Create Control - Data Entry

Control Number: OCR-14-001-5132 Alternate Number:

Citizen Information

Citizen/Originator: 1). Jantz, Eric - 1405 Louisa Street, Santa Fe, NM 87505 Search Citizen

Constituent: Search Constituent

Committee:

Sub-Committee:

Control Information

Status: Pending *

Letter Date: Sep 15, 2014 * Received Date: Sep 16, 2014

Contact Type: LTR (Letter) * Priority Code: Normal *

Addressee: US/EPA Office Of Civil Rights (+) Addressee Org: 1200 Penn Avenue, N.W. Wi

File Code: 108-025-08_497_a Discrimination Complaints - External Record Copy

Signature: (+)

CC: Search CC

Signature Date: Date

Primary Subject: Discrimination Complaint (+) *

Secondary Subject: (+)

Instructions: NRN-No Response Necessary (+) *

Instruction Notes:

General Notes: This control is assigned to title 6 for apprpnate action

*: Required field
(+): Lookup field, press space bar for complete list

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New Mexico
Environmental Law Center
TM

September 15, 2014

By email and Federal Express

Gina McCarthy
Administrator
Environmental Protection Agency
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Washington, DC 20460
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Velveta Golightly-Howell
Director, Office of Civil Rights
Environmental Protection Agency
Mail Code 1210A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Title_VI_Complaints@epa.gov

Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7

Dear Ms. McCarthy and Ms. Golightly-Howell:

Please find attached the SouthWest Organizing Project's complaint under Title VI of the 1964 Civil Rights Act and its implementing regulations, against the Albuquerque Air Quality Division and Albuquerque/Bernalillo County Air Quality Control Board. I look forward to your response and please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

Eric Jantz
Staff Attorney
ejantz@nmelc.org

RECEIVED
SEP 16 2014

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

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SouthWest Organizing Project Complainants, v. Albuquerque Air Quality Division and Albuquerque/Bernalillo County Air Quality Control Board Respondents.	)))))))))))))))))	COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000d and 40 C.F.R. PART 7

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Attorneys for Complainants

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I. INTRODUCTION

Communities of color and low-income communities in Albuquerque and Bernalillo County, New Mexico, have suffered disproportionate impacts of air pollution since the Clean Air Act , 42 U.S.C., §§ 7401 *et. seq.* was enacted in 1970. As a result, these communities suffer a higher risk and rate of disease and death than non-minority communities. The disparate impacts on minority and low-income communities are not accidental. They are the result of years of discriminatory policy choices by local government. The Albuquerque/Bernalillo County Air Quality Board ("Board") and Air Quality Division ("Division") have a demonstrated record of marginalizing minority communities so that they are exposed to an unequal burden of air pollution and the concomitant adverse health effects.

In order to demonstrate racial discrimination from disparate impacts under Title VI of the Civil Rights Act of 1964, 42. U.S.C. §§ 2000d *et. seq.* ("Civil Rights Act") and the United States Environmental Protection Agency's ("EPA") implementing regulations, a complainant must satisfy four factors: 1) a state or local agency's action has an adverse impact; 2) that the action is discriminatory on the basis of race, color or national origin, 3) the action is caused by a recipient of federal money and 4) the complaint is filed within the statute of limitations period.[1] The Complainants' petition meets all these criteria, and the EPA should therefore grant their petition and the relief requested.

[1] The Board's and Division's conduct also violates the anti-discrimination provisions of the International Covenant on the Elimination of All Forms of Racial Discrimination ("CERD"), which the United States has ratified and by whose provisions all levels of government in the U.S. are bound. The United Nations committee overseeing implementation of the CERD recently expressed concern at the disproportionate impacts of pollution on minority communities in the U.S. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, CERD/C/USA/CO/7-9 at ¶ 10 (2014), attached as Exhibit A. Moreover, the Committee called upon the U.S. to ensure that environmental laws were being enforced and implemented equally on state and local levels and that the U.S. undertake independent investigations of allegations of disparate impacts of pollution. Id. at ¶ 10(a), (b).

