BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

Citizens for Alternatives to Radioactive Dumping;	)	
Conservative Use of Resources and the	)	
Environment; Water Information Network,	)	COMPLAINT UNDER
(b) (6) - Privacy and (b) (6) - Privacy	)	TITLE VI OF THE
	)	CIVIL RIGHTS ACT
COMPLAINANTS	)	
	)	

INTRODUCTION

Citizens for Alternatives to Radioactive Dumping ("CARD"), Conservative Use of Resources and the Environment ("CURE"), Water Information Network ("WIN"), (b) (6) - Privacy and (b) (6) - Privacy (collectively "Complainants"), through their undersigned representative, file this administrative complaint with the Office of Civil Rights of the United States Environmental Protection Agency ("EPA") for an investigation into violations of Title VI of the Civil Rights Act of 1964 by the New Mexico Environment Department ("NMED") with regard to its handling of the application of Gandy-Marley, Inc. ("GMI") for a treatment, storage and disposal ("TSD") facility permit to construct and operate a hazardous waste TSD facility approximately 40 miles east of Roswell, New Mexico. NMED's actions or omissions complained of have had the effect, if not the purpose, of discriminating against the Complainants based on their race, color or national origin.

NMED is located at: New Mexico Environment Department, Office of the Secretary, 1190 St. Francis Drive, P.O. Box 26110, Santa Fe, NM 87502-6110. NMED is a "recipient" of "Federal financial assistance" and "EPA assistance" as defined by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to 2000d-7, and 40 CFR §7.25.

Complainants are so-called "minority" members or have minority membership in their organizations, many of whom live, work and recreate in the general area of the proposed GMI facility (AKA "Triassic Park facility"). CARD and CURE were parties in the hearing for the facility; they, along with WIN, as groups, many of their members as individuals, and others of Complainants have actively opposed GMI's TSD facility since at least the latest revision of the application was accepted for permitting

by NMED. Complainants therefore petition for an investigation as Complainants who have opposed this facility during the permitting process and who have suffered the effects of NMED's discrimination.

BACKGROUND

New Mexico is the only state where no single racial group is in the majority. It does, however, have a significant percentage of minority residents. It is one of the poorest states in the nation, ranking number 48 in per capita personal income for every year from 1995 through 1999.[1] The percentage of persons of Hispanic or Mexican origin at or below poverty level is more than twice that of the United States population as a whole (27.8% compared to 13.1%).[2] In New Mexico, Hispanics and Mexicans are twice as likely as Non-Hispanic Whites (25% vs. 12%) to lack healthcare coverage and those living in poverty are much more likely never to have received cancer-screening exams or early and continuous prenatal care.[3]

Chaves County, where the Triassic Park facility is located, has high percentages of people living in poverty–23.1% for all ages and 32.4% for children below 18 according to the *Chaves County 2002 County Health Profile.* The low income population of the County has also been designated as a *Shortage Area* by the New Mexico Department of Health because of limited access to healthcare.[4] Most of the minority population in that area is made up of Hispanics or Latinos of Mexican origin. This population is often concentrated in communities or in residential neighborhoods within towns that have a larger non-Hispanic White population. Looking more closely at just 6 towns potentially affected by the Triassic Park facility with high percentages of Hispanics or Mexicans, it can be seen that towns with high minority populations also have high percentages of youth (5-17 year olds) living in poverty:

	% people of color	% youth in poverty	County
Dexter	72.6%	35.7%	Chaves
Lake Arthur	71.1%	61.0%	Chaves
Hagerman	64.1%	36.7%	Chaves
Lovington	56.7%	25.6%	Lea
Roswell	49.1%	28.4%	Chaves
Artesia	48.3%	25.9%	Eddy[5]

Air quality in Chaves County is among the worst in the state (measuring volatile organic compounds ("VOCs"), carbon monoxide, nitrogen dioxide, sulfur dioxide and particulate matter less than 10 microns) and New Mexico already has the highest level of airborne particulate matter in the nation.[6] Bad air results from a combination of natural dust, aerosol vapors and other pollutants from the extensive oil and gas industry, and from industrial and waste disposal activities in the area. Topsoil in parts of the County is known to contain high levels of lead and arsenic.

From 1995 through 1997, rates of hospitalizations for diseases of the respiratory system in Chaves County were some of the highest in New Mexico–way above the State rate.[7] One of the most frequently reported categories in the *New Mexico Children's Chronic Conditions Registry* ("CCCR") is respiratory conditions–especially asthma–and numbers in Chaves County are particularly high compared to most surrounding counties.

According to hospital inpatient discharge data for ambulatory care sensitive conditions from 1995 through 1997, Health District 4 (which includes Chaves County) had the highest rate of these hospitalizations in the State for all top chronic and infectious diseases in every age category except infections diseases in ages 65 and over[8]. Chaves County itself had the fourth highest cancer incidence rate in the State and the highest cancer mortality rate in the state during 1970-1996.[9]

The New Mexico Department of Health ("NMDH") website states that Hispanics in New Mexico are more likely (35%) than Non-Hispanic Whites (26%) to be overweight and more than twice as likely (7%) than Non-Hispanic Whites (3%) to have received a diagnosis of diabetes. The NMDH *Border Health and Environmental Survey* (April 2000) reported that in 6 border Counties, Hispanic households were more likely (11%) to have had a family member diagnosed with asthma than non-Hispanic households (7%). Although Chaves County was not included in the survey, it borders this block of 6 counties. Hispanic and Mexican residents near the Triassic Park facility testified during the permit hearing about their numerous health problems–including asthma and bronchitis. One woman could hardly speak because her bronchitis was so bad she had to use a respirator.

