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January 15, 2004

Karen Higginbotham, Director
Division of Civil Rights MC1201A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

By facsimile (202) 501-1836
w/o exhibits) and Federal Express

Re: Southwest landfill
South Valley Coalition of Neighborhood Associations/Isleta Pueblo/SouthWest Organizing Project, Complainants, v. New Mexico Environment Department
U.S. EPA File 13R-99-R6

Dear Ms. Higginbotham:

This is a second amended complaint ("Second Amended Complaint") under Title VI of the Civil Rights Act of 1964. This Second Amended Complaint is filed by the South Valley Coalition of Neighborhood Associations, a coalition of neighborhood associations in the South Valley of Albuquerque, New Mexico, the Isleta Pueblo, a sovereign Native American nation located south of the Southwest landfill and the South Valley, and the SouthWest Organizing Project, a grassroots environmental justice group working for justice throughout New Mexico and the southwestern United States.[1] This Second Amended Complaint supplements the original Complaint in this matter filed on May 13, 1999 and the First Amended Complaint filed on August 13, 1999.

This Second Amended Complaint is filed against the State of New Mexico Environment Department ("NMED"), which is a recipient of U.S. Environmental Protection Agency ("EPA") assistance within the meaning of 40 C.F.R. §7.25. The South Valley Coalition of Neighborhood Associations, the Isleta Pueblo, and the SouthWest Organizing Project (collectively referred to as "the Complainants") are represented in this matter by the New Mexico Environmental Law Center.

The Complainants allege that by issuing a Resource Conservation and Recovery Act ("RCRA") permit to the Southwest landfill (located on the southwestern escarpment

[1] The neighborhood associations that are part of the South Valley Coalition of Neighborhood Associations and that are Complainants are: the Armijo, Conita Real, Don Andres, Five Points, Foothill, Gunclub West, Los Padillas, Meade, Mountain View, Pajarito Village, Powersway, South Atrisco, Valley Gardens, and Vecinos del Bosque Neighborhood Associations.

1405 Luisa Street, Suite 5, Santa Fe, New Mexico 87505
Phone (505) 989-9022 Fax (505) 989-3769 nmelc@nmelc.org

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of Bernalillo county) for an expansion from 80 acres to 120 acres and authorization to accept and dispose of municipal waste in addition to construction and demolition debris waste, the NMED has discriminated on the basis of race, color, national origin, and income level against the Latino and Native American residents who live near the landfill, including the Latino residents who live within 1800 feet of the landfill. This discrimination violates Title VI of the Civil Rights Act of 1964 and the EPA's implementing regulations, codified at 40 C.F.R. Part 7. The Complainants allege that the NMED decision resulted in illegal discrimination against these minority populations at the time that the decision was made and that its illegal discriminatory effect continues at the time of the filing of this Second Amended Complaint.

The Complainants are filing this Second Amended Complaint at this time because the Southwest landfill has obtained from the Bernalillo County Board of County Commissioners an amendment to the landfill's special use zoning permit; this amendment allows the Southwest landfill to expand the landfill by 60 acres to a total size of 140 acres.

The Complainants are complying with the direction that the EPA provided in response to the Complainants' First Amended Complaint. The EPA asserted that the NMED's decision could not have a disparate impact upon the Latino and Native American populations affected by the landfill because the landfill did not have the zoning permit that it needed in order to undertake the expansion and acceptance of municipal solid waste authorized by the NMED decision.[2] The EPA also indicated that if the landfill did obtain that zoning permit, the Complainants could re-file their Complaint.[3] Although the amendment to the landfill special use zoning permit that was issued by the Bernalillo County Board of County Commissioners does not authorize the landfill to accept municipal waste, it does authorize the landfill to expand, and the Complainants therefore are re-filing their Complaint.[4]

Introduction

This Second Amended Complaint comes as a result of an administrative process conducted by the NMED, in which the NMED, under state and federal law, approved a permit for the Southwest landfill. The permit allows the landfill to expand significantly and to accept for disposal municipal solid waste in addition to construction and demolition debris waste.

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[2] Letters dated February 11, 2002 and May 13, 2002 from Karen Higginbotham, Acting Director, Office of Compliance Assurance, EPA, to Douglas Meiklejohn, counsel for the Complainants.

The Complainants asserted then, and continue to assert, that if the EPA really wanted to prevent a disparate impact from occurring, the EPA should have taken the opportunity to investigate the Complainants' allegations against the NMED before a zoning permit was issued. Letter dated April 26, 2002 from Douglas Meiklejohn, counsel for the Complainants, to Eva Hahn, Attorney, Office of Compliance Assurance, EPA.

[3] Letter dated May 13, 2002 from Karen Higginbotham, Acting Director, Office of Compliance Assurance EPA, to Douglas Meiklejohn, counsel for the Complainants.

[4] The Complainants reserve the right to supplement this Second Amended Complaint if the landfill seeks and obtains an amendment to its Bernalillo County special use zoning permit authorizing the landfill to accept municipal waste.

This decision came after the 1989 NMED decision to permit the Cerro Colorado municipal solid waste landfill, which also lies in the southwestern quadrant of Bernalillo County, and after years of demonstrated successful operation of the Cerro Colorado facility. Although the Cerro Colorado landfill and the Southwest landfill sit in two different ground water basins,[5] the ground water beneath both of these solid waste facilities flows to the southwest and to the south; the future direction of the ground water flow is difficult to predict. All of the current and predicted ground water flows impose substantial risks on the predominantly Latino communities around the Southwest landfill and on the Isleta Pueblo. In addition, the other impacts of the NMED's decision, including the effects of landfill traffic on residential neighborhoods and littering in those neighborhoods, have their primary impacts on those predominantly Latino communities.

In 1989, while seeking a site for the consolidated landfill for Bernalillo County and the City of Albuquerque which became the Cerro Colorado landfill, a premier Albuquerque area engineering firm specifically ruled out the Southwest landfill site because of its proximity to residential areas and the Pueblo and because of its limited access.

Bernalillo County and NMED records show that the Southwest landfill has failed to operate according to State law on many occasions. The NMED permit proceeding hearings also demonstrated that there was no need by either Albuquerque or Bernalillo County or the State for this facility. And, the permitting of this facility runs counter to the New Mexico Solid Waste Management Plan, which sets forth NMED's solid waste management policy of consolidating municipal waste in larger, regional solid waste disposal facilities that can service larger populations with adequate liners and monitoring wells, and moving away from the permitting of smaller facilities such as the Southwest landfill.

Despite Southwest landfill's poor performance, the lack of any demonstrated need for this facility, the low-income Latino and Native American communities that lie so close to the landfill, the private wells in the area, the Cerro Colorado landfill's substantial capacity which has been calculated to meet Bernalillo county and Albuquerque's needs for at least another 50 years, and a fast-eroding escarpment, the NMED granted a permit for Southwest landfill to be able to expand and to dispose of municipal waste.

The NMED's decision on the Southwest landfill has resulted in the imposition of a disproportionate environmental impact and disproportionate environmental risks on the predominantly minority South Valley communities and on the Isleta Pueblo. The NMED decision's imposition of those disproportionate environmental impacts and risks existed at the time of the filing of the Complainants' original Complaint, when they filed their First Amended Complaint, and continues to exist now.