II. THE COMPLAINANTS

The SouthWest Organizing Project ("SWOP") is a non-profit environmental and social justice organization based in Albuquerque, New Mexico. SWOP works primarily with low-income and minority communities toward community empowerment and equal treatment under existing laws. SWOP's guiding principle is that every community has the right to a healthy and sustainable environment in which to live, work, and play.

SWOP and its members work hand in hand with communities disproportionately impacted by pollution to address both the physical and systemic sources of the pollution. Confronting environmental racism in this context includes organizing for political and social change, litigation, building relevant knowledge and skills within communities, and conducting citizen science.

III. FACTUAL AND PROCEDURAL BACKGROUND

Since 2010, SWOP, its members, and its community allies have been attempting to ensure that the Division equitably implements and enforces the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1*et. seq.*, which is the state statute implementing the requirements of the Clean Air Act. Community attempts to address disparate air pollution impacts include challenging individual pollution permits and petitioning for regulatory changes.

A. Permit Challenges

It was over 30 years from the time the Clean Air Act was enacted before any community in Albuquerque or Bernalillo County challenged a permit issued under state laws implementing the Clean Air Act.[2] Once affected communities began challenging air permits, the difference in results has been stark, depending on the affected community's demographics.

[2] It is unclear why the first community challenge to an air permit occurred over 30 years after the Clean Air Act was enacted. Given the Division's and the Board's lack of candor about Albuquerque's and Bernalillo County's air

1. *Vulcan Cement Plant*

The first ever community challenge to a permit that the Division issued pursuant to the New Mexico Air Quality Control Act was the Mountain View community. That challenge occurred in 2006. The Mountain View Neighborhood is located in Albuquerque's South Valley and is predominantly minority. According to Census 2010 data, the 87105 ZIP code, where the Mountain View Neighborhood is located, has a population that is 79.3% Latino, [3] compared to 46.7 % for the whole of Albuquerque[4] and 48.4% for Bernalillo County. [5]

The Mountain View Neighborhood Association, among other organizations and individuals, challenged the construction permit the Division issued to Vulcan Materials, Inc. for a concrete batch plant. The plant was to be located across the street from Mountain View Neighborhood's new community center. In issuing the permit, the Division found that Vulcan's operations would meet all the Clean Air Act's and New Mexico Air Quality Control Act's requirements.[6]

The Mountain View community challenged Vulcan's permit on several grounds; however, most significantly, the community challenged the Division's failure to use any air pollution data from the Mountain View neighborhood as the basis for background air quality conditions and the attendant failure to adequately assess cumulative air impacts. As a result of the Division's failure to take these critical factors into account, the Division significantly

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quality, low-income and minority communities may not have felt like they had the resources to challenge that position. The Division's and Board's lack of outreach to low-income and minority communities could also have been a contributing factor. Other institutional obstacles, such as exorbitant filing fees to challenge an air permit, could have also contributed to such a long history of excluding minority community involvement in the state air pollution permitting process.

[3] A copy of the U.S. Census 2010 data for ZIP Code 87105 is attached as Exhibit B.

[4] A copy of the U.S. Census 2010 data for Albuquerque is attached as Exhibit C.

[5] http://quickfacts.census.gov/qfd/states/35/35001.html

[6] For reasons unrelated to its construction permit, the Vulcan plant never began operations.

underestimated the amount of pollution the Vulcan plant would produce. Despite the Mountain View community's challenge, the Board ultimately approved Vulcan's construction permit.

2. *American Cement Company*

After the Vulcan permit challenge, other predominantly minority neighborhoods in Albuquerque began to challenge permit applications. In 2009, the Greater Gardner Neighborhood Association and the North Valley Coalition of Neighborhood Associations challenged a construction permit modification to a cement plant located in the Greater Gardner neighborhood. The 87107 ZIP code where the Greater Gardener neighborhood is located is 56.6% Latino.[7] The area also has five aggregate processing plants, three asphalt production facilities, six concrete production operations, and two cement distribution terminals, among other pollution sources. In Bernalillo County there are 939 permitted stationary sources of pollution which are permitted a total of 2388.62 tons per year of all suspended particulates.[8] ZIP code 87107 (with 5% of the county population) contains 11% of the stationary sources of pollution and 17% of the permitted yearly tonnage of total suspended particulates.[9] The American Cement transfer facility is located less than 2000 feet from La Luz Elementary School and less than 3000 feet from Mountain Mahogany Community School.[10] The Division granted American Cement's permit modification application, but American Cement voluntarily agreed to certain operational conditions after negotiations with community members.