Birth defects are the leading causes of infant mortality in New Mexico and national estimates placed New Mexico fourth highest in the US for infant mortality due to birth defects in 2001.[10] Children with birth defects have a higher prevalence of developmental disabilities than children without birth defects. Not surprisingly, in 1996, two other most frequently reported chronic conditions in the CCCR included developmental delays and birth defects. Chaves County had higher numbers of children diagnosed with congenital anomalies than any of the surrounding counties[11] in 1995 through 1999 and had the 2nd highest rate of congenital anomalies in the state.[12] It also had the highest rate of neural tube defects and the second highest rate of both isolated cleft palate and cleft lip with or without cleft palate in the state according to the *1999 New Mexico Selected Health Statistics Annual Report.* The Report goes on to state that while vitamin usage is associated with preventing congenital malformations, Spanish-speaking pregnant women were less likely to use vitamins. The infant mortality rate in Chaves County was 9.2/1,000 live births compared to 6.5 for New Mexico as a whole–giving it the 3rd highest infant mortality rate in the State.

The New Mexico Department of Public Health's website lists air pollution from power plants and oil refineries; disposal and recycling of solid waste and disposal of hazardous materials; drinking water contamination due to unintentional radioactive or chemical discharges; as well as equity and justice in the distribution of environmental health resources and risks as some of the environmental health issues that are significant for New Mexicans. These all apply to the residents of Chaves County. Studies have shown

a statistically significant correlation between living near a landfill and upper respiratory disorders,[13] skin rashes,[14] fatigue and headaches,[15] cancer[16] and birth defects. The 1998 EUROHAZCON Study showed a 33% increase in risk of non-chromosomal anomalies near hazardous waste landfill sites, including a significantly raised odds ratio for neural-tube defects.[17] Although most of these studies showed a correlation with living quite close to a landfill, perhaps a lesser but still significant effect could be shown on the Hispanic communities nearest to the Triassic Park facility–especially on particularly sensitive subpopulations of Hispanic asthmatics, children and fetuses. The 2002 EUROHAZCON Study showed a higher risk of chromosomal anomalies in people living close to hazardous landfill sites, and risk did not decline consistently with increasing distance from sites.[18] Frequent winds are very high in the area (40-60 mph) and testimony was given during the permit hearing that the oil refinery in Artesia could be smelled in Hagerman (about 40 miles away). Clearly some kinds of pollutants are able to travel long distances in this area. Hispanic residents also work in the dairy, cattle and ranching industries which surround the facility.

Hispanic and Mexican residents in this area are already subjected to numerous pollutants from sources other than the Triassic Park facility. Nearby facilities and development include a mixed-waste treatment, storage and disposal facility at Andrews, Texas; a 'special wastes' landfill at Eunice, New Mexico; landfills, transfer stations and processing facilities (sometimes for hazardous and special wastes) throughout the area; petroleum land-farms adjacent to the site and numerous other landfarms throughout the area; a petroleum refinery at Artesia, New Mexico; a mixed-waste treatment, storage and disposal facility near Carlsbad, New Mexico (the Waste Isolation Pilot Plant ["WIPP"]); as well as extensive oil and gas development throughout southeastern New Mexico/west Texas.

All of these sources have associated transportation which also contributes a chronic effect on human health in the area. All of the towns listed above except Lovington lie on or near the transportation route to WIPP. Since the WIPP transportation containers are allowed to emit up to 10 mrem per hour of penetrating radiation at 2 meters during travel, Hispanic and Mexican residents who travel this route or go to gas stations and convenience stores on this route could also be repeatedly exposed to low levels of radiation.

There is also a Superfund site in downtown Roswell where chlorinated solvents (primarily PCE) have contaminated an aquifer–at 5000 times the Clean Water Act limit in places. At least 15 downgradient domestic wells have shown evidence of PCE contamination. Upon information and belief there is also ground water contamination from TCE and other chemicals at the former Walker Air Force Base south of Roswell proper. In fact the area near the Triassic Park facility as well as the larger area of southeastern New Mexico/west Texas appears to be, as one member of the public commented, "...singled out as a dumping ground for the rest of the world." (AR 01-193) Another member of the public said that, "Companies like these [GMI] target areas where communities have low education levels, are economically depressed, and have high levels of minorities." (AR 01-130). Attachment A is a map showing only some

of the waste dumps and other polluting facilities that have been proposed for or sited near Triassic Park and the larger southeastern New Mexico/west Texas area..

TIMELINESS

The Secretary's *Final Order* (Attachment E) permitting the Triassic Park facility is dated March 18, 2002. Therefore this complaint is timely for discriminatory siting.

Originally, Complainants were going to allege that the last discriminatory act involving public participation was NMED's act of not posting the Spanish revision of the Triassic Park Fact Sheet on their website for months after it was created, while having an English Fact Sheet posted. CARD noted in their *Response to the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law* that the August 2001 Spanish revision of the Fact Sheet (as well as the latest English version of the Fact Sheet) had not been posted as late as December 2001. At that time the latest on-line Fact Sheet was dated 6/15/01 and was the English supplemental Fact Sheet. CARD did not revisit this page of NMED's website until late July 2002 when CARD noted that both English and Spanish versions were present. Consequently, CARD wrote to NMED's webmaster the morning of August 1, 2002 asking when the Spanish Fact Sheet had finally been posted on the site, in order to determine the last date it was **not** present as the date of the last discriminatory act. Within hours of this request, NMED removed both Fact Sheets from the site. (See Attachment B for e-mail correspondence and a copy of the web page showing that it was modified on August 1, 2002. The modification was the removal of both Fact Sheets.) A little more than a week later on August 9, 2002 NMED replied that they couldn't pinpoint the date the Spanish Fact Sheet was posted. The next day CARD asked why the Fact Sheets had been removed from the site the day of CARD's request for information. As of this writing, CARD has received no reply.