This decision has perpetuated a system of discrimination in this part of the state's most populous area, where major solid and liquid waste facilities have been permitted by the NMED, exclusively, in the southwest quadrant of Bernalillo County, in the South Valley, on

[5] The Cerro Colorado landfill is not located over ground water that is a source of drinking water for Albuquerque.

the southwestern escarpment, and just north of the Pueblo of Isleta. This pattern of discriminatory impact violates Title VI and the EPA's regulations and should not be continued by the NMED's issuance of a permit authorizing expansion and disposal of municipal solid waste by the Southwest landfill.

Finally, although the ruling by the Bernalillo County Board of County Commissioners limits the Southwest landfill to acceptance of construction and demolition debris waste, that does not excuse the NMED from its determination to permit the landfill to accept municipal waste. Regardless of the actions taken by Bernalillo County, the NMED must bear responsibility for its decision, and that decision authorized both expansion of the landfill and acceptance of municipal waste by the landfill. For that reason, this Second Amended Complaint addresses both aspects of the NMED's decision.

Timeliness

The NMED's final action on the permit for the Southwest landfill was taken on November 17, 1998. That is the date on which the NMED issued its Amended Final Order following the remand to the NMED of issues that had been appealed to the State Court of Appeals. The Complainants' original complaint was filed on May 14, 1999, within 180 days of the NMED's final action; it was therefore timely pursuant to 7 C.F.R. §7.120(b)(2). The Complainants' First Amended Complaint was filed by August 13, 1999, the date on which the Complainants indicated to the EPA that they would provide a more complete briefing of the allegations in their original complaint. In addition, the EPA informed the Complainants that filing their First Amended Complaint by August 13, 1999 would be appropriate.[6]

Finally, in response to the Complainants' First Amended Complaint, the EPA indicated that the EPA would treat as timely a re-filing of the Complainants' Complaint if that re-filing occurred within 60 days after the granting of an amendment to the landfill's Bernalillo County special use zoning permit. The amendment to the landfill's Bernalillo County special use zoning permit authorizing the landfill to expand was issued by the Bernalillo County Board of County Commissioners on November 18, 2003. This Second Amended Complaint is being filed on January 15, 2004, and it therefore is timely.

Statement of Procedural Facts

This Second Amended Complaint challenges the NMED's issuance of a permit authorizing acceptance of municipal solid waste by and expansion of the Southwest landfill, located on the southwestern escarpment of Bernalillo county. This Second Amended Complaint alleges that the NMED, in issuing this permit, has failed to consider the impact of the permit on the neighboring Latino and Native American communities. Specifically, NMED has failed to consider that these minority communities will bear the principal impact of the facility's expansion and change of status, including impacts from significant increases in truck

[6]July 30, 1999 telephone message from Mike Matheison, Office of Civil Rights of the EPA to Douglas Meiklejohn, counsel for the Complainants.

traffic. These minority communities also will bear a disproportionate share of the risks that result from the granting of the permit, such as the risk of ground water contamination from the landfill.

The Southwest landfill has been operated as a construction and demolition debris only landfill since 1986. NMED's August 5, 1999 Response to the Complaint ("NMED Response") at 2. In response to an NMED request, the operator of the Southwest landfill filed an application for a permit with the NMED on September 25, 1995. Id. at 2, NMED Hearing Officer's Report and Recommended Findings of Fact and Conclusions Of Law entered on April 9, 1997 in the NMED permit proceeding ("Hearing Officer's Report") at 6.[7] The permit application sought to change the status of the landfill from one that accepts only construction and demolition debris waste to one that accepts municipal waste. NMED Response at 2. The application also sought a 50% increase in the size of the landfill, from 80 acres to 120 acres. Hearing Officer's Report at 7. The NMED decision granted both changes sought by the landfill. The decision authorized the landfill to accept municipal waste and to expand from 80 acres to 120 acres.

Both before and during the NMED administrative proceeding, the Southwest landfill initiated separate proceedings before Bernalillo County in which the landfill sought an amendment to its Bernalillo County special use zoning permit to allow the landfill to accept municipal waste and to expand. Atlixco Coalition v. County of Bernalillo, 127 N.M.549, 550-551; 984 P.2d 796 (Ct. App.), cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999). At the conclusion of the County administrative proceeding initiated by the landfill in September, 1996, the County Board of County Commissioners authorized both expansion of the landfill and acceptance of municipal waste by the landfill. Id. 127 N.M. 551. That ruling was subsequently overturned by the New Mexico Court of Appeals. Id. 127 N.M. 554-556.

In late 2002 and throughout 2003, the Southwest landfill again sought to amend its Bernalillo County special use zoning permit to allow the landfill to expand from 80 acres to 120 acres. The landfill also sought an amendment to that permit to authorize the landfill to establish a transfer station and an equipment yard, each on a separate ten acre parcel of land. Although each of these proposed changes was rejected by the County Extraterritorial Land Use Commission and the County Extraterritorial Land Use Authority, the Bernalillo County Board of County Commissioners voted on November 18, 2003 to approve an amendment to the special use zoning permit authorizing the landfill to expand to a total size of 140 acres.[8]

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[7]The Hearing Officer's Report was adopted (with modifications) by the NMED Secretary in the NMED's May 8, 1997 Final Order ("hereafter NMED's Final Order") granting the permit for the Southwest landfill.

The Complainants have cited to various documents and to the transcript in the NMED permit proceeding for the convenience of the EPA in its investigation of their Complaint, First Amended Complaint, and Second Amended Complaint. In order to facilitate that investigation, the Complainants request that the EPA incorporate the record of that proceeding into the record for this proceeding.

[8] November 20, 2003 Notification of Decision of the Bernalillo County Board of County Commissioners, a copy of which is attached as Second Amended Complaint Exhibit A. The Board of County Commissioners denied the landfill's request for authorization to establish the transfer station and equipment yard. (Continued)

Title VI and NMED

Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground 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.

42 U.S.C. §2000d.

NMED, a recipient of federal financial assistance from EPA, has violated Title VI and EPA's regulations by permitting waste facilities in low-income Latino communities. NMED is not only an active participant in the system of siting these facilities, but continues to use a method of administering its RCRA permitting authority that results in discriminatory outcomes.

EPA must insure that recipients of EPA financial assistance are not subjecting people to discrimination. In particular, EPA's Title VI regulations provide that an EPA aid recipient:

> shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex.

40 C.F.R. §7.35(b).

The siting of waste facilities in a discriminatory manner is directly prohibited by the regulations:

> A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

40 C.F.R. §7.35(c).

Attached Exhibits are referred to as "Second Amended Complaint Exhibits". Exhibits that were submitted with the First Amended Complaint are referred to as "First Amended Complaint Exhibits". Exhibits that were presented during the NMED permit proceeding are referred to as "NMED Permit Proceeding Exhibits".

NMED is subject to the nondiscrimination requirements of Title VI because it is a recipient of federal funds and services from EPA. NMED has primary authority in New Mexico under the federal RCRA solid waste program (59 Federal Register 66306), and thus has approval authority over all solid waste facility proposals in New Mexico. As a recipient of EPA financial and other assistance, NMED has violated and is violating Title VI as implemented by EPA's Title VI regulations.

Title VI Violations

I. NMED's action has a discriminatory disproportionate impact.

The overwhelming majority of residents who will bear the impact of the NMED's decision allowing disposal of municipal waste in the Southwest landfill, and who will be at risk of further impacts from that decision, are people of color. The NMED did not consider this in making its decision to allow disposal of municipal waste in the landfill.

