ / _____ / _____ <i>Month/Mes Day/Día Year/Año</i>	<i>Check / Marcar</i> <input checked="" type="checkbox"/> <i>Decline</i> Rechazar <input type="checkbox"/> <i>Accept</i> Aceptar <input type="checkbox"/> <i>Requires More Information</i> Requiere más información <input type="checkbox"/>

DEPARTAMENTO DEL MEDIO AMBIENTE DE NUEVO MÉXICO



Oficina del Secretario

POLÍTICA Y PROCEDIMIENTO 07-09

TEMA: Queja por discriminación de no empleado.

PROPÓSITO: Proporcionar orientación y aclaraciones para no empleados ("reclamante/s") que crean de buena fe que han sido ilegalmente discriminados por el Departamento del Medio Ambiente de Nuevo México (en adelante "NMED", por su sigla en inglés, o el "Departamento") por motivos de raza, color, origen nacional, discapacidad, edad o sexo, en lo que respecta a decisiones tomadas por un programa del NMED, según lo prescripto por 40 C.F.R. Partes 5 y 7, e incluidos: 1) el Título VI de la Ley de Derechos Civiles de 1964, como fuera enmendado; 2) la Sección 504 de la Ley de Rehabilitación de 1973, como fuera enmendada; 3) la Ley de Discriminación por Edad de 1975, como fuera enmendada; y 4) la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972, Ley Pública 92-500 (en adelante colectivamente denominadas las "Leyes").

POLÍTICA: Esta política indica paso a paso los procedimientos a seguir por los no empleados que crean de buena fe que han sido ilegalmente discriminados por el NMED por motivos de raza, color, origen nacional, discapacidad, edad o sexo, para presentar quejas detalladas y en forma oportuna ante el Coordinador de No Discriminación del NMED (o "Coordinador"). Esta política también describe el proceso que se usará para investigar y resolver dichas quejas. Estos procedimientos no impedirán, no dificultarán indebidamente ni obstruirán que el NMED lleve a cabo sus funciones administrativas o normativas incluidas, de manera enunciativa pero no limitativa, las actividades relativas a permisos, reglamentaciones o cumplimiento de las reglas. Asimismo, esta política no se aplica a las decisiones o acciones de contratación de empleados del departamento. Esta política no reemplaza ni se usa en lugar de los derechos jurídicos de apelación establecidos en los estatutos de control del NMED.

REVISIONES: Esta política reemplaza toda otra versión previa de la Política 07-09 del NMED.

PERTINENCIA: Esta política se aplica a no empleados afectados por decisiones tomadas por programas del NMED. Los empleados del NMED cumplirán con la Política 01-04 del NMED de No Discriminación y con la Política 02-70 del NMED de Resolución de conflictos y reclamaciones relativas a quejas internas del NMED que aleguen discriminación ilegal por motivos de raza, etnicidad, origen nacional, discapacidad, edad o género.

REFERENCIAS: 40 C.F.R. Partes 5 y 7; el Título VI de la Ley de Derechos Civiles de 1964, como fuera enmendado; el Título IX de la Ley de Derechos Civiles de 1964, como fuera enmendado; la Sección 504 de la Ley de Rehabilitación de 1973, como fuera enmendada; la Ley de Discriminación por Edad de 1975, como fuera enmendada; la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972, Ley Pública 92-500; la Política 01-04 del NMED de No Discriminación; y la Política 01-70 del NMED de Resolución de conflictos y reclamaciones.

PROCEDIMIENTOS:

1.0	Alcance
2.0	Función del Coordinador de No Discriminación
3.0	Presentación de quejas
4.0	Investigación
5.0	Preponderancia de la prueba
6.0	Disposición de quejas
7.0	Alternativa a la presentación de quejas
8.0	Represalias

APROBACIÓN: _____ **FECHA:** _____

Butch Tongate
Secretario de Gabinete

Queja por discriminación de no empleado

1.0 ALCANCE

1.1 De conformidad con 40 C.F.R Partes 5 y 7 y las Leyes, el NMED prohíbe las prácticas discriminatorias ilegales en sus procedimientos departamentales. El NMED no aprueba, no tolera, no practica ni participa en discriminación ilegal contra ninguna persona, parte o partes externas. Los empleados del NMED no tomarán represalias, no intimidarán, no amenazarán, no coaccionarán ni discriminarán contra ninguna persona o grupo con el propósito de interferir con ningún derecho o privilegio otorgado por las Leyes, o debido a que una persona haya presentado una queja o haya testificado, asistido o participado en alguna investigación contemplada en esta política o se haya opuesto a cualquier práctica declarada ilegal por las Leyes.

