Yale Law School

Lilian Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton North Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C., 20460

Butch Tongate
Environment Secretary
New Mexico Environmental Department
Office of the Secretary
1190 Saint Francis Dr.
Santa Fe, NM 87505

Re: Implementation of Resolution Agreement in EPA Case No. 09R-02-R6

Dear Director Dorka and Secretary Tongate,

We are writing on behalf of Citizens for Alternatives to Radioactive Dumping (CARD) to request an update on the status of measures required by a January 19th, 2017 Resolution Agreement between the External Civil Rights Compliance Office (ECRCO) and the New Mexico Environmental Department (NMED)[1]. As you know, CARD filed a complaint in 2002 alleging that NMED discriminated on the basis of race and national origin in violation of Title VI of the Civil Rights Act of 1964 and EPA implementing regulations, raising claims that NMED's decision to permit the Triassic Park waste facility in Chaves County, New Mexico, and inadequate public participation throughout the permitting process, violated the law.

As complainants and key stakeholders in the outcome of the Resolution Agreement, CARD seeks to have input into policies and practices NMED develops in compliance with the Resolution Agreement and requests that ECRCO provide information on the status of NMED's compliance efforts. CARD is eager to receive an update both because it has an interest in NMED's compliance with the Resolution Agreement and, also, because, consistent with

[1] Informal Resolution Agreement, New Mexico Environment Department and the US. EPA (Jan. 19, 2017) (EPA File No. 09R-02-R6) ("Resolution Agreement").

principles of environmental justice,[2] CARD believes NMED must engage members of affected communities when shaping policies and practices affecting their rights, such as public participation and language access policies.

We note that the Resolution Agreement calls for completion of a number of key policies on a 60 or 90 day timeline.[3] Yet to date, almost six months after the Resolution Agreement was finalized, CARD has not been notified by NMED of opportunities to comment or otherwise provide input on the development of the policies required under the terms of the Agreement. We hope that NMED has been working in good faith to develop the policies required under the Agreement. But we also ask that no such policies be finalized without opportunities for input and comment from CARD and other community-based stakeholders.

We thus request information on NMED's performance to date on the obligations listed in the agreement, including but not limited to the following:

Regarding the Triassic Park Facility:

- Ensuring that all "vital information" regarding Triassic Park is accessible to persons who are Limited English Proficient (LEP) in a language they can understand;[4]
- Translating and redistributing the Triassic Park Facility Fact Sheet;[5]
- Taking steps to ensure that vital information regarding Triassic Park is available to the non-English speaking public through a qualified interpreter or through translation;[6]
- Making available technical staff via phone or email to answer questions in languages other than English;[7]
- Reviewing all public comments about the permit, consideration of holding a public hearing prior to making a final decision, and making any changes deemed necessary based on such comments;[8] and
- Notifying complainants, in both English and Spanish, of opportunities for public comment and other important actions related to the permitting and operations of the facility.[9]

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[2] First National People of Color Environmental Leadership Summit, Principles of Environmental Justice, para. 7 (1991), http://www.ejnet.org/ej/principles.pdf; EPA, "Environmental Justice" (defining environmental justice as including "equal access to the decision-making process to have a healthy environment"), https://www.epa.gov/environmentaljustice.
[3] *See, e.g.,* Resolution Agreement at III.H.3, III.F.4
[4] *Id.* at III.B.1.
[5] *Id.* at III.B.1.
[6] *Id.* at III.B.2.
[7] *Id.* at III.B.3.
[8] *Id.* at III.A.2, 4.
[9] *Id.* at III.A.3.

Regarding Hazardous Waste Permits, generally:

- Ensuring that all permit applications for hazardous waste facilities contain the necessary components required by 40 C.F.R §270.10, and following-up as necessary to ensure protection of public health and the environment.[10]

Non-Discrimination Procedural Safeguards:

- Reviewing and revising, as necessary, existing grievance procedures for bringing discrimination complaints;[11]
- Making the above procedures available in print and online "widely and prominently;"[12]
- Ensuring that the Non-Discrimination Coordinator's duties include the elements required by the Resolution Agreement and do not have responsibilities that create a conflict of interest.[13]

Public Participation Policy:

- Developing and implementing a public participation policy to inform, consult and work with potentially affected and affected communities at various stages of the environmental decision-making and permitting processes that require the elements listed in the Resolution Agreement at III.G.2.(a) – (i).[14] It should go without saying that NMED must seek, consider, and incorporate input from the community as it prepares its public participation policy. Among other things, the policy would benefit from input from the people it is designed to engage.

Language Access Policy, Access for People with Disabilities, & Training:

- Developing and implementing written procedures to provide meaningful access to all persons, including people who are LEP and persons with disabilities;[15]
- Conducting an analysis outlined in EPA's own LEP guidance to determine language services needed to ensure meaningful participation, and the development of a language

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[10] *Id.* at III.C.a.
[11] *Id.* at III, D-I.
[12] *Id.* at III.E.1.
[13] *Id.* at III.F.3, 4.
[14] *Id.* at III. G.
[15] *Id.* at III.H.

access plan;[16]

- Providing written procedures and resources to ensure effective communication with people with disabilities;[17]
- Training for all appropriate staff on non-discrimination, public participation, and grievance procedures, and implementing a program for routine training on an ongoing basis.[18]

NMED's website now contains some information about NMED's nondiscrimination program, but the information is minimal and conflicting. *See* https://www.env.nm.gov/non-employee-discrimination-complaint-page/. The website contains a non-discrimination statement and identifies NMED's non-discrimination coordinator. It also includes a second non-discrimination statement on a different page which identifies a different coordinator, providing inconsistent information.[19] The website does not, however, display, information more generally about NMED's compliance with the Resolution Agreement, including the status of grievance procedures.

These questions about NMED's fulfillment of its obligations are all the more relevant due to the ongoing public comment period regarding the Groundwater Discharge Permit for the Waste Control Specialists (WCS) Facility near Eunice, New Mexico. CARD has significant concerns about the language accessibility of the permitting process, and believes that deficiencies in language access mean that NMES is continuing to run this process in a discriminatory manner.

The WCS Facility is less than 10 miles from Eunice, a city where more than half of the residents are Latino and 40 percent of the population is native Spanish speaking[20]. Despite these demographics, to CARD's knowledge, NMED and the Ground Water Quality Control Bureau have not provided any information about the permit in Spanish, neither in person nor online. Such a lack of language access is inconsistent with the plan established in Section III.H of the Resolution Agreement, and thus CARD is concerned that NMED's current activities violate the letter and spirit of the Agreement.

Most critically, NMED should engage CARD and other environmental justice and community-based organizations before finalizing its non-discrimination, participation, and language access policies, not afterward. These community groups are most affected by the policies, and developing these policies without input from the community would reduce the

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[16] *Id.* at III.H.2.
[17] *Id.* at III.I.
[18] *Id.* at III. H.
[19] New Mexico Environment Department, Notice of Nondiscrimination, https://www.env.nm.gov/documents/NMED_Notice_of_Nondiscrimination.pdf.
[20] See: https://datausa.io/profile/geo/eunice-nm/#demographics

effectiveness of the regulations.

We look forward to information on the progress of NMED's compliance with the Resolution Agreement. Please let us know within two (2) weeks whether you are able to provide this information in an expedient manner. If it would be helpful, we can also file a request under the Freedom of Information Act[21] and the New Mexico Inspection of Public Records Act.[22]

Thank you.

Sincerely,

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[21] Freedom of Information Act, 5 U.S.C. §552.
[22] Inspection of Public Records Act, N.M.S.A §14-2-1