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[7] A copy of the U.S. Census 2010 data for ZIP code 87107 is attached as Exhibit D.

[8] Petition for Review, *Greater Gardner Neighborhood Ass'n, et. al. v. City of Albuquerque Air Quality Division*, Permit Modification No. 0902 M3 at 2-3 (Nov. 2, 2009).

[9] Id.

[10] Id.

3. *Smith's Food and Drug*

In stark contrast to the Board's decisions to approve the Vulcan and American Cement construction permits, the Board reached a very different conclusion with respect to a permit modification to a gas station in the Summit Park neighborhood. The Summit Park neighborhood is located near the University of New Mexico. The 87106 ZIP code, where the Summit Park neighborhood is located, is 34.7% Latino and 50.7% non-Hispanic White.[11]

In that case, Smith's Food & Drug sought a modification to an existing permit, which the Division granted, to increase the number of cars that could be served by its gas station. The Summit Park Neighborhood Association, among others, appealed the Division's decision to the Board. The Board decided, in keeping with its mandate to prevent and abate air pollution, to overturn the Divisions decision, and deny Smith's permit modification.[12] The Board based its decision on the rationale that increased traffic at the Smith's gas station would have cumulative impacts on the nearby neighborhood, adversely affecting its residents' quality of life.[13]

B. Community Policy Efforts

Because the Board and Division have repeatedly ignored predominantly minority community concerns in the context of pollution permit applications, minority and low-income communities and their allies, including SWOP, have undertaken several policy initiatives to address disparate pollution impacts in Albuquerque and Bernalillo County. There have been two primary efforts.

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[11] A copy of the U.S. Census 2010 data for ZIP code 87106 is attached as Exhibit E.

[12] A copy of the Board's decision is attached as Exhibit F.

[13] Id.

1. *Environmental Justice Task Force*

First, communities persuaded the Board to create an Environmental Justice Task Force ("Task Force") that convened to identify environmental justice issues related to the Board and Division's work and make recommendations for change to the Board.[14] Unfortunately, from the very beginning of the Task Force process, legal counsel for the Board and Task Force members who were Division employees obstructed Task Force progress and none of the Task Force's recommendations were ever implemented.

2. *Cumulative Impacts Ordinance*

Most recently, SWOP and its community partners asked the Board to consider a regulation that would have required permit applicants to disclose and analyze the environmental and public health impacts of their proposed operation when combined with emissions from existing and reasonably foreseeable operations in the area.[15] This proposed regulation amendment would have also implemented a single Task Force recommendation.[16] Despite significant community support, the Board refused to even hear SWOP's petition.[17]

SWOP's asked the Board to consider and pass its proposed ordinance because minority communities continue to suffer an unequal pollution burden from industrial activities. In addition to the individual permit challenges, described above, SWOP based its rulemaking petition on the fact that polluting activities are concentrated in a few minority communities.

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[14] A copy of the Task Force's findings and recommendations is attached as Exhibit G.

[15] *See*, http://www.cabq.gov/airquality/air-quality-control-board/documents/PetitiontoAmend20_11_72_NMACPortfolio.pdf (last reviewed 9/11/14).

[16] Exhibit G at 5.

