UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

December 18, 2019

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In Reply Refer to:
EPA Complaint No. 02NO-19-R6

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. 02NO-19-R6

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. 02NO-19-R6, 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 age[1] in programs or activities that receive federal financial assistance from EPA. On June 27, 2019, ECRCO accepted for investigation the following issue:[2]

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[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).

> 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 Mexican[3] 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 regulations[4] 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 Report[7] from the WCS public hearings.[8] ECRCO investigated the source of Eunice's drinking water[9] 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

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[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 (b) (6) Privacy, (b) (7)(C) Enforcement Privacy on October 2, 2019, and the interview with [redacted] was conducted on October 4, 2019.

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, siltsone, sandstone, and silty dolomite deposits. The Dockum Group is over 1,000 feet thick beneath the WCS. The upper

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[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/

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 siltsone/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 2018[19] 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 (b) (6) Privacy, (b) (7)(C) Enforcement Privacy 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.

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

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[22] Title VI Complaint filed by Citizens for Alternatives to Radioactive Dumping; Alliance for Environmental Strategies; Concerned Citizens for Nuclear Safety; [redacted] 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; [redacted] 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 #09R-02-R6.

[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.*

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).

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

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[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).

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

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[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; (b) (6) Privacy (b) (6) Privacy 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; (b) (6) Privacy (b) (6) Privacy (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; (b) (6) Privacy pages 8 and 9. URENCO USA permit DP-1132 email from (b) (6) Privacy, (b) (7)(C) E (b) (6) Privacy, (b) CARD to Brittany Robinson, EPA ECRCO (Nov. 25, 2019).

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).

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 groundwater[51], 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 Eunice[53] 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; (b) (6) Privacy (b) (6) Privacy
[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).

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.*

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

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 (b) (9) [redacted] (b) (9) [redacted] 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

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[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

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. 02NO-19-R9. 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,

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