1.2 El NMED llevará a cabo una investigación rápida e imparcial de toda queja por discriminación presentada por un no empleado, si la queja cumple con los requisitos especificados en este documento.

2.0 FUNCIÓN DEL COORDINADOR DE NO DISCRIMINACIÓN

2.1 El Coordinador de No Discriminación del NMED es responsable de poner a disposición de los no empleados la información relativa a derechos a servicios, ayudas, beneficios y participación sin importar la raza, el origen nacional, la etnicidad, el género, la discapacidad, la edad u oposición previa a la discriminación. El Coordinador de No Discriminación del NMED evaluará periódicamente la eficacia de los esfuerzos del NMED para ofrecer dichos servicios, ayudas, beneficios y oportunidades de participación cuando sea factible.

2.2 El Coordinador de No Discriminación del NMED coordinará o facilitará los esfuerzos de capacitación para el personal del NMED relativos a las obligaciones del Departamento para cumplir con los estatutos, las políticas y los procedimientos de no discriminación.

2.3 El Coordinador de No Discriminación del NMED hará un seguimiento de todas las quejas presentadas contra el NMED contempladas en esta política o con la Agencia de Protección Ambiental de los Estados Unidos ("U.S. EPA", por su sigla en inglés), y examinará semestralmente todas las quejas con el fin de identificar y abordar cualquier patrón o problema sistemático. El Coordinador de No Discriminación del NMED también garantizará que se actualice a los reclamantes con respecto al progreso de sus quejas por discriminación presentadas ante el NMED, si así lo solicitaran. El Coordinador de No Discriminación del NMED informará al reclamante sin demora sobre cualquier determinación que se tome.

2.4 El Coordinador de No Discriminación del NMED es responsable de notificar sobre esta política y de llevar a cabo el proceso, según lo prescribe esta política, de la investigación de quejas de no empleados. El Coordinador de No Discriminación del NMED podrá delegar una investigación a otro investigador o designado, si fuera necesario, según cada caso en particular.

3.0 PRESENTACIÓN DE QUEJAS

Queja por discriminación de no empleado

3.1 Presentación de quejas por discriminación alegada.

A. Mediante el uso del formulario de quejas por discriminación para no empleados del NMED ("formulario de quejas" o "queja"), el/los reclamante/s podrá/n presentar quejas por discriminación por escrito ante el Coordinador de No Discriminación del NMED en: Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Drive, P.O. Box 5469, Santa Fe, New Mexico 87502-5469 o por correo electrónico a: nd.coordinator@state.nm.us.

B. En casos en que el reclamante no pueda presentar una queja por escrito, ya sea por Correo Postal de los Estados Unidos o por correo electrónico, o que necesite ayuda para presentar una queja por tener un dominio limitado del inglés o una discapacidad, pero solicita que el NMED investigue una alegación de discriminación ilegal, el reclamante podrá presentar una queja verbal con el Coordinador de No Discriminación del NMED llamando a la oficina central del NMED: 505-827-2855. Un empleado del NMED podrá asistir al reclamante para convertir la queja verbal a su forma escrita usando el formulario de quejas. Una vez hecho esto, el reclamante o el representante de esa persona deberá firmar el formulario de quejas o autorizar el formulario por correo electrónico.

C. Las quejas deben presentarse ante el Coordinador de No Discriminación del NMED dentro de los noventa (90) días calendario posteriores a la fecha en que haya ocurrido el acto de discriminación ilegal alegada. El NMED podrá eximir del plazo de 90 días para la presentación de una queja. Sin embargo, el NMED solo considerará la exención del plazo si el reclamante demuestra que el hecho de no presentar una queja dentro del plazo establecido se debió a una "buena causa". Para propósitos de esta política, una buena causa incluye cualquier circunstancia que explique y justifique razonablemente por qué el reclamante no pudo haber presentado una queja antes del vencimiento del plazo. Si un reclamante pidiera una exención del plazo, el reclamante o el representante de esa persona deberá presentar una explicación completa por escrito ante el coordinador, en la que explique por qué el reclamante no presentó la queja dentro del plazo de noventa (90) días posteriores a la fecha en que haya ocurrido la discriminación ilegal alegada.