[17] The order denying SWOP's petition is attached as Exhibit H.

a. San Jose Neighborhood

For example, the San Jose neighborhood is within the 87105 ZIP code that is 79.3% Latino.[18] San Jose is also host to a large concentration of industrial operations that create a disproportionate amount of pollution. Some of the polluting operations in San Jose as of 2012[19] are: 1) Van, Waters & Rogers, Inc., a chemical distributor, which is permitted to emit 24 tons per year ("TPY") of Hazardous Air Pollutants ("HAPs) and 6 TPY of VOCs; Albuquerque Products Terminal, a petroleum bulk terminal, permitted to emit 51 TPY of VOCs and 12 TPY of HAPs; a General Electric Co. manufacturing plant, permitted to emit 25 TPY of VOCs, 7 TPY of HAPs, 20 TPY of PM_{10}, and 23.14 TPY of $PM_{2.5}$; Vecenergy Albuquerque Bulk Petroleum Terminal, permitted to emit 36 TPY of VOCs and 1 TPY of HAPs; CEI Enterprises, a manufacturing operation, permitted to emit 19 TPY of VOCs and 13 TPY of HAPs, and the Karsten Company, a wood manufacturing operation that is permitted to emit 21 TPY of VOCs.

b. Mountain View Neighborhood

As described above, Mountain View is a predominantly Latino neighborhood. Like San Jose, to which it is adjacent, it hosts many polluting industrial operations. Some of the polluting operations in Mountain View are: Duke Redi-Mix Concrete, which is permitted to emit 18 TPY of carbon, 2 TPY of VOCs, 37 TPY of PM_{10}, and 12.15 TPY of $PM_{2.5}$; Albuquerque Refined Products terminal, which is permitted to emit 97 TPY of VOCs and 13 TPY of HAPs; Albuquerque Redi-Mix Concrete, permitted to emit 1 TPY of VOCs, 2 TPY of PM_{10}, and 1.22 TPY of $PM_{2.5}$; and Conoco Phillips Pipeline Co., permitted to emit 21 TPY of Carbon, 10 TPY of Nitrogen Oxides ("NOx"), 94 TPY of VOCs, and 20 TPY of HAPs.

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[18] Exhibit B at 3.

[19] All individual operation pollution information is from http://www.arcgis.com/home/webmap/viewer.html?webmap=0a83a5e7e57c4a7f8fe1f091b52acdc7 (last reviewed 9/8/14).

c. Greater Gardner Neighborhood

Like San Jose and Mountain View, the Greater Gardner neighborhood is predominantly Latino. Like San Jose and Mountain View, it is also host to a disproportionate number of polluting activities. Some of the polluting operations in the Greater Gardner Neighborhood are: Holly Asphalt Company, permitted to emit 10 TPY of carbon, 12 TPY of NOx, 12 TPY of VOCs, 1 TPY of HAPs, and 3 TPY of PM_{10}; J & B Manufacturing, permitted to emit 2 TPY of NOx and 2 TPY of VOCs; and Earthgrains Baking Company, permitted to emit 6 TPY of carbon, 7 TPY of NOx, 248 TPY of VOCs, and 2 TPY of HAPs.

d. Summit Park Neighborhood

The concentration of polluting sources and amount of pollution emitted in the above minority neighborhoods stands in dramatic contrast to the concentration of sources and emissions in the Summit Park neighborhood, also described above. In Summit Park, the polluting sources are a series of gas stations, with the Smith's gas station being the largest emitter at 22 TPY of VOCs. The Carl Mart emits 2TPY of VOCs and the Texaco gas station emits 9 TPY of VOCs. The concentration of polluting sources shown in the ARC map cited in this Complaint is consistent with the Division's analysis of source concentrations.[20]

IV. SWOP'S COMPLAINT MEETS EPA'S JURISDICTIONAL REQUIREMENTS

A complaint under Title VI of the Civil Rights Act and the EPA's implementing regulations must show the following: 1) a state or local agency's action has an adverse impact; 2) that the action disproportionately impacts communities protected by Title VI on the basis of race, color or national origin, 3) the complaint meets EPA's jurisdictional criteria.