In fact, there can be no reason for their removal on the day of CARD's request other than to hamper Complainants' efforts to file this complaint. CARD has made no secret of their intention to file a Title VI complaint with EPA. Fact sheets (including the original Fact Sheet and a Supplemental Fact Sheet) for the only other hazardous waste storage and disposal facility permitted by NMED (WIPP) are still on-line today, years after that facility was permitted. Even though a facility is permitted, the Fact Sheets still contain useful information. This is especially true of the Spanish Fact Sheet since it is the only written information about the facility provided in Spanish by either GMI or NMED.

Before the Fact Sheets were removed from the site, it should have been a simple matter for NMED's webmaster to look up the date of the Spanish Fact Sheet's posting. Now it would be much more difficult to determine this date. However, the point is moot since Complainants' are alleging that the last in a long line of discriminatory acts is NMED's removal of these Fact Sheets on August 1, 2002. This complaint is therefore timely for discrimination in the public participation process.

DISCRIMINATORY SITING

I. NMED VIOLATED TITLE VI BY CHOOSING THE SITE OF THE GMI FACILITY AND/OR BY USING CRITERIA OR METHODS OF ADMINISTERING ITS PROGRAM WHICH HAVE THE EFFECT OF SUBJECTING RESIDENTS OF HISPANIC AND MEXICAN DESCENT TO DISCRIMINATION ON THE GROUNDS OF RACE, COLOR OR NATIONAL ORIGIN.

EPA's Title VI regulations at 40 CFR §7.35(c) forbid a recipient of Federal funding from choosing 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 CFR §7.35(b) forbids a recipient of Federal funds from using criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

Through its permitting of the GMI facility, NMED has violated 40 CFR §§7.35(b) and (c) as it is a recipient of Federal funds whose actions, criteria or methods have had the purpose or effect of subjecting Complainants and their Hispanic and Mexican members to discrimination because of their race, color or national origin. NMED has violated Title VI because on March 18, 2002 it issued GMI's permit for the construction and operation of a hazardous waste storage, treatment and/or disposal facility (TSDF) near Roswell, New Mexico at a location that could disparately impact surrounding residents of Hispanic and Mexican descent–especially Hispanic and Mexican youth and Hispanic and Mexican residents suffering from asthma or other respiratory diseases. These populations are already overburdened with the effects from facilities which generate, transport, treat, store, release or dispose of pollution; suffer from ill health and poverty to a greater degree than equivalent non-Hispanic White populations and have less access than non-Hispanic White populations to health care and other factors (such as vitamins, good nutrition, etc.) which could mitigate negative effects from GMI's facility.

A. NMED HAS NOT ADDRESSED THE EFFECT OF ITS PERMITTING DECISION ON THE HISPANIC AND MEXICAN COMMUNITIES NEAREST THE GMI FACILITY, INCLUDING COMMUNITIES WHICH INCLUDE COMPLAINANTS.

During the Permit Comment Period for GMI's facility, NMED received almost 800 cards and letters indicating that the GMI facility could cause "...negative environmental justice impacts on the local population..." (AR 01-117). One letter from the Fambrough Water Cooperative near Hagerman, New Mexico stated that "...the vast majority of people we serve are poor and Hispanic with very little formal education. Most of these people do not utilize English as their primary language..." and requested a disparate impact study be done when it asked for "...funds for an investigation into possible environmental justice issues." (Attachment G).

At the permit hearing CARD sought to present testimony on the potential adverse, disparate environmental justice issues associated with the siting of the GMI facility and request that a disparate impact study of the facility be done before the facility was permitted. GMI challenged CARD's testimony on grounds of relevancy, arguing that CARD's testimony was not relevant to the proceeding since only

state requirements were relevant to permit proceedings and not federal requirements. GMI also argued that even EPA guidance documents referring to Title VI or environmental justice issues were also irrelevant.

The Hearing Officer accepted GMI's arguments, excluding CARD's testimony and documents, and ruling that environmental justice and Title VI issues issues were not relevant to the proceeding. Evidently, NMED and the Hearing Officer had not read EPS's *Draft Recipient Guidance* where it states under *Title VI Approaches* that:

> "[y] may elect to adopt a comprehensive approach that integrates all of the Title VI activities described below into your existing permitting process. EPA expects that such comprehensive approaches will offer recipients the greatest likelihood of adequately addressing Title VI concerns, thereby minimizing the likelihood of complaints."

NMED's Hearing Officer professed an inability to reconcile state law under which hazardous waste permits are issued with CARD's demands for compliance with Title VI and corresponding EPA regulations even though this reconciliation is mandated by statute. (If, indeed, state law governing the granting of permits is inconsistent with or fails to follow Federal law with respect to Title VI, then the state law must be changed or NMED could be subjected to de-funding.)

CURE argued that Title VI and environmental justice issues were relevant to the permitting process under both the New Mexico Hazardous Waste Act and Article XX of the New Mexico Constitution. However the Hearing Officer avoided any examination of the statute or Article XX.

CARD pointed out in its *Response to the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law* that the New Mexico Hazardous Waste Act at NMAC 20.4.1.900 (incorporating 40 CFR §270.10(k)) would allow the proper disparate impact analysis to be done, citing EPA General Counsel Gary S. Guzy's December 1, 2000 memo[19] which describes how the "omnibus" authority laid out in RCRA section 3005(c)(3) could be used to address cumulative risks due to exposures from pollution sources in addition to the applicant facility, unique exposure pathways and sensitive populations (e.g., children with high levels of lead in their blood and individuals with poor diets); that section 3005(3) provides authority to consider environmental justice issues in establishing priorities for facilities; that section 3019 provides authority to increase requirements for applicants for land disposal permits to provide exposure information; and that section 3004(0)(7) provides authority to issue location standards as necessary to protect human health and the environment. This was, however, to no avail.

Despite her assertions to the contrary, the Hearing Officer appeared to realize that NMED did have some responsibility to comply with Title VI requirements when she went on to suggest that the Department had, in fact complied with the Act. Without a shred of evidence in the Record, the Hearing Officer concluded in her *Report* that "On the question of whether a certain community is being subjected to disproportionate impact, it appears that the Bureau gave some consideration to the matter..." This conclusion was based totally on one obscure statement offered by NMED in their *Findings of Fact and*

HAS HAD THE EFFECT OF DISCRIMINATING AGAINST COMPLAINANTS AND OTHER PERSONS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

NMED has established a pattern and/or practice of criteria or methods of administering its programs which have had the effect, if not the intent, of subjecting individuals to discrimination due to their race, color or national origin. Specifically, NMED has chosen to ignore its Title VI responsibilities in all of its permitting decisions in the State of New Mexico.

In her Report, with absolutely no evidence in the Record demonstrating either GMI's or NMED's compliance with Title VI, the Hearing Officer set forth her **belief** that NMED "...embraces the concepts embodied in Title VI and its implementing regulations..." She further stated that "**In my experience** NMED is fully committed to the principles of environmental protection and civil rights and does not discriminate based on race, color, national origin or other protected status." *(emphasis added)* However, it is **not** Complainants' experience that NMED is committed to the principles of environmental protection and civil rights.

Although EPA's *Recipient Guidance* and *Investigations Guidance* are only guidance documents and only suggest possible ways for agencies to assure that their programs do not discriminate, it is telling that NMED has adopted virtually none of the suggestions in either document, has no approach to assure compliance with Title VI or EPA's implementing regulations, appears to have no knowledge of the history of any Agency efforts to comply with these requirements, has trained only a small number of people in any aspect of Title VI or environmental justice (and almost all are no longer working for NMED), has no formal policy regarding environmental justice or Title VI, frequently permits facilities in areas with high concentrations of minorities without ever having required or performed a single scientific investigation into possible disparate impacts, considers environmental justice and Title VI issues irrelevant in permitting, and has actively opposed incorporating Title VI requirements into its permitting process. NMED has shown only the most minimal understanding that they have any obligation to be sure that their activities are not discriminatory.

In the *Final Order* permitting GMI's facility the Secretary denied that there were any Title VI related problems with the permitting process while at the same time admitting that improvements were called for. He then directed that changes be made in the Department's procedural regulations and amendments be proposed to the Environmental Improvement Board and the Water Quality Control Commission which included several elements. Most of these elements involved public participation. However, element *d* stated that these changes should include:

> "A consideration of affected populations and other permitted facilities **within three miles of the facility in question,** based on readily obtainable information, sufficient to ascertain whether an adverse, discriminatory and disparate impact is likely to be found by the Environmental Protection Agency (EPA) under EPA's Interim Guidance For Investigating Title VI Administrative Complaints Challenging State Environmental Permits. This consideration must be made with an eye to the resources available in the Department to make such a consideration,

> and should not be carried out in a way that requires the revisiting of the siting regulations in each case, or assumes authority beyond that granted to the agency in the applicable statute." (*Emphasis added*)

Although this paragraph grudgingly admits that there should be some consideration of Title VI issues, it's primary purpose is to limit the scope of any disparate impact investigation and therefore discriminates against Complainants and other persons due to their race, color or national origin. These limitations also appear to be directly opposed to guidance described in the same EPA document named in paragraph *d.*

Under *Identify and Characterize Affected Population*, EPA's *Investigations Guidance* states that:

> "The impacts from permitted entities and other sources are not always distributed in a predictable and uniform manner. therefore, the predicted degree of potential impacts could be associated with a possible receptor population in several ways...An area of adverse impacts may be irregularly shaped due to environmental factors or other conditions such as wind direction, stream direction, or topography. Likewise, depending upon the location of a plume or pathway of impact, the affected population may or may not include those people with residences in closest proximity to a source."

Limiting consideration of affected populations only to those within 3 miles of a proposed facility is arbitrary and capricious. Such regulations, if passed, would eliminate Complainants and thousands of other potentially affected minorities even from consideration whether they were actually impacted by a facility or not. There are many examples of contamination in New Mexico which have affected minority populations farther than three miles from the source. (*e.g.* contamination from Los Alamos National Laboratory (LANL) which has accumulated at Cochiti Dam by Cochiti Pueblo, and contamination from the last LANL fire which spread for many miles across Native American and Hispanic communities. In fact, so much of the smoke from that fire rose to a high altitude and was carried across several states that it is possible that the bulk of the contamination was carried for hundreds of miles out of state.) The Secretary is well aware of these; therefore, this paragraph *d* does not represent a good-faith effort on NMED's part to address their discriminatory actions.

The Secretary also appears to be limiting consideration of the *Universe of Facilities* only to those permitted by NMED that fall within the three mile limit. This, again, is arbitrary and capricious. The *Investigations Guidance* clearly states under *Determine Universe of Sources* that an assessment may need to evaluate:

> "...the cumulative impacts of pollution from a broad universe of regulated and permitted sources...as well as regulated but usually unpermitted sources...and unregulated sources."

Even background sources can be considered if appropriate. There is also no limitation on location of these sources if they are "relevant" sources of stressors. Clearly, EPA recognizes the reality that an emissions source does not cease to affect people simply because it is unpermitted, not a facility or more than 3 miles from the facility under consideration.

Stating that a disparate impact study should only be based on "...readily obtainable information..." and that it shouldn't cost too much, also appears to limit such a study unreasonably. Again, under *Analyses or Studies,* the *Investigations Guidance* says that:

> "...a relevant adverse impact analysis or a disparity analysis would, at a minimum, generally conform to accepted scientific approaches."

Adequate data to perform such an analysis in a scientific manner may or may not be "readily obtainable." Since NMED's Solid Waste Bureau has said they don't expect to be able to accurately map their facility locations for years because of inadequate resources (see below), one shudders to think what a disparate impact analysis would look like under the same resource limitations. Certainly, at Triassic Park, distance to Hispanic and Mexican receptors was never accurately determined. NMED does not appear to realize that it has the authority under RCRA's *Omnibus* provision to require the applicant to provide the data–even to do the study if the applicant can do it in an unbiased manner. Nor does NMED appear to realize that they could bill the applicant if the Department has to do the study itself.

Finally, the Secretary says in the *Order* that:

> "...state permitting laws do not contemplate a consideration of disparate impact as part of the permitting process, and...state law does not provide such a ground for denial of a permit application,..."

How then, in NMED's opinion, could any consideration of affected populations **not** assume authority beyond that granted the agency by statute?

C. NMED HAS SHOWN A PATTERN OR PRACTICE OF BIAS, HOSTILITY AND INTIMIDATION IN FAVOR OF INDUSTRY AND AGAINST NEW MEXICANS, INCLUDING HISPANIC AND MEXICAN NEW MEXICANS, WHO ATTEMPT TO ENSURE THAT TITLE VI AND ENVIRONMENTAL JUSTICE CONCERNS ARE INCORPORATED INTO NMED'S PERMITTING PROGRAM. THIS PATTERN OR PRACTICE OF BIAS, HOSTILITY AND INTIMIDATION HAS HAD THE EFFECT OF DISCRIMINATING AGAINST HISPANIC AND MEXICAN NEW MEXICANS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

This pattern of bias and hostility and intimidation has had the effect of creating a disparate impact and discriminating against Hispanic and Mexican members of Complainants as well as other Hispanics and Mexicans and other minority populations in the state because of their race, color or national origin. Specific incidents of discrimination include, but are not limited to the following:

1. NMED HAS DEMONSTRATED BIAS IN FAVOR OF INDUSTRY AND AGAINST THE PUBLIC, INCLUDING COMPLAINANTS IN REGULATING NEW MEXICO DEPARTMENT OF ENERGY (DOE) FACILITIES

In their *Letter of Intent Meeting Environmental Responsibilities At New Mexico DOE Facilities,* NMED has stated that they are committed to:

> "[c]ontinue the established **partnership** between DOE, its contractors, and regulators for LANL [Los Alamos National Laboratory] and SNL [Sandia National Laboratory]..." (*emphasis added*)

NMED does not appear to realize that it is inappropriate for a regulator to be in partnership with the industry it is regulating and that their mission is not to be in business with industry, but to protect human health and the environment.

2. NMED HAS DEMONSTRATED BIAS, HOSTILITY AND INTIMIDATION IN ADMINISTERING THE WASTE ISOLATION PILOT PLANT PERMIT APPLICATION, DISCRIMINATING AGAINST HISPANIC AND MEXICAN PARTICIPANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

During the WIPP mixed waste facility hearing the Hearing Officer also stated that environmental justice concerns were not part of the permitting procedure. Although the Hearing Officer allowed some parties to testify and cross examine witnesses **at length** on issues truly unrelated to the permit (e.g. tritium gas and radioactive waste transportation) he would not allow CARD to ask even one single question of NMED's witness regarding if environmental justice concerns were addressed in any way by NMED.

3. NMED HAS DEMONSTRATED BIAS, HOSTILITY AND INTIMIDATION IN ADMINISTERING THE RHINO (CHAPARRAL) FACILITY PERMIT APPLICATION, DISCRIMINATING AGAINST HISPANIC AND MEXICAN PARTICIPANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

During the Rhino Environmental Services Facility Permit process, the State's application process only allowed questions to be raised on technical aspects of the landfill application. No questions concerning the social or potentially discriminatory impact of Rhino's proposal could be addressed within the mandated application process. More than half of the Chaparral community consists of Latinos of Mexican decent and the poverty rate is over twice the national average. In or close to Chaparral are currently three other landfill facilities, a hazardous waste transfer station, a gravel pit, an electric generation plant, and a soil remediation plant. A health survey by the Chaparral Community Health Council ("CCHC") showed that many respondents had difficulty getting medical care because of cost and more than half had to travel more than 30 minutes when seeking medical attention. Asthma was the most frequently reported (24.3%) health problem in the CCHC survey with chronic bronchitis being third (15.3%). Chaparral is situated in one of the border counties described above where a New Mexico Department of Health survey showed that Latino households are more likely than non-Latino households to have had a family member diagnosed with asthma.

Despite these facts, NMED never discussed the possibility of discriminatory siting or did any disparate impact evaluation or study of the site. In addition, NMED again showed its bias in favor of industry and against Latinos trying to raise Title VI issues when it denied residents the assistance of their sole expert witness by refusing to reschedule the hearing for a time when that witness could appear. This occurred after the hearing had already been rescheduled several times to accommodate Rhino Environmental Services.

4. COMPLAINANTS BELIEVE THAT NMED HAS PERMITTED MORE LANDFILLS AND OTHER SOLID AND HAZARDOUS WASTE FACILITIES IN MINORITY COMMUNITIES, BUT THE DEPARTMENT HAS MADE IT IMPOSSIBLE TO DETERMINE IF THIS IS TRUE. NMED'S NEGLIGENCE IN INACCURATELY DETERMINING FACILITY LOCATIONS DISCRIMINATES AGAINST COMPLAINANTS AND OTHER MINORITIES DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

Complainants researched and listed the latitude/longitude locations given in records for all of NMED's permitted solid waste facilities in an attempt to see if NMED was siting most facilities in minority communities. When Complainants attempted to map these locations however, many (if not most) of these figures were incorrect, often placing the facilities in the wrong county and, in one instance, even in the wrong state. While NMED may be able to drive to a facility that it has permitted, it clearly does not know the legal location of these facilities. NMED's negligence is discriminatory since it hampers minority community members' efforts to determine if waste dumps in their communities are part of a programmatic pattern of discriminatory siting within which it is more likely that facilities with their accompanying burdens will be permitted in minority communities. As part of the relief requested in this complaint, Complainants request that NMED be required to determine accurate legal locations for all of its permitted facilities.

A similar problem arose during the Triassic Park hearing when NMED staff attempted to use GPS equipment to determine the distance between the community of Hagerman and the Triassic Park site. The staff member was unable to operate the equipment and an accurate distance was never determined.

II. THE UNIVERSE OF FACILITIES PRESENTS A CUMULATIVE BURDEN UPON HISPANIC AND MEXICAN COMMUNITIES NEAR GMI'S FACILITY AND REFLECTS A PATTERN OF DISPARATE IMPACT UPON THESE COMMUNITIES. THEREFORE, EPA MUST CONSIDER THE ENTIRE UNIVERSE OF FACILITIES IN ITS ANALYSIS.

Under Title VI and EPA's implementing regulations, programs receiving Federal funds may not be administered in a manner that has the effect of subjecting individuals to discrimination based upon race, color or national origin. To determine the effect of NMED's permitting of the GMI facility, EPA must consider the preexisting burden of potentially affected Hispanic and Mexican communities near the facility and the contribution to compounding of that burden which the GMI facility presents. Not only permitted facilities, but **all** polluting facilities must be considered. Only by considering the real and complete

cumulative burden upon these communities can EPA meet its Title VI obligations to avoid subjecting these communities to discrimination based on race, color or national origin. Any limitation upon this universe of facilities to be considered would fail to provide a true picture of the actual disparate effect of NMED's permitting of the GMI facility.

Many of these facilities and pollution sources are described above and/or shown on the map in Attachment A. (However, this may not be a complete list.) Several of these facilities, including the Triassic Park facility, receive waste from other states, or even from other countries. (e.g. WIPP will receive about 35,000 shipments of mixed radioactive and hazardous waste over its lifetime from generator sites both within and outside of New Mexico.) Hispanic and Mexican communities near Triassic Park are mostly situated on transportation routes and are already exposed to the risks that accompany the transport of hazardous, toxic and radioactive materials: accidental releases, explosions and fire, and transportation accidents. Thus, these communities already bear disproportionate cumulative burdens of toxic waste importation. NMED's permitting of the GMI facility adds to this burden and therefore has the effect of discriminating against Hispanic and Mexican members of Complainants. (Although there is a WIPP bypass around Roswell going south, there is no bypass going east. Many, if not most, shipments to Triassic Park would have to go directly through Roswell. One "suggested" route for commercial trucking goes right through predominantly Hispanic and Mexican neighborhoods; Hispanic and Mexican neighborhoods are also situated next to Route 285 through Roswell)

III. LOCATING GMI'S FACILITY AT THE PERMITTED SITE WILL ADD TO THE POLLUTION BURDEN OF THE DISPROPORTIONATELY IMPACTED HISPANIC AND MEXICAN COMMUNITIES IN THE AREA.

The area near the GMI facility is an area where members of Complainants live, work and/or recreate. This area is already almost surrounded by hazardous and radioactive waste disposal facilities, landfills, and other polluting facilities; includes natural sources of contamination (heavy metals in the soils); and is subject to contamination from extensive oil and gas development in the area, including a refinery in Artesia which has had multiple releases and oil field waste disposal. Hispanic and Mexican community residents have already disparately suffered the effects of ill health related to these sources including respiratory and other diseases. Siting yet another hazardous TSD facility in the area will only add to this cumulative burden and represents a disproportionate and significant cumulative burden and pattern of disparate impact on these communities.

1. EPA MUST CONSIDER ALL REASONABLY FORESEEABLE POTENTIAL RELEASES FROM BOTH NORMAL OPERATIONS AND ACCIDENTS ASSOCIATED WITH THE GMI's FACILITY AND/OR WHICH REFLECT A PATTERN OF DISPARATE IMPACT UPON HISPANIC AND MEXICAN COMMUNITIES NEAR THE FACILITY.

GMI did provide limited exposure information concerning operational and accidental releases of VOCs from their facility. However, neither they nor NMED described all reasonably foreseeable potential

releases from both normal operations and accidents as is required by the regulations. Nor did they describe all potential pathways of human exposure. These still need to be modeled and assessed. The facility permit allows the facility to accept PCB-contaminated liquids, soils and bulk remediation waste and GMI has admitted that the facility will accept ash from the incineration of hazardous waste. (GMI has also stated that it is it's intention to modify the permit to receive larger quantities of PCBs in the future.) However, neither GMI nor NMED provided any comprehensive information on exposures from PCBs and no information at all on exposures from particulate releases of any kind even though GMI's scientists stated that particulate emissions would probably be one of the greatest sources of air emissions from the proposed facility.

Although the incinerated ash will have to meet Land Disposal Restrictions under 40 NMAC 4.1.800 (incorporating 40 CFR 268), it could still contain quantities of metallic particulates as underlying hazardous constituents when it arrives at the facility. There is no requirement for ash to be in a container on-site. Nor is there any requirement to monitor for any type of air releases at the facility boundary, the landfill, or at the treatment buildings where the ash (and other wastes) would be mixed and treated. Ash and contaminated soils can be disposed of in the landfill without containers and the ash need be only partially solidified. Ash and contaminated soils could be exposed to the local winds during at least part of each working day. Even in a container, contaminated ash could be released in an accident before treatment and spread by these high winds.

NMED's *Final Order* states that at 3 miles from the facility "...the concentration of PCBs would be indistinguishable from background." Although one of GMI's witnesses made this statement during the permit hearing, no modeling was ever done by either GMI or NMED for PCB contamination. In fact, another GMI witness agreed that it was possible to get a PCB exposure pathway contaminating property off the proposed facility site. This same witness also described how extremely low levels of PCBs (the actual studies were done with PPBs) "...in the parts per million, subparts per million...accumulated in cattle and then appeared in the milk of dairy cows." (Tr. pp. 116-117) This is significant since there are over 40 large dairies, a considerable beef-raising industry and numerous crop producing farms in the area. (GMI and NMED also did not include any exposure pathway information about exposure through the food chain for PCBs or any other hazardous material that could be released from the facility.) Hispanic and Mexican community members, including nursing mothers, would be exposed to these same low levels of PCBs as the dairy cows. (In fact many of these Hispanics and Mexicans work on the same dairies, ranches and farms where they are also often subjected to herbicide and pesticide exposure.) GMI's own modeling showed that effects from air releases could actually be greater farther from the site than closer-by, depending on a variety of factors including type of release, terrain meteorology, etc..

Because topsoil in the Hagerman area is known to contain lead and arsenic; construction, transportation and operations at the facility could lead to toxic dust releases if these contaminants are also present on-site. However, no investigation has been done on background levels of these toxic particulates in the soils, nor have their potential releases and impacts on Hispanic and Mexican communities, including

sensitive subpopulations, been calculated, even though large, uncovered soil stockpiles will exist on-site during the operational life of the facility.

Although landfill fires are a common occurrence in the waste disposal industry, and although construction debris and other flammable materials will be allowed in the landfill, no exposure information for either acute or chronic releases to the atmosphere from fires at the facility was given. The actual likelihood of such hazardous waste fires occurring in the landfill and their duration were never calculated, nor were their potential impacts on Hispanic and Mexican communities.

Neither GMI nor NMED considered the effects from any releases into the soil or groundwater. Perhaps this is because they believed that such releases would never occur or would never reach the accessible environment if they do. Nevertheless, not only could contaminants leak from the surface impoundment or from the landfill, but they could also occur from a liquid spill on-site. It would be difficult to calculate effects and travel times for such contamination, however, since GMI never definitively identified the closest aquifer beneath the site and was allowed by NMED not to use conservative parameters when defining travel times. (See CARD's *Findings of Fact and Conclusions of Law* [Attachment C] and *Response to the hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law* [Attachment D])

Neither GMI nor NMED considered the effects from transportation associated with the facility either for accidental or chronic releases, including, but not limited to the effects of releases of hazardous materials through accidents or effects from vehicle emissions, dust and hazardous particulates stirred up by traffic to and from the proposed facility. Again, many of the Hispanic and Mexican communities are on or near transportation routes, these disparate impacts still need to be calculated.

2. EPA MUST CONSIDER THE PRE-EXISTING POOR HEALTH AND POVERTY OF HISPANIC AND MEXICAN COMMUNITIES NEAR TRIASSIC PARK WHEN CALCULATING DISPARATE IMPACTS UPON HISPANIC AND MEXICAN COMMUNITIES NEAR THE FACILITY.

Clearly, as described above, the health of all residents of Chaves County is poorer than that in many other areas in New Mexico. Unfortunately, studies specifically describing the health of Hispanic and Mexican residents nearest to the Triassic Park facility have not been done. Additional information may exist through New Mexico's Department of Health, University of New Mexico, or other organizations. However, Complainants do not have the resources to do this type of research. In fact, gathering this type of information is exactly what CARD wanted NMED and GMI to do. From information described above on the health of Hispanics and Mexicans in New Mexico as a whole and in the near-by border counties, and from testimony at the hearing from Hispanic and Mexican residents who described their personal health problems and those of their families, it is likely that Hispanics and Mexicans near GMI's facility will be found to have higher rates of asthma and other respiratory diseases, cancer and birth defects than non-Hispanic Whites. Because of their high levels of poverty, they will also be less likely to be able to

prevent or improve poor health, or to mitigate the effects of exposure from facility releases, with vitamins, a nutritious diet or early and adequate medical care.

Therefore, pollutants from the facility or from its accompanying transportation will affect these populations–especially Hispanic and Mexican subpopulations, including, but not limited to those with respiratory disease, youth and fetuses–more severely and thus in a significant and disparate manner. Environmental standards which may be adequate for a healthy, well-nourished population with access to adequate preventative and early medical care are not adequate for these populations. The addition of even small amounts of contaminants from the Triassic Park facility to the contaminant "stew" from other sources in the area will add significantly to the pollution burden of these disproportionately impacted, poor and sick Hispanic and Mexican populations.

IV. NMED HAS NO GROUNDS ON WHICH TO JUSTIFY THEIR DISCRIMINATORY IMPACTS IN PERMITTING THE GMI LANDFILL

NMED cannot provide an acceptable justification of their decision to issue GMI's Triassic Park Landfill permit notwithstanding the adverse disparate impact that permitting decision will cause. The GMI permit is not necessary to meet any goal that is legitimate, important or integral to the recipient's institutional mission. Throughout the permitting process GMI claimed that the primary purpose for the landfill was to provide for disposal of New Mexico's hazardous waste so New Mexicans would not continue to be burdened by the extra costs and inconvenience of shipping hazardous waste out of state. In reality, the Triassic Park facility is permitted to receive waste from anywhere in the United States and can even receive waste from other countries if that waste is generated by American-owned companies.

If the primary purpose of this facility were to make hazardous waste disposal more accessible to New Mexicans, NMED would have sited such a facility in a more central location or in an area that does not already have access to hazardous waste disposal. New Mexicans can already dispose their hazardous waste at the Waste Control Specialists ("WCS") site which is only about 50 miles south, directly on the border at Andrews, Texas. This site is even more convenient for some New Mexicans in the south.

There is, in fact, a "shortage" of hazardous waste and even the WCS facility is having difficulty finding enough waste to be profitable–even though they are now the only such facility in the area. There simply is not a need for another hazardous TSD facility in the area.

Likewise there cannot be any economic justification for this facility since it will only employ about 30-35 employees at maximum operations--some of whom may need to come from outside the local area. Costs to repair damage to the city streets of Roswell caused by the increased facility trucking through town could easily off-set much or all of any economic gain from employment. The deleterious health effects on an already weakened population will also far outweigh the small number of jobs created for local people.

DISCRIMINATORY PROCESS

HISTORY

40 CFR §25.3(a) says that "...State...agencies carrying out activities described in §25.2(a) **shall** provide for, encourage, and assist the participation of the public." (*emphasis added*) yet NMED did virtually none of this. At times they actively blocked public participation by both all members of the public and particularly by Hispanic and Mexican participants.

On 3/15/01 NMED gave Public Notice of the proposed permit for Triassic Park, including a description of the Comment Period, and issued a Fact Sheet. The Public Notice, Draft Permit and Fact Sheet were all issued in English-only versions. The Draft permit and the Fact Sheet were not available after working hours in the facility area until three months later when they were put into the Roswell Public Library. This was a re-issue of the Draft Permit and Fact Sheet after the previous version had been rescinded. At this time Public Notice was given in Spanish, but no Spanish Fact Sheet or any other document in Spanish was made available.

Even then, only part of the Draft Permit was put in the library. Ground-Water Monitoring Waiver documents and site characterization documents were among the missing permit documents that were not available until a month later. Residents of the area had already informed NMED of the difficulties of getting to Roswell from other parts of the potentially affected area. It is about an 80 mile round-trip from Artesia to Roswell, 144 miles round-trip from Tatum, and 210 mile round-trip from Lovington–almost a 4-hour drive. This limited availability of permit documents was compounded by problems with the on-line versions: The Draft Permit and its attachments were not all posted on-line on March 15th or August 27th as noticed; there were continuing compatibility problems with Mac-based systems, and many local residents didn't have on-line access.

These residents continued to complain of document access problems including problems getting on-line, through at least September. They particularly noted that the Roswell Public Library had been closed for 2 weeks, cutting off both hard-copy access and Internet access to the on-line version for many people. As late as 12/17/01 the latest on-line Fact Sheet was dated 6/15/01–leaving off the 8/15/01 English supplemental Fact Sheet and the August 2001 Spanish Fact Sheet. (The only information in Spanish on the facility provided by either NMED or GMI.)

There were also serious problems with accessibility to the Administrative Record in the Department's Santa Fe office. Because of a computer problem, numerous documents had been deleted from the Administrative Record Index during the comment period; some documents that should have been available were being kept from the public in a confidential file; and some documents were missing altogether from the Record. These problems were not straightened out until well after the hearing was complete which made it difficult or impossible for the public to view these documents and therefore to give meaningful comment at the Hearing. One memo (AR 99-086) dated 2/4/99 which was supposed to be removed from the confidential file and returned to public access pursuant to CARD's 11/28/01 motion,

was not returned to the Record and added to the Index until 12/14/01 at the end of the period for submittal of *Findings of Fact and Conclusions of Law*–and then only at CARD's insistence.

In addition, at one point in the permit process, NMED refused to release GMI's financial disclosure information to the public. This information is part of the application and therefore public record. Nevertheless, members of the public had to hire a lawyer to obtain these documents.

GMI did provide 6 public meetings in 2001, but these meetings were not provided as a good-faith effort to inform the public about the facility. NMED allowed GMI to use these meetings to misinform the public, encouraged GMI to present the meetings in an ineffective manner and at times even joined GMI in harassing the Spanish-speaking public. In April, 2001 NMED incorrectly instructed GMI that"

> "You obviously will not be able to meet the 30-day meeting notice deadline of subsection (d). That would be ok in light of our desire to meet as soon as possible." 9AR 01-040)

This resulted in GMI giving such short notice of these meetings that it was difficult for people to attend. The last meeting, which took place on the first day of the hearing in October, had the longest notice at about 2 weeks, but other meetings were only noticed in the newspaper a week before and in some cases only a few days before the date of the meeting. NMED did request GMI to provide public meeting notices in Spanish in April (which was rather hypocritical since NMED itself was not providing any notice in Spanish at the time), but never followed up on this. No notice was given in Spanish of any of the meetings until the last one.

GMI also used the meetings and the permit process to **misinform** the public about the facility and about some of their intentions for that facility. During the meetings GMI told participants that there would be a maximum of 3-5 trucks entering the facility per hour. Even if only waste trucks are counted, this is only true if a working day is 16 hours long. If all trucks entering the site are counted, this is only true if the work day is 23 hours long. Their estimate of an average of 1-2 trucks per hour is even more misrepresentational since, using data from the draft permit, the work day would have to be 55 hours long to make those figures work–even for waste trucks alone. NMED personnel, including the permit manager, were present when these statements were made, but said nothing about their inaccuracy. Since so much of the trucking could affect Hispanic and Mexican members of the public (see above), this effort