D. No se aceptarán ni se investigarán quejas anónimas.

3.2 Formato de la queja.

A. Todas las quejas deben documentarse en el formulario de quejas, y el reclamante o el representante de esa persona deberá firmar o autorizar el formulario por correo electrónico antes de que el NMED proceda con su revisión. Las quejas deben incluir:

- 1) la fecha en que la queja fue presentada ante el coordinador;
- 2) la información de contacto del reclamante, incluidos su nombre y apellido, dirección, ciudad, estado, código postal, número de teléfono y dirección de correo electrónico (según sea apropiado);
- 3) si el reclamante tiene un representante y, de ser así, proporcionar la información de contacto del representante, incluidos su nombre y apellido, dirección, ciudad, estado, código postal, número de teléfono y dirección de correo electrónico (según sea apropiado);

Queja por discriminación de no empleado

- 4) la identidad de la clasificación protegida sobre la cual se basa la infracción alegada (es decir: raza, etnicidad, origen nacional, discapacidad, edad o género);
- 5) una descripción específica y detallada de la/s decisión/decisiones o de la/s acción/acciones (incluida la fecha o el intervalo de fechas) que se alega ha/n constituido discriminación ilegal en contravención de 40 C.F.R. Partes 5 y 7;
- 6) una descripción específica de todo impacto adverso alegado que haya ocurrido o que ocurrirá; y
- 7) la identidad de las partes que se alega fueron sometidas a la discriminación alegada o que potencialmente estarían afectadas por la misma.

B. El NMED acusará recibo de la queja por escrito al reclamante dentro de un plazo de cinco (5) días laborales.

3.3 Determinación preliminar de jurisdicción, autoridad y fundamento.

A. El Coordinador de No Discriminación consultará con la Oficina de Asesoría Legal (en adelante "OGC", por su sigla en inglés) del NMED para determinar si el NMED tiene jurisdicción o autoridad para proceder en el asunto y si se justifica una investigación. Dentro de los quince (15) días laborales posteriores a la fecha en que el coordinador reciba la queja firmada, el NMED notificará al reclamante por escrito sobre su determinación acerca de si el NMED tiene jurisdicción o autoridad para investigar la queja y si el NMED encuentra que existe fundamento en las alegaciones para investigar la queja. Toda queja ameritará una investigación a menos que:

- 1) se trate de una decisión o acción relativa a una contratación;
- 2) intente reemplazar o funcionar en lugar de los derechos jurídicos de apelación previstos por los estatutos de control del NMED;
- 3) parezca ser infundada o improcedente;
- 4) dentro de los quince (15) días laborales posteriores a la recepción de la queja, el NMED admita voluntariamente el incumplimiento y acepte tomar una acción correctiva apropiada o llegue a una resolución informal con el reclamante;
- 5) dentro de los quince (15) días laborales posteriores a la recepción de la queja, el reclamante retire la queja; o
- 6) la queja no fuera presentada dentro del plazo establecido y no haya una "buena causa" para eximir del requisito de 90 días.

4.0 INVESTIGACIÓN

4.1 Aceptación e investigación de una queja válida. Si el Coordinador de No Discriminación del NMED acepta la queja, el Coordinador o un designado investigará la/s alegación/alegaciones. El Coordinador o designado hará una investigación usando, como sea apropiado, entrevistas, declaraciones u otras pruebas reunidas.

4.2 Solicitud de información adicional. El Coordinador de No Discriminación del NMED o el designado podrá pedir al reclamante información, pruebas o documentación

Queja por discriminación de no empleado

adicionales. El reclamante debe presentar la información solicitada dentro de un plazo de treinta (30) días laborales. Si el reclamante no presentara la información adicional solicitada, el Coordinador podrá considerar si existen pruebas suficientes para continuar o si existe una buena causa para determinar que no existe fundamento para la investigación.

4.3 Solicitud de información que involucra a terceras partes. En caso de que una queja involucre o implique a terceras partes, por ejemplo: un receptor indirecto, un solicitante de permiso o un permisionario, el NMED notificará a las terceras partes sobre la queja tan pronto como sea posible luego de recibir la queja. El Coordinador de No Discriminación del NMED podrá pedir que las terceras partes proporcionen información al NMED para investigar la queja. El NMED usará esa información como sea necesario para resolver la queja.