Based on EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigation Guidance"), the EPA will accept

[20] A copy of that analysis is attached as Exhibit I.

and investigate a complaint if it meets the following jurisdictional criteria: 1) the complaint is written; 2) it identifies the entity that allegedly performed the discriminatory act and describes the alleged discriminatory acts that violate EPA's Title VI regulations (*i.e.*, an act of intentional discrimination or one that has the effect of discriminating on the basis of race, color, or national origin); 3) it is filed within 180 days of the discriminatory act; and 4) it is filed by a person who was allegedly discriminated against, or by party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations. Id., 65 Fed. Reg. 39,650, 39, 672 (June 27, 2000).

In this case, the Complainants have met all the jurisdictional requirements. This Complaint is written, it identifies the entities responsible for the discriminatory acts and describes the discriminatory acts, and SWOP is authorized to represent individuals in communities where the Board's and Division's discriminatory acts occurred.

Further, pursuant to 40 C.F.R. § 7.120(b)(2), a complaint is timely if it is filed within 180 days of the discriminatory act. In this case, the Albuquerque Air Quality Division's disparate enforcement of New Mexico Air Quality Control Act provisions, the state implementation plan ("SIP") and the Clean Air Act is ongoing. *See, e.g.*, Stanley v. Darlington Co. School Dist., 879 F. Supp. 1341, 1364 (D. S.C., 1995) (school district properly sued under Title VI for ongoing discrimination). Therefore, SWOP's Complaint is timely.

Additionally, the Albuquerque/Bernalillo County Air Quality Control Board rejected SWOP's most recent effort to eliminate disparate implementation and enforcement by refusing to hear SWOP's petition to require the Division to take into account cumulative air impacts. The Board's order refusing to hear SWOP's petition was issued on March 21, 2014. September 17, 2014 is 180 days from March 21, 2014. This Complaint is therefore timely.

V. THE BOARD AND DIVISION ARE FEDERALLY FUNDED ENTITIES THAT HAVE IMPLEMENTED AND ENFORCED THE STATE STATUTE IMPLEMENTING THE CLEAN AIR ACT IN A DISCRIMANATORY MANNER.

The EPA's regulations implementing the 1964 Civil Rights Act prohibit any program or activity receiving EPA assistance from discriminating on the basis of race, color, national origin or gender. 40 C.F.R. § 7.35(a)(1)-(3), (7)(b). In particular, Part 7 prohibits any recipient from using any:

> criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin or sex.

Id. at § 7.35(7)(b). Additionally, recipient of Federal funds is prohibited from choosing a site or location of a facility that has the effect of discriminating against individuals based on race, color, national origin or gender. Id. at § 7.35(c).

In this case, both the Board and Division have received and continue to receive Federal assistance. Further, the Division's and Board's decisions and ongoing policy have the effect of discriminating against communities of individuals based on their race, color, or national origin. The Complainants have therefore established that the Board and Division have violated Title VI of the 1964 Civil Rights Act and their requests for relief should be granted.

A. The Albuquerque/Bernalillo County Air Quality Board and Albuquerque Air Quality Division Receive Federal Funds.

The Division and Board must comply with EPA's Title VI implementing regulations because both entities receive substantial financial assistance through EPA grants. 40 C.F.R. § 7.15. In fiscal year 2011, the Division and Board, through the City of Albuquerque, received

$892,622 in EPA assistance.[21] In fiscal year 2012, the last year for which data are available, the Division and Board received $1,569,440 in EPA assistance.[22] The Division's and Board's obligation to comply with Title VI's requirements is not limited to programs that are funded by EPA, although all the Division's and Board's activities implementing and enforcing the Clean Air Act are funded by EPA. "Program or activity" is defined as "all of the operations of" a department, agency, special purpose district or other instrumentality of a State or local government. 42 U.S.C. § 2000d-4a. Thus, by any measure, both the Division and the Board receive federal funds and are required to comply with Title VI's requirements.

B. The Division's and Board's Failure to Consider Cumulative Impacts in Permitting Decisions Under the Clean Air Act and Air Quality Control Act have Resulted in Adverse Health and Environmental Impacts on Communities of Color.