A. The populations that will be at risk from disposal of municipal waste in the Southwest landfill are overwhelmingly minority and low income.

The impacts and risks that will result from the NMED's issuance of the permit will be borne by communities that are both overwhelmingly minority and low income. The community that lies closest to the Southwest landfill is a Mexican immigrant community that includes an estimated 350 families. Announcement of March 8, 2003 Meeting at the Home of [redacted] and Family (attached as Second Amended Complaint Exhibit B), page 2. Many of the members of this community were sold illegally platted land, and community members have been working for half a dozen years or more to address this situation with Bernalillo County. The closest trailer to the landfill is 1800 feet off of the Southwest landfill's southeastern corner. These residents live without electricity or running water. There is a handful of private wells in this closest Latino community. See Announcement of March 8, 2003 Meeting at the Home of [redacted] and Family (Second Amended Complaint Exhibit B), page 2. Thus, the communities of color that lie in the direction of the ground water gradient from Southwest landfill and the Cerro Colorado landfill are not on city or county water systems and are particularly susceptible to risks posed by contamination of ground water.

More broadly, the communities that are most at risk of contamination from the NMED's decision to allow the Southwest landfill to expand permit disposal of municipal solid waste in the Southwest landfill are the South Valley of Albuquerque and the Isleta Pueblo. Each of these communities consisted of an overwhelmingly minority population at the time that the NMED made its decision, and continue now to consist of such a population.

The South Valley of Albuquerque as defined by the U.S. Census Bureau (the South Valley Census Designated Place) consists of the areas outlined in yellow on First Amended Complaint Exhibit 1 (except for the cross-hatched areas), including the following census tracts

shown on First Amended Complaint Exhibit 2: 45.02, 46.02, and parts of tracts 13, 23, 40.01, 43, 44.01, 44.02, 45.01, 46.03, and 46.04. The South Valley is also defined more broadly to include the south west quadrant of Bernalillo county, that is, everything west of Interstate 25 and south of Interstate 40.[9] (The locations of these Interstates are shown on First Amended Complaint Exhibit 2.) Regardless of the definition, the South Valley consists of an overwhelmingly minority population with a low per capita income.

The total 1990 population of the South Valley as defined by the Census Bureau was 35,701. According to the 1990 Census, the South Valley was 72.5% Hispanic (all races), with an additional 1.0% non-Hispanic Black, 1.1% non-Hispanic American Indian, Eskimo, or Aleut, 0.2% non-Hispanic Asian or Pacific Islander, and 0.8% other race. The non-Hispanic White population was 24.4%. The total 1990 population of the southwest quadrant of Bernalillo county was 95,755. That year, that population consisted of 71.8% Hispanic (all races), 2.5% non-Hispanic Black, 1.8% non-Hispanic American Indian, Eskimo, or Aleut, 0.3% non-Hispanic Asian or Pacific Islander, and 0.7% other race. The non-Hispanic White population was 23%.

The total 2000 population of the South Valley as defined by the Census Bureau was 39,060. According to the 2000 census, the South Valley has 77.6% Hispanic or Latino (all races), with an additional 1.1% non-Hispanic Black, 2.0% non-Hispanic American Indian and Alaska Native, 0.3% non-Hispanic Asian, and 0.1% non Hispanic Native Hawaiian and Other Pacific Islander.

The population of the Isleta Pueblo also is overwhelmingly minority. The most densely populated portion of the Isleta Pueblo (the Census Designated Place termed the Pueblo[10]) lies in Bernalillo County a few miles to the southeast of the Southwest landfill. According to the Census, the population in 1990 was 1,703, made up of 93.1% non-Hispanic American Indian, Eskimo, or Aleut, with an additional 4.8% Hispanic (all races), 0% non-Hispanic Black, 0.1% non-Hispanic Asian or Pacific Islander, and 0.1% other race. The non-Hispanic White population was 1.9%. The 1990 population of the entire Isleta Pueblo was 2,915, made up of 89.4% non-Hispanic American Indian, Eskimo, or Aleut, with an additional 7.8% Hispanic (all races), 0% non-Hispanic Black, 0.2% non-Hispanic Asian or Pacific Islander, and 0.1% other race. The non-Hispanic White population was 2.5%.

The 2000 population of the entire Isleta Pueblo was 2,201. This population consisted of 88.3% non-Hispanic American Indian and Alaska Native, 10.2% Hispanic or Latino (all races), 0.1% non-Hispanic Black, 0.2% non-Hispanic Asian, and 0.0% Native Hawaiian and Other Pacific Islander. The non-Hispanic White population was 1.7%.

In contrast, Bernalillo county has much smaller minority populations than either the South Valley or the Pueblo. The total county population in 1990 was 480,577. Of that population, 37.1% were Hispanic (all races), an additional 2.5% were non-Hispanic Black, 3.0% were non-Hispanic American Indian, Eskimo, or Aleut, 1.4% were non-Hispanic Asian

[9] This definition was used in the 1990 Census but not in the 2000 Census.

[10] This definition was used in the 1990 Census but not in the 2000 Census.

or Pacific Islander, and 0.3% were other races. The non-Hispanic White population was 55.8%. In 2000, Bernalillo county's total population was 556,678. The breakdown of that population was as follows: 42% Hispanic or Latino (all races), 2.8% non-Hispanic Black, 4.2% non-Hispanic American Indian and Alaska Native, 1.9% non-Hispanic Asian, and 0.1% Native Hawaiian or Other Pacific Islander.

The State of New Mexico too has much smaller minority populations than either the South Valley or the Isleta Pueblo. In 1990, New Mexico had a total population of 1,515,069; 38.2% were Hispanic (all races), with an additional 1.8% non-Hispanic Black, 8.5% non-Hispanic American Indian, Eskimo, or Aleut, 0.8% non-Hispanic Asian or Pacific Islander, and 0.2% other race. In 2000, New Mexico's population was 1,819,046. Hispanic or Latino (all races) accounted for 42.1%; 1.9% were non-Hispanic Black; 9.5% were American Indian and Alaska Native; 1.1% were Hispanic Asian; and 0.1% were Native Hawaiian and Other Pacific Islander.

The Census data also demonstrate that per capita incomes are lower in the South Valley and the Isleta Pueblo than they are in the state and county generally. In 1989, the per capita income in New Mexico was $11,246 generally and $7,542 for Hispanics; in Bernalillo county the comparable figures were $13,594 and $8,807. In 1999, the per capita income in New Mexico was $17,261 for the general population and $12,045 for Hispanics. In Bernalillo county, the comparable figures were $20,790 for the general population and $14,085 for Hispanics.

By contrast, the per capita income in 1989 in the South Valley Census Designated Place was $8,051; for Hispanics in the South Valley Census Designated Place it was $6,606. The 1989 per capita income figures for the southwest quadrant of Bernalillo county were $9,372 for the total population and $7,072 for Hispanics. In 1999, the per capita income figures for the South Valley Census Designated Place were $13,217 for the general population and $11,478 for Hispanics.

The 1989 per capita income on the Isleta Pueblo was similarly low. In the most densely populated portion of Isleta Pueblo (the Census Designated Place) the per capita income was $6,966 for the total population and $6,779 for Native Americans. The 1989 per capita income for the entire population of Isleta Pueblo was $7,417. The 1999 per capita income on the Isleta Pueblo was $9,804 for the entire population and $10,747 for Native Americans.

B. The NMED's decision authorizing expansion of the Southwest landfill and disposal of municipal solid waste at the Southwest landfill adversely affects the surrounding minority communities because of the increased truck traffic and littering that will result in those communities.

Testimony at the NMED permitting proceeding hearings indicated that the operation of the landfill has significant impacts in the surrounding communities. These include the landfill truck traffic, which causes noise pollution, air pollution and potential human safety and

health impacts, as well as blowing trash and dumping of trash. Moreover, all of these impacts will be magnified as a result of the NMED decision.

Residents of the community surrounding the landfill testified during the NMED permit proceeding to the impact on the community of blowing trash and dumping of trash in the community resulting from the presence of the landfill there. See, e.g. NMED Permit Proceeding testimony provided by [redacted], NMED Permit Proceeding hearing transcript ("TR") 56, [redacted], TR 72-78, [redacted], TR 95-96, [redacted], TR 110-115, 125-127, [redacted], TR 852, and [redacted], TR 748. In addition, residents of three areas, the Pajarito Mesa, the neighborhood just east of the landfill, and the area around the landfill testified during the NMED permit proceedings that they are subjected to continuous environmental and personal safety dangers by the landfill; these dangers include: trash trucks traveling at high rates of speed, blowing trash, fumes, debris (including nails) that often gives them flat tires, and trucks that dump trash in their community rather than taking it to the landfill. See, e.g. testimony of [redacted], TR 77, [redacted], TR 110-115, [redacted], TR 103-105, [redacted], TR 159-160, [redacted] TR 653-654, [redacted], TR 654-655, [redacted], TR 667-670, and [redacted] TR 746-749.

These impacts have continued during the operation of the landfill between the NMED permit proceeding and the filing of this Second Amended Complaint. See, e.g., January 22, 2002 letter from Sandra Montes to the Bernalillo County Extraterritorial Land Use Commission (attached as Second Amended Complaint Exhibit C), page 2; February 4, 2003 letter from the Norbertine Community to [redacted] (attached as Second Amended Complaint Exhibit D); January 26, 2003 letter from the South Valley Coalition of Neighborhood Associations to the Bernalillo County Extraterritorial Land Use Commission (attached as Second Amended Complaint Exhibit E), page 4; March 11, 2003 letter from the South Valley Coalition of Neighborhood Associations to the Bernalillo County Extraterritorial Land Use Authority (attached as Second Amended Complaint Exhibit F), page 2; March 11, 2003 letter from the South Valley Clean Environment Campaign to the Bernalillo County Extraterritorial Land Use Authority (page two) and attached six pages of photographs and 17 pages of petitions (attached as Second Amended Complaint Exhibit G); September 8, 2003 letter from the South Valley Clean Environment Campaign to the Board of Bernalillo County Commissioners (attached as Second Amended Complaint Exhibit H), page 2; and September 8, 2003 letter from the Pajarito Mesa Mutual Domestic Water Consumer Association to Bernalillo County Commissioners (attached as Second Amended Complaint Exhibit I), pages 2-4.

The landfill also causes erosion and flooding resulting from bare ground. The escarpment where the landfill is located is particularly susceptible to these latter problems because it is one of the fastest eroding slopes in the world, according to the figures set forth in the 1992 Bernalillo County Southwest Area Plan generated by the National Resource Conservation Service (formerly the Soil Conservation Service).

Moreover, the NMED granted the Southwest landfill a 50% expansion. See Hearing Officer's Report at 7. Testimony at the NMED permit proceeding hearing indicated that this expansion, coupled with the change in the landfill's status, will result in an overwhelming amount of truck traffic through the residential areas around the landfill. The landfill has only one means of access, by traveling west on Pajarito Road and south on Escarpment Road. These roads are mostly unpaved, and use of them to access the landfill requires traffic through entirely residential areas. Access to the landfill on Pajarito Road involves traveling on a stretch of road where children load on and off school buses three times a day.

Southwest landfill's application for a state solid waste facility permit noted that the expansion and change of use status will bring an estimated 156,000 trucks per year to the landfill when it is at full capacity. NMED Permit Proceeding Southwest Landfill's Application for an NMED Solid Waste Permit (hereafter "Southwest's Application"), exhibit 201-6 at 2-3. This is an increase of almost 145,000 trucks per year over the approximately 11,000 trucks per year for the landfill in 1994 (Id.), and it will result in a truck going through the community every 90 seconds. Testimony of Paul Robinson, TR 817. This is a very significant increase in the landfill's impact on the surrounding residential communities. Like the increased risk to ground water and the problems of blowing trash and dumping that will be worse if the waste involved is municipal waste, these traffic impacts are directly attributable to the NMED's issuance of the permit for the landfill's expansion and change in status.

Finally, although the landfill's status may not change immediately because the amendment to its Bernalillo County special use zoning permit does not authorize acceptance of municipal waste, that restriction is not due to any action or inaction on the part of NMED. As far as NMED is concerned, the entire range of impacts that would result from the expansion and change in status of the landfill can occur immediately. Moreover, because NMED authorized both expansion and a change of status, the amendment to the landfill's Bernalillo County special use zoning permit means that the landfill will be able to accept and dispose of 50% more construction and demolition debris waste than was the case prior to the NMED decision. The impacts of the landfill testified to by the residents of the surrounding communities therefore will be increased, extended, or both increased and extended, until that additional 50% of landfill capacity is used.

C. Permitting the Southwest landfill for expansion and disposal of municipal waste subjected the minority populations surrounding the landfill to increased risks of ground water contamination.

NMED's decision approved a change in the status of the landfill from a construction and demolition debris only waste landfill to a municipal waste landfill. That is a significant change that would impose substantial new risks on the surrounding communities and the environment. In addition, the operation of the landfill as authorized by Bernalillo County also presents a substantial risk to the surrounding community and the environment because the landfill is accepting more than 25 tons per day of construction and demolition debris waste. The effect of the NMED decision therefore has been to subject the surrounding communities to substantial risks.

The differences between "construction and demolition debris" and "municipal waste" are indicated by the Solid Waste Management Regulations. The Regulations provide that "construction and demolition debris" must be dry and cannot include either liquids or hazardous materials.[11] "Municipal waste", on the other hand, consists of a much broader range of materials, including hazardous constituents, principally household hazardous waste.[12]

The importance of the change in the status of the Southwest landfill from a landfill that accepts only construction and demolition debris to one that accepts municipal waste was recognized by the New Mexico Court of Appeals in its opinion invalidating the Bernalillo County Commission's 1996 approval of a zoning permit for the landfill. The Court stated:

> Moreover, we note that Southwest sought no small modification of its Special-Use Permit. Simply recognizing the expanded menu of wastes it would be allowed to accept if operating a municipal waste landfill, this is a radical change. Compare 20 NMAC 9.1(T) (defining "construction and demolition debris") with 20 NMAC 9.1(AM)(1) (defining types of wastes permitted at municipal landfill; cf. Town of Grimes v. Board of Adjustment, 243 N.W.2d 625. 628 (Iowa 1976) (noting that neighboring landowners understandably fear the unpleasant consequences of an adjacent landfill and "a landfill without protective standards might lead to a variety of health, environmental, and esthetic difficulties"). The county's insertion of the construction and demolition debris limitation in each previous permit and its steadfast rejection over the years of Southwest's entreaties that it be allowed to expand its operations further indicates that the change is not to be lightly regarded.
> Indeed, Southwest was not attempting merely to amend its existing Special-Use Permit with no significant consequence, but was seeking to expand and change entirely the effect and scope of its existing permit, resulting in a more intense use of the subject land.

Atlixco Coalition v. County of Bernalillo, 127 N.M. 556 (citations omitted).

The Court of Appeals' reasoning is confirmed by the many cases of municipal waste landfills that have contaminated ground water. Even landfills that are constructed with liners

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[11] "Construction and demolition debris" are defined as: materials generally considered to be not water soluble and nonhazardous in nature, including, but not limited to, steel, glass, brick, concrete, asphalt roofing materials, pipe, gypsum wallboard and lumber from the (continued) construction or destruction of a structure project, and includes rocks, soil, tree remains, trees and other vegetative matter that normally results from land clearing. 20 NMAC 9.1.105.T.

The definition also provides that: If construction and demolition debris is mixed with any other types of solid waste, it loses its classification as construction and demolition debris. Construction and demolition debris does not include asbestos or liquids including but not limited to waste paints, solvents, sealers, adhesives or potentially hazardous materials. *Id.*

[12] The Solid Waste Management Regulations define a "municipal landfill" as a landfill that receives household waste and that also may receive: other types of RCRA Subtitle D waste such as commercial solid waste, nonhazardous sludge, small quantity generator waste, industrial solid waste, solid waste, construction and demolition debris and other special wastes .... 20 NMAC 9.1, 105.AM.1.

can leak. In particular a contaminated material such as municipal waste leachate can erode a geosynthetic clay liner such as the one that is to be used in the Southwest landfill. See testimony provided during the NMED permit proceeding by [redacted], TR 886, 892-893, 896, 900, 1,020.

The risks associated with disposal of municipal waste are the basis for the Solid Waste Management Regulations' stringent requirements for protection of ground water on municipal waste landfills. These requirements include criteria for the design and operations of those landfills such as the installation of composite liners and leachate collection systems that meet specified technical specifications, control of water run on and run off, installation of daily and final covers that prevent infiltration of moisture into the landfill, and installation and operation of ground water monitoring systems. See, e.g., 20 NMAC 9.1, 306-308, 402, 502. Municipal waste landfills also are required to be sited so that the bottom of the fill is at least 100 feet from ground water. 20 NMAC 9.1, 302.

The NMED decision to authorize acceptance of municipal waste by the Southwest landfill therefore subjects the ground water in the area of the landfill to substantial risks. Moreover, the operation of the landfill as a construction and demolition debris waste landfill that accepts more than 25 tons per day of waste also presents significant risks to that ground water.

The New Mexico Solid Waste Management Regulations impose on construction and demolition debris landfills that accept more than 25 tons of waste per day the same ground water protection requirements that apply to municipal waste landfills. That is, construction and demolition debris landfills that accept more than 25 tons of waste per day must be lined and must provide for closure and post closure systems that include installation of composite liners and leachate collection systems that meet specified technical specifications, control of water run on and run off, installation of daily and final covers that prevent infiltration of moisture into the landfill, and installation and operation of ground water monitoring systems. 20 NMAC 9.1, 105.AM.2, 306-308, 402, 502. Construction and demolition debris landfills that accept more than 25 tons of waste per day are also required to be sited so that the bottom of the fill is at least 100 feet from ground water. 20 NMAC 9.1, 105AM 2, 302.

For that reason, even though Bernalillo County has limited the landfill to acceptance of construction and demolition debris waste, the NMED decision poses substantial risks to the area ground water. Moreover, the NMED decision authorizing expansion of the landfill exacerbates those risks. Finally, those risks directly impact the minority communities that surround the landfill because of those communities' reliance on ground water from wells.

The direction of the ground water gradient beneath the landfill is not well established. What is clear is that the ground water flow is generally to the south, and therefore towards portions of the minority communities in the South Valley. Moreover, any southerly flow is towards the Isleta Pueblo, the Native American nation located south of the landfill and the South Valley.

There are several domestic wells at risk from ground water contamination from the landfill. These include six private domestic wells located within 6000 feet south and southeast of the Southwest landfill. In addition, one livestock well is located within 4000 feet west of the landfill. Stevens, 1996, Southwest's Application exhibit 202-3, First Amended Complaint Exhibit 3. There also are a private well located approximately 1,800 feet from the southeast corner of the landfill and a privately owned water system that serves more than 30 households within three miles southeast of the landfill. September 8, 2003 letter from Pajarito Mesa Mutual Domestic Water Consumer Association to Bernalillo County Commissioners (attached as Second Amended Complaint Exhibit I), page 2.

In addition, the Pajarito Mesa Mutual Domestic Water Consumer Association plans to construct a well west-southwest of the landfill, the direction in which the landfill asserted in 1997 that ground water flows. Id. Moreover, as is shown on First Amended Complaint Exhibit 4, the City of Albuquerque plans to construct public wells to the north and east of the landfill. Finally, the Isleta Pueblo is located southwest, south, and southeast of the landfill. The Pueblo's reservation extends from east of Albuquerque to the southwestern corner of Bernalillo county. First Amended Complaint Exhibit 5. The Pueblo therefore is in the path of any ground water contamination from the landfill that flows southwest, south, or southeast.

The ground water may flow either to the southwest or to the southeast, depending upon whether the flow direction is determined at the surface of the ground water or at a deeper level. Ground water level maps presented by the U.S. Geological Survey (USGS) in a 1993 report show the ground water gradient in the area of the Southwest landfill sloping toward the southwest. Specifically, maps representing 1960-61 conditions on a regional basis, as well as on a more local scale, in the Santa Fe Group aquifer system in the Albuquerque Basin, show the direction of ground water flow to be toward the southwest in the landfill vicinity.[13] Thorn, Conde R., Douglas P. McAda, and John Michael Kernodle, 1993, Geohydrologic framework and hydrologic conditions in the Albuquerque Basin, central New Mexico: U.S. Geological Survey Water-Resources Investigations Report 93-4149 (Thorn et al.) at 61-62, First Amended Complaint Exhibit 6. This same report includes the only map from recent USGS reports to show actual water table surface contours.

These data, which represent 1988-89 conditions, indicate that the ground water gradient at the surface of the water table slopes to the southwest in the vicinity of the landfill. Ground water levels measured in the three landfill monitoring wells also support a south-southwest slope to the ground water gradient in this area. Stevens, 1996, NMED Permit Proceeding hearing exhibit 202-7 at 16-17.

Later USGS reports include regional maps which show that by 1994-95, pumping from Albuquerque water supply wells, which are to the north and east of the landfill, had caused the ground water gradient to shift more toward the southeast in the general vicinity of the landfill. Kernodle, John Michael, 1998, Simulation of ground-water flow in the

[13] On each of the maps showing ground water gradient, the approximate location of the Southwest landfill is marked with a red dot.

Albuquerque Basin, central New Mexico, 1901-95, with projections to 2020: U.S. Geological Survey Open-File Report 96-209 (Kernodle, 1998) at 19, 20, Amended Complaint Exhibit 7; Tiedeman, Claire R., John Michael Kernodle, and Douglas P. McAda, 1998, Application of nonlinear-regression methods to a ground-water flow model of the Albuquerque Basin, New Mexico: U.S. Geological Survey Water-Resources Investigations Report 98-4172 (Tiedeman et al.), First Amended Complaint Exhibit 8 at 10.[14]

A 1995 USGS report presents simulated ground water flows in the Santa Fe Group aquifer system of the Albuquerque Basin of central New Mexico. Kernodle. John Michael, Douglas P. McAda, and Conde R. Thorn, 1995, Simulation of ground-water flow in the Albuquerque Basin, central New Mexico, 1901-1994, with projections to 2020: U.S. Geological Survey Water-Resources Investigations Report 94-4251 (Kernodle et al., 1995). The report describes the results of a computer model used to predict ground water gradients based on future growth and ground water withdrawals in the Albuquerque area. Although this model generated maps which depict the future ground water gradient sloping toward the southeast, east, or even the northeast, in the vicinity of the Southwest landfill, it is not clear what the future direction of the ground water gradient will be. McAda, 1999.

The weight of the evidence is that the ground water gradient is to the south-southwest or to the southwest and that it may be changing to be more to the east. Regardless of future changes, as long as the ground water flows to the southwest, south, or southeast, it will affect the Pueblo of Isleta. All of the maps showing ground water gradient that are attached as exhibits show that the gradient (which flows perpendicular to the contour lines that define its direction) will intersect the Pueblo's reservation.

In addition, if the ground water flows to the south, the southeast, or the southwest, it will affect the Latino communities nearest the landfill. The uncertain effect that will result from continued pumping by the City of Albuquerque from wells to the north and the east of the landfill means that all of the communities in the vicinity of the Southwest landfill are at risk from ground water contamination caused by the landfill. The NMED decision to permit the landfill to expand and to accept municipal solid waste subjects the minority communities that surround the landfill and the Pueblo to the disproportionate risk of that contamination.

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[14] These maps are based on water level data from wells screened at various depths in the aquifer, and therefore may not represent water movement at the surface of the water table. This type of water level data is also best suited to depicting regional ground water contours, and may be less accurate with respect to local conditions. McAda, 1999.

Kernodle also presents a map at a more local scale, which shows the ground water gradient to be relatively flat in the area of the landfill. This local map is misleading in two ways, however, and therefore may not accurately represent ground water flow in the vicinity of the landfill. First, the map is based upon water level data from wells screened at various depths in the aquifer. These water level contours therefore depict large-scale horizontal ground water movement through the Albuquerque Basin, but do not accurately represent smaller scale ground water flow conditions. Tiedeman *et al.*, 1998 at 9. Additionally, the water level data used for this map do not include data from a ground water trough that occurs to the west of the landfill location. McAda, Douglas, 1999, Personal communication, U.S. Geological Survey, Albuquerque office, July 29 and 30, 1999 (McAda, 1999).

D. The permit was issued to the Southwest landfill despite its pattern of repeated violation of State and County requirements, and that pattern has continued.

NMED and Bernalillo County records indicate that the Southwest landfill has consistently violated the requirements of its County and NMED permits and the Solid Waste Act and the Solid Waste Management Regulations. County records identify that the landfill has been out of compliance with some of the conditions of its permit for more than 10 years. State inspection reports identified failures to report un-permitted liquid substances being taken in; acceptance of un-permitted materials (such as tires); and failure to address issues related to drainage on the only access road. Other problems at the landfill have included a fire at the landfill in March 1992 (which was reported by a television reporter), inadequate cover and blown litter in May 1993, acceptance of liquid waste in August 1993, inadequate inspections and acceptance of household waste in December 1993, and failure for eight months to file a report required within 24 hours concerning inadvertent dumping of hazardous waste at the landfill. Robinson, TR 801-07.

Moreover, similar violations have continued to occur since the NMED decision to grant a permit for the landfill. During an inspection of the landfill conducted in late 2000, NMED found 20 violations of the Act and Regulations, ranging from failure to maintain the required financial assurance to failure to post required notices. Specifically, the landfill failed for a period of two to two and one half years to ensure adequate financial assurance for closure and post-closure care, and failed to adjust the required financial assurance annually. The landfill also violated applicable requirements governing operating practices, including compliance with sanitary engineering practices, application of daily and intermediate cover, and segregation of waste materials from recyclables. The landfill was cited as well for safety hazards, for failure to post appropriate signs, and for failure to make available required records.[15] NMED December 5, 2000 Administrative Order Requiring Compliance and Proposing to Assess a Civil Penalty (attached as Second Amended Complaint Exhibit J).

Members of the community have observed other violations by the landfill as well. Members of the Pajarito Mesa Mutual Domestic Water Consumer Association letter have witnessed the disposal of mixed waste, including household waste, in the landfill. September 8, 2003 letter from Pajarito Mesa Mutual Domestic Water Consumer Association to Bernalillo County Commissioners (attached as Second Amended Complaint Exhibit I), page 2.

Finally, the landfill has been named as a defendant in a lawsuit arising from an incident in which an individual disposing of trash at the landfill was run over and killed by a piece of landfill heavy equipment operated by a landfill employee. Bernalillo County Sheriff's Department Criminal Investigation Division Supplemental Report Form in Case #02-555998 (attached as Second Amended Complaint Exhibit K).

[15] Despite the severity and duration of these violations, the NMED took no serious action against the landfill, declining even to assess the fines that it initially proposed.

Despite all of these problems, and despite demands by members of the community that the NMED revoke the landfill's permit, the NMED has failed to take meaningful enforcement action against the landfill. The failure of the NMED to consider the compliance problems that occurred before NMED made its decision, and to take appropriate action based on the problems that have occurred since that decision is striking. It is particularly striking and disturbing given the demonstrably discriminatory impact of the landfill and of its failure to comply with applicable requirements. The NMED's initial permitting and continued approval of this behavior is illegal under Title VI and its implementing regulations.

II. NMED's action is a part of a pattern of discrimination against the South Valley and Isleta communities.

A. The NMED has subjected the South Valley to substantial risks of contamination from various facilities.

The South Valley and the Isleta Pueblo are already subject to substantial risks of environmental contamination. First Amended Complaint Exhibit 9 shows the substantial ground water contamination that already exists in the South Valley, from nitrate contamination, septic systems, and other sources of pollution. First Amended Complaint Exhibit 10 shows potential hazards to ground water that exist in the South Valley, including active and closed landfills, dairies, and the waste water treatment plant for Bernalillo county.

NMED has contributed substantially to the imposition of these risks on these communities. NMED already has permitted the liquid waste facility for the entire Bernalillo county area in the South Valley and just north of the Isleta Pueblo. NMED has already also permitted the Albuquerque/Bernalillo County joint municipal waste landfill, the Cerro Colorado, which lies just northwest of the Southwest landfill. These are the only two NMED permitted waste facilities in Bernalillo county, and both of them are in the southwest quadrant of the county. See First Amended Complaint Exhibit 11. In addition, the South Valley already houses two Superfund sites, created as a result of the NMED and local government's pattern of permitting almost all of the more toxic manufacturing (such as the General Electric turbine plant), gasoline tanks, and waste facilities in the South Valley.

Finally, these risks have been imposed upon these communities despite the mandate of the Albuquerque City/Bernalillo Ground Water Policy Protection and Action Plan (GPPAP) that the ground water beneath much of the South Valley be protected. As is indicated on First Amended Complaint Exhibit 11, much of the Valley is in the crucial zone designated for protection of ground water by the GPPAP. The NMED's most recent action of permitting the Southwest landfill is in spite of the location of that landfill in the crucial zone, a point that was made during the NMED permitting proceedings. First Amended Complaint Exhibit 11; *see also* Atlixco Coalition v. County of Bernalillo, 127 N.M. 554-555.

B. Permitting the Southwest landfill for municipal waste is contrary to the Solid Waste Act and to NMED's policy and its practice elsewhere in New Mexico.

1. The New Mexico Solid Waste Act, Solid Waste Management Regulations and the State Solid Waste Plan establish a policy of regionalization of solid waste facilities.

a. The Solid Waste Act requires adoption of a mandatory solid waste management plan for New Mexico.

The New Mexico Legislature enacted the New Mexico Solid Waste Act, NMSA 1978 sections 74-9-1 et seq. in 1990. The Act required the NMED to prepare and submit to the New Mexico Environmental Improvement Board by December 31, 1992 for approval a solid waste management plan (the Plan). The Act also provides that NMED shall prepare and publish an annual report concerning management of solid waste in the state, with the first report to be published by July 1, 1994. NMSA 1978 section 74-9-13. In addition, the Act required the NMED to prepare (by December 1, 1993) and implement (by July 1, 1994) a state solid waste management program (the Program). The Program is required by the Solid Waste Act to be designed to achieve coordinated regional activity for management of solid waste within each solid waste district to be established pursuant to the Act. NMSA 1978 section 74-9-12.B.2.

The Solid Waste Act indicates the mandatory nature of the Plan. Section 74-9-5 NMSA 1978 of the Act provides:

> The plan approved by the board shall be effective thirty days after its approval and shall be filed under the provisions of Section 14-4-4 NMSA 1978. Consistency with the plan shall be required:
>
> A. Of any regulation adopted by the board under the provisions of the Solid Waste Act;.
> B. *In any action taken by the director [of NMED] under authority contained in the Solid Waste Act;*
> C. As a condition of approval of any application by a county or municipality for a grant under the provisions of the Solid Waste Act.

Emphasis added.

The Act therefore provides directly that any action taken by the NMED pursuant to the Act must be consistent with the Plan. As is indicated below, the Plan and the annual reports demonstrate the NMED's policy of regionalization of solid waste disposal facilities, including landfills. Although NMED's decision to permit the Southwest landfill for disposal of municipal waste was made pursuant to the Act, that decision was directly contrary to the

Plan's stated goal of regionalization. For that reason, NMED's decision to permit the Southwest landfill for disposal of municipal waste violated the Act as well as the Plan.

b. The Plan and the NMED's annual reports demonstrate the NMED's emphasis on regionalization of landfills.

The Plan and the NMED's annual reports emphasize regionalization. The Plan was published in 1993. Its purpose is "to serve as a basis for developing statewide solid waste management programs" that accomplish five purposes, the second of which is to: "Encourage the coordination of regional approaches for solid waste management within a solid waste district." Plan at 3. The Plan also lists as one of four medium range (3-5 years) goals the siting of "additional regional landfills". Plan at 142. The Plan includes at least two statements of the rationale for regionalization, pointing out that "[t]he strongest argument for regionalization is cost savings realized through economies of scale", and stating in the context of New Mexico border communities, that "by increasing the population and waste base for a regional landfill, greater revenues can be generated to cover the cost of economically and environmentally sound landfills." Id. at 147, 98.

The Plan's emphasis on regionalization is confirmed by the NMED's annual reports issued between 1994 and 1997 pursuant to the Solid Waste Act.[16] The first annual report was published in 1994. It points out that regionalization makes sense from an economic point of view, but that it is a new concept that has yet to be fully implemented in New Mexico. Solid Waste in New Mexico, 1994 Annual Report at 2. The Executive Summary for the 1995 Report states that: "NMED encourages regionalization where it best solves the needs of participating entities." Solid Waste in New Mexico, 1995 Annual Report Executive Summary (1995 Report) at 3. That Summary also points out that "[t]he economic realities of modern solid waste management regulations will eventually compel municipalities and counties to move forward with cooperative planning." 1995 Report at 13. Finally, the 1995 Report's recommendations includes a clear preference for regionalization, stating that: "Regional approaches to solid waste management should be given preferential treatment in all financial and regulatory considerations where they best serve the solid waste management needs of the governmental entities involved." 1995 Report at 14.

The 1996 Report (Solid Waste in New Mexico 1996 Annual Report [1996 Report]) states that "NMED encourages regionalization because it offers economies of scale and avoids expensive duplication of facilities and equipment." 1996 Report at 4. This policy is also reflected in the 1997 Report (Solid Waste in New Mexico, 1997 Annual Report [1997 Report]). Although the Report does not address regionalization directly, it does indicate that in about half the state, regional landfills have been or are being constructed and that they will provide ample capacity for years. 1997 Report at 1. The Report also points out the benefits of economies of scale for dealing with solid waste streams. Id. at 2.

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[16] Although reports also were issued in 1998 and 2000, neither of those reports discusses the issue of regionalization.

Finally, the emphasis on regionalization is also apparent from the criteria that are used to determine whether New Mexico local governments can obtain grants from the solid waste grant fund established by the Solid Waste Act. NMSA 1978 74-9-41. The Guidelines for the Environmental Protection Solid Waste Facility Grant Fund detail a point system which is used to determine which solid waste facilities receive grants. Those Guidelines provide that up to ten points will be awarded "to the extent that an application is jointly made by more than one municipality or county. The greater the regionalization effort the higher the score." 20 NMAC 9.3.III.301.

2. NMED's regionalization policy is being implemented.

The number of landfills in New Mexico decreased dramatically during the 1990s. There were 280 landfills in the state in 1989. Plan Executive Summary at 2. That number was reduced to 74 by 1996, and 25 of those 74 were expected to close by 2001. 1996 Report at 1. In fact, by 2000 there were only 47 landfills operating in the state. 2000 Report (Solid Waste in New Mexico, 2000 Annual Report [2000 Report]), 1.

The reason for this trend is the regional approach that is being used throughout the state. In several of the Annual Reports issued pursuant to the Act, NMED has described the efforts at cooperation being made by New Mexico local governments, principally through the formation of solid waste authorities involving several municipalities and/or counties. The number of those authorities being formed has increased in accordance with the trend towards regionalization of solid waste management efforts. For example, the number of such authorities in the state more than doubled between 1995, when there were only six, and 1997, when a total of 13 had been formed. 1995 Report at 42; 1997 Report at 13-23. By 1998, there were 16 such authorities. 1998 Report, 4-12. In addition, by 2000, about half of the local governments in New Mexico had joined cooperative associations for the management and disposal of solid waste. 2000 Report, 14.

3. Issuance of the permit for municipal waste to the Southwest landfill is contrary to the policy of regionalization.

With the exception of NMED's permitting of the Southwest landfill, the policy of regionalization that is mandated by the Act, the Program, the Plan, and NMED's policy is also being implemented in Bernalillo county, the site of the Southwest landfill. The City of Albuquerque and County of Bernalillo cooperated to establish the Cerro Colorado municipal solid waste landfill, which was estimated in 1997 to have a remaining capacity of 50 years. 1997 Report at 13. The Cerro Colorado is operated by the City of Albuquerque, and accepts municipal solid waste from all of Bernalillo County. Id. It also accepts municipal solid waste from Southern Santa Fe county, Torrance county, and Isleta Pueblo as well. Id. Finally, the Cerro Colorado is also permitted for construction and demolition debris waste by the NMED.

The Cerro Colorado not only has adequate municipal solid waste capacity for all of Bernalillo county, it is the regional type of landfill that is called for by the Act, the Plan, and NMED's policy. The Cerro Colorado serves approximately 520,000 people within an area of

1,200 square miles. 1997 Report at 13. That is about a third of the population of the entire state. The landfill's capacity is estimated to be at least 50 years, and it is serving all of Bernalillo county as well as parts of two other counties. Id. The Cerro Colorado is an example of regionalization, and the permitting of the Southwest landfill for municipal waste in the Cerro Colorado's service area is directly contrary to the regionalization mandates of the Act, the Program, the Plan, and NMED's policy.

III. NMED is required to take into account the disproportionate impact of its actions.

That NMED's permitting action was taken under other federal and New Mexico laws does not excuse NMED from compliance with Title VI. The federal courts have not hesitated to enforce Title VI against federal, state, and local government agencies that have violated its anti-discriminatory provisions in the course of carrying out other laws. See, e.g., Gatreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Meek v. Martinez, 724 F. Supp. 888 (S.D. Fla. 1987). NMED must comply with all applicable federal laws, including Title VI.

Nor is it sufficient for NMED to assert that it plays no role in site selection for solid waste facilities because those sites are selected by permit applicants. EPA's Title VI regulations prohibit a recipient of EPA assistance from "using methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin ...." 40 C.F.R. §7.35(b). Moreover, the regulations explicitly state that "a recipient shall not choose a site or location of a facility that has the purpose or effect of ... subjecting [individuals] to discrimination ... on the grounds of race, color, or national origin ...." 40 C.F.R. §7.35(c). All that complainants must show to establish a violation of Title VI and the EPA regulations is that when applied in a particular manner, NMED's "method of administering its program" yields a discriminatory outcome. As shown above, NMED's method of administering its solid waste permitting program has resulted in discriminatory impacts on the basis of race, color, and national origin in this case.

Although NMED does not openly solicit the location for a facility, it "chooses" whether or not a facility can operate in a particular location. As the Director of EPA's Office of Civil Rights has pointed out: "[T]he fact that the recipient does not select the site in a permit application does not relieve the recipient of the responsibility of ensuring that its actions in issuing permits for such facilities do not have a discriminatory effect." Any assertion by NMED that it has no authority over site selection is therefore incorrect.

The effect of NMED's permitting process is clear: In New Mexico's most populous county, Hispanics and Native Americans will bear a disproportionate burden of the impacts of and a disproportionate share of the risks from the Southwest landfill expansion and conversion to a municipal waste disposal facility. Moreover, the minority populations being subjected to these impacts and risks are already being subjected to disproportionate burdens and risks, including burdens and risks imposed upon them by NMED permitted facilities. By granting the permit to the Southwest landfill, NMED has administered its program in a manner that

results in a discriminatory impact on people based on race, color, and national origin; NMED therefore has violated Title VI and EPA's regulations.

IV. NMED overlooked less discriminatory alternatives.

In issuing the permit to the Southwest landfill, NMED ignored the fact that several less discriminatory alternatives existed to granting the permit. The President of the United States, who has the authority to review and approve federal agency regulations under Title VI, has delegated this power to the U.S. Attorney General under Executive Order 12,250. The Attorney General, in a "Memorandum to Heads of Departments and Agencies that Provide Federal Assistance" dated July 14, 1994, stated:

> Individuals continue to be denied, on the basis of their race, color, or national origin, the full and equal opportunity to participate in or receive the benefits of programs assisted by Federal funds. *Frequently discrimination results from policies and practices that are neutral on their face but have the effect of discriminating. Those policies must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative.*

Emphasis added.

Here, there is a discriminatory impact of NMED's permitting of the Southwest landfill. Moreover, there are several less discriminatory alternatives.

First, NMED did not consider any alternative locations that would have less discriminatory impact. In fact, NMED did not even consider the demographics of any alternative locations for the landfill.

Second, NMED did not consider limiting the capacity of or the material to be disposed of in the Southwest landfill so that it would not have as many impacts on the community. There is no need for the Southwest landfill to take municipal solid waste; the municipal solid waste generated in Bernalillo county can be adequately disposed of in the Cerro Colorado landfill. The request for an expansion of the Southwest landfill also was not based on need.

NMED should have considered that reduction in the amount of waste to be taken would reduce the impacts on the surrounding minority communities of the traffic, noise, air and dust pollution, and litter that will result from the landfill, and the risks to which those surrounding minority communities would be subjected by the landfill. NMED also should have considered that denying the change in the status of the landfill would reduce those impacts and risks.

Finally, the NMED did not seriously consider not granting the permit to Southwest landfill. NMED could have denied the permit application based on the discriminatory impact that would result. Moreover, denial of the application would have had no effect on the ability of the City of Albuquerque and the County of Bernalillo to dispose of municipal waste

generated within their borders because the Cerro Colorado landfill has adequate capacity to dispose of all of that waste.

Remedy

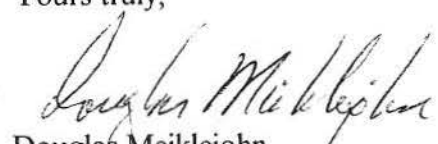
The Complainants request that the EPA immediately suspend NMED's municipal solid waste permitting authority unless and until NMED devises a method of administering that authority that does not result in the violation of Title VI and EPA's regulations. The Complainants further request that the EPA immediately suspend all financial and other assistance to NMED unless and until NMED revokes the Southwest landfill municipal solid waste facility permit, as granting that permit violated Title VI and EPA's regulations. The Complainants also request that their counsel, the New Mexico Environmental Law Center, be sent copies of all correspondence concerning this Second Amended Complaint between EPA, NMED, and Southwest landfill.

Conclusion

As the Complainants' original Complaint, their First Amended Complaint, and this Second Amended Complaint indicate, the NMED permitting of the Southwest landfill as a municipal waste facility has created a disproportionate impact on the Native American and Latino communities of the entire southern end of Bernalillo county. The discriminatory impact created and sanctioned by NMED's actions violates Title VI and EPA's regulations. Because NMED receives federal assistance from EPA, NMED is subject to Title VI as implemented by EPA's regulations. The Complainants expect and look forward to a prompt investigation of their original Complaint, their First Amended Complaint, and this Second Amended Complaint pursuant to 40 C.F.R. §7.120. The Complainants also will provide to the EPA any requested documentation and other information.

We would appreciate your acknowledging receipt of this Second Amended Complaint. If you have any questions about the Complainants' original Complaint, their First Amended Complaint, or this Second Amended Complaint, or if you would like further information, please do not hesitate to contact me at (505) 989-9022. Thank you for your cooperation.

Yours truly,



Douglas Meiklejohn
Attorney for the Complainants

Copies to:

The Honorable Alvino Lucero
Governor
Pueblo of Isleta

Shannon Horst
Orlando Olivas
South Valley Coalition of
Neighborhood Associations

Sandra Montes
Robby Rodriguez
SouthWest Organizing Project

The Honorable Ron Curry
Secretary
New Mexico Environment Department

David Mielke
Sonosky, Chambers, Sachse, Endreson
& Mielke
Attorneys at Law