4.4 Informe investigativo de determinación de hechos. Luego de examinar toda la información conforme a 40 C.F.R. Partes 5 y 7, el coordinador consultará con la OGC, y redactará y presentará un informe investigativo de determinación de hechos, que incluya un resumen de las determinaciones y recomendaciones, y lo presentará ante la Oficina del Secretario del NMED (en adelante "OOTS", por su sigla en inglés).

5.0 PREPONDERANCIA DE LA PRUEBA

"Preponderancia de la prueba" es el estándar por el cual se debe comprobar la veracidad de las quejas de no empleados. Este estándar exige que, para una determinación de discriminación, la prueba y el testimonio deben mostrar que es más probable que improbable (esto significa que es más del 50% probable) que el NMED haya causado daños debido a una acción discriminatoria.

6.0 DISPOSICIÓN DE QUEJAS

Dentro de los 180 días posteriores a la aceptación de la queja, a menos que se determine que se necesita tiempo adicional debido a la complejidad de la queja, la OOTS del NMED emitirá una decisión por escrito que se proporcionará al reclamante por escrito e indicará si se aprueban o desaprueban, en su totalidad o en parte, las recomendaciones del informe investigativo de determinación de hechos. Si se determinara la necesidad de tiempo adicional para emitir la decisión escrita, se proporcionará al reclamante por escrito el número especificado de días que se prolongará la evaluación de la queja. El NMED implementará toda recomendación aprobada por la OOTS.

7.0 ALTERNATIVA A LA PRESENTACIÓN DE QUEJAS ANTE EL NMED

En lugar de presentar una queja ante el NMED, se podrán presentar quejas conforme a 40 C.F.R. Partes 5 y 7 ante la U.S. EPA., dirigidas a: External Civil Rights Complaint Office, U.S. Environmental Protection Agency, Mail Code 2310A, 1200 Pennsylvania Ave. NW, Washington D.C. 20460, o por correo electrónico a Title_VI_Complaints@epa.gov.

8.0 REPRESALIAS

Los empleados del NMED no tomarán represalias, no intimidarán, no amenazarán, no coaccionarán ni discriminarán contra ninguna persona o grupo con el propósito de interferir

Queja por discriminación de no empleado

con ningún derecho o privilegio otorgado por las Leyes, o debido a que una persona haya presentado una queja o haya testificado, asistido o participado en alguna investigación contemplada en esta política o se haya opuesto a cualquier práctica declarada ilegal por las Leyes, ni el NMED tolerará dichas acciones. Las represalias son una violación grave de esta política y deben denunciarse inmediatamente ante el Coordinador de No Discriminación.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

COGNIZANT AGENCY
NEGOTIATION AGREEMENT

Page 1 of 2

State of New Mexico
 Environment Department
 Santa Fe, New Mexico

Date: February 15, 2024

Filing Ref: March 22, 2023

The indirect cost rates contained herein are for use on grants and contracts with the Federal Government, subject to the limitations contained in the guidance and in Section II, A below.

SECTION I: RATES

<u>Type</u>	<u>Effective Period</u>		<u>Rate</u>	<u>Base</u>
	<u>From</u>	<u>To</u>		
Fixed	7/1/2024	6/30/2025	35.20%	(a)

Basis for Application

(a) Direct Salaries and fringe benefits.

Treatment of Fringe Benefits: Fringe benefits applicable to direct salaries and wages are treated as direct costs.

SECTION II: GENERAL

A. LIMITATIONS: The rates in this Agreement are subject to any statutory and administrative limitations and apply to a given grant, contract or other agreement only to the extent that funds are available. Acceptance of the rates is subject to the following conditions: (1) Only costs incurred by the department/agency or allocated to the department/agency by an approved cost allocation plan were included in the indirect cost pool as finally accepted; such costs are legal obligations of the department/agency and are allowable under governing cost principles; (2) The same costs that have been treated as indirect costs have not been claimed as direct costs; (3) Similar types of costs have been accorded consistent accounting treatment; and (4) The information provided by the department/agency which was used to establish the rates is not later found to be materially incomplete or inaccurate by the Federal Government. In such situations the rate(s) would be subject to renegotiation at the discretion of the Federal Government.