The EPA has determined that "exceedance of a concentration threshold ... have been identified as a significant concern, and expects to generally recognize such exceedances as adverse under Title VI." U.S. Environmental Protection Agency, Investigative Report, Case File No. 16R-99-R9 at 26 (Aug. 25, 2011) ("Investigative Report"). Moreover, EPA has also concluded that a complainant does not need to demonstrate actual harm to establish adverse impacts. Id. at 26-27. Instead, a complainant need only demonstrate a "reasonable cause for concern for the public health." Id.

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[21] *See*, http://usaspending.gov/search?form_fields={%22search_term%22%3A%22Albuquerque%22%2C%22spending_cat%22%3A[%22g%22%2C%22c%22]%2C%22dept%22%3A[%226800%22]%2C%22recipient_duns%22%3A[%2200711891%22]%2C%22fyear%22%3A[%222011%22]}&sort_by=dollars&per_page=25 (last reviewed 9/11/14).

[22] *See*. http://usaspending.gov/search?form_fields={%22search_term%22%3A%22Albuquerque%22%2C%22spending_cat%22%3A[%22g%22%2C%22c%22]%2C%22dept%22%3A[%226800%22]%2C%22recipient_duns%22%3A[%2200711891%22]%2C%22fyear%22%3A[%222012%22]}&sort_by=dollars&per_page=25 (last reviewed 9/11/14).

1. *The Division's and Board's Failure to Consider Cumulative Impacts has Resulted in Pollution Concentrations Above Regulatory Standards.*

The Division's and Board's failure to consider the cumulative impacts of their permitting decisions has resulted in increased risk of disease in minority communities as well as resulting in actual increases in mortality and morbidity. In the San Jose neighborhood, recent community air quality monitoring data show levels of the hazardous air pollutant chlorobenze, with a mean concentration over a year of 23.6 micrograms per cubic meter ("μ/m^3"), exceeding the EPA's provisional Reference Concentration ("RfC") of 20 μ/m^3.[23,24] Further, long-term mean concentrations of particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$"), which measured 18.9 μ/m^3, exceeded EPA's annual standard of 12 μ/m^3.[25]

A 2005 study conducted by the South Valley Partners for Environmental Justice showed that several volatile organic compounds ("VOCs") in several minority neighborhoods, including Mountain View, exceeded EPA's cumulative risk levels. For instance, benzene concentrations in Mountain View were orders of magnitude greater than EPA's acceptable risk level.[26] Similar results were found for carbon tetrachloride, chloroform, and tetrachloroethylene.[27] Hence, based solely on the exceedances of regulated pollutants in San Jose and Mountain View, Complainants have demonstrated adverse impact. However, adverse impact can also be demonstrated because of the health risks posed by concentrated air pollution in minority neighborhoods.

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[23] A copy of the report with those data is attached as Exhibit J.

[24] Id. at 5.

[25] Id. at 6.

[26] Attached as Exhibit K at 15.

[27] Id. at 16-18.

2. *The Division's and Board's Failure to Consider Cumulative Impacts has Resulted in Elevated Incidence of Disease and Mortality in Minority Communities.*

Communities of color in Albuquerque and Bernalillo County have higher than expected rates of disease associated with elevated air pollution concentrations. For example, in the 87017 ZIP code, where the Greater Gardner neighborhood is located, the death rate from asthma between 1990-2005 was nearly double that of Bernalillo County.[28] Further, between 1998 and 2002, the number of children under five hospitalized for acute asthma symptoms in the 87107 ZIP code was nearly 50% higher than for the rest of Bernalillo County.[29] Finally, life expectancy in the area of the Greater Gardner neighborhood is nearly 5 years less than the rest of Bernalillo County.[30]

The Mountain View neighborhood is burdened by similar circumstances. As explained in Section III, above, Mountain View has elevated concentrations of VOCs. Not surprisingly, Mountain View also has higher than expected numbers of lung, bladder, brain and thyroid cancers, as well as higher than expected numbers of leukemia compared with the rest of Bernalillo County.[31] All of these cancers are associated with exposure to VOCs. Thus, the Division's and Board's actions have resulted in a reasonable concern for public health and SWOP has established a showing of adverse impacts.

C. The Division's and the Board's Failure to Consider Cumulative Impacts Results in Disproportionate Adverse Impacts on Communities of Color.

As a result of the Board's and Division's failure to implement the Clean Air Act and Air Quality Control Act equally, minority and low income communities in Albuquerque bear a

[28] Attached as Exhibit L at 14.

[29] Id.

[30] Id. at 17.

[31] Attached as Exhibit K at 24.

disproportionate burden of air pollution. The result is those communities suffer higher rates of disease and lower life expectancy.

Disparate impact is evaluated by comparing the adversely impacted community to a comparison population. Investigative Report at 30. The comparison population is chosen in order to evaluate whether there is a significant difference between them with respect to demographic characteristics or degree of impact. Id. Disparity between groups is evaluated on a case by case basis, but typically ranges from 20% to 100%. Id. at 31; Smith v. Xerox Corp., 196 F.3d 358, 365-366 (2nd Cir. 1999). In other words, if an adversely impacted community has 20% to 100% greater minority population than the comparison community, the disparity is significant.

In this case, the affected communities are predominantly minority communities including, but not limited to, the Mountain View community and the Greater Gardner community, where the Division and Board approved permits for operations that would increase air pollution in already burdened neighborhoods. The Comparison communities include, but are not limited to, primarily non-minority communities, such as the Summit Park neighborhood, where the Board denied an application for pollution permit modification under the Air Quality Control Act.

In the case of Mountain View, the Latino population for the ZIP code (87105) where that neighborhood is located is 79.3%. In the 87106 ZIP code, where the Summit Park neighborhood is located, the Latino population is 34.6%. Thus, the Mountain View neighborhood has a 44.7% larger Latino population, well within the range that would indicate significantly disparate treatment.

Likewise, the Greater Gardner neighborhood is located in the 87107 ZIP code, where the population is 58% Latino. Thus, the Greater Gardner neighborhood has a 23.4% larger Latino population than Summit Park. Again, the disparity between the two neighborhoods is significant.

These significant disparities are a pattern throughout Albuquerque. In a report entitled *Place Matters for Health in Bernalillo County*, the Joint Center for Political and Economic Studies determined that communities with higher percentages of Latinos and recent immigrants were much more likely to host industrial and other operations that increased adverse health impacts.[32] There are significant data on pollution and demographics in Albuquerque and Bernalillo County indicating that minority communities bear a disproportionate burden of polluting industry.

VI. RELIEF REQUESTED

SWOP respectfully requests that the EPA grant the following relief:

1) Conduct an investigation into the Board's and Division's discriminatory implementation of the Clean Air Act by way of the provisions of the New Mexico Air Quality Control Act;

2) Require that the Board and Division use monitoring data from the neighborhood or neighborhoods that will be impacted by a proposed operation in determining background air quality for every permit the Board or Division considers;

3) Require that any air quality modeling the Board or Division uses to evaluate a permit application under the New Mexico Air Quality Control Act be calibrated against air quality monitoring data described in 2), above;

[32] Attached as Exhibit M at 16-19.

4) Require that the Board adopt a regulation prohibiting Board members from being employed by any business that may seek a permit from the Division or Board;

5) Require the Board and Division to conduct extensive and regular outreach to minority and low-income neighborhoods regarding its permitting and policy initiatives;

6) Require that the Board adopt a regulation requiring disclosure and analysis of cumulative impacts of permit application operations;

7) If warranted, reduce or eliminate federal funding for the Board and Division.

Dated: September 15, 2014.

NEW MEXICO ENVIRONMENTAL LAW CENTER
Eric Jantz
R. Bruce Frederick
Douglas Meiklejohn
Jonathan Block
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2014, I have delivered a copy of the foregoing pleading via electronic mail and/or Federal Express to the following:

Gina McCarthy
Administrator
Environmental Protection Agency
Mail Code 1102A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
mccarthy.gina@epa.gov

Velveta Golightly-Howell
Director, Office of Civil Rights
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1200 Pennsylvania Avenue, NW
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Title_VI_Complaints@epa.gov

By: _____

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Recipient

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Total Weight

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