B. CHANGES. The fixed rate contained in this agreement is based on the organizational structure and the accounting system in effect at the time the proposal was submitted. Changes in the organizational structure or changes in the method of accounting for costs which affect the amount of

State of New Mexico
Environment Department
Santa Fe, New Mexico

Page 2 of 2

reimbursement resulting from use of the rate in this agreement, require the prior approval of the authorized representative of the responsible negotiation agency. Failure to obtain such approval may result in subsequent audit disallowances.

C. THE FIXED RATE contained in this agreement is based on an estimate of the cost which will be incurred during the period for which the rate applies. When the actual costs for such a period have been determined, an adjustment will be made in the negotiation following such determination to compensate for the difference between the cost used to establish the fixed rate and that which would have been used were the actual costs known at the time.

D. NOTIFICATION TO FEDERAL AGENCIES: Copies of this document may be provided to other Federal agencies as a means of notifying them of the agreement contained herein.

E. SPECIAL REMARKS: Please confirm your acceptance of the terms of the indirect cost rate agreement by signing and returning this letter to me. Please retain a copy for your records.

ACCEPTANCE

The undersigned official warrants
that he/she has the proper authority
to execute this agreement on the
behalf of the State Agency:

By the Federal Agency:

DocuSigned by:
Miranda Ntoko
2BCC0BD02B86414
(Signature)

Miranda Ntoko

(Name)

Chief Financial Officer

(Title)

NM Environment Dept.

(Agency)

09 February 2024

(Date)

JACQUELINE SMITH
Digitally signed by JACQUELINE SMITH
Date: 2024.02.09 16:05:38 -05'00'
(Signature)

Jacqueline Smith, Rate Negotiator
National Policy, Training and
Compliance Division
U.S. Environmental Protection
Agency

Negotiated by: Jenny Bae
Telephone: (202) 564-0422



EPA KEY CONTACTS FORM

This collection of information is approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (OMB Control No. 2030-0020). Responses to this collection of information are required to obtain an assistance agreement (40 CFR Part 30, 40 CFR Part 31, and 40 CFR Part 33 for awards made prior to December 26, 2014, and 2 CFR 200, 2 CFR 1500, and 40 CFR Part 33 for awards made after December 26, 2014). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public reporting and recordkeeping burden for this collection of information is estimated to be 0.5 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the Regulatory Support Division Director, U.S. Environmental Protection Agency (2821T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.

Authorized Representative: *Original awards and amendments will be sent to this individual for review and acceptance, unless otherwise indicated.*

Name:	Prefix: Mr.	First Name: James	Middle Name:	
	Last Name: Kenney		Suffix:	
Title:	NMED Cabinet Secretary			
Complete Address:				
Street1:	P.O. Box 5469			
Street2:				
City:	Santa Fe	State:	New Mexico	
Zip / Postal Code:	87502-5469	Country:	United States	
Phone Number:	505-827-2855	Fax Number:		
E-mail Address:	James.Kenney@env.nm.gov			

Payee: *Individual authorized to accept payments.*

Name:	Prefix: Ms.	First Name: Miranda	Middle Name:	
	Last Name: Ntoko		Suffix:	
Title:	NMED Deputy ASD Director - Chief Financial Officer			
Complete Address:				
Street1:	1190 St. Francis Drive, S-4107			
Street2:				
City:	Santa Fe	State:	New Mexico	
Zip / Postal Code:	87505	Country:	United States	
Phone Number:	505-699-9176	Fax Number:		
E-mail Address:	Miranda.Ntoko@env.nm.gov			

EPA KEY CONTACTS FORM

Administrative Contact: *Individual from Sponsored Programs Office to contact concerning administrative matters (i.e., indirect cost rate computation, rebudgeting requests etc).*

Name: Prefix: First Name: Middle Name:
Last Name: Suffix:
Title:

Complete Address:

Street1:
Street2:
City: State:
Zip / Postal Code: Country:
Phone Number: **Fax Number:**
E-mail Address:

Project Manager: *Individual responsible for the technical completion of the proposed work.*

Name: Prefix: First Name: Middle Name:
Last Name: Suffix:
Title:

Complete Address:

Street1:
Street2:
City: State:
Zip / Postal Code: Country:
Phone Number: **Fax Number:**
E-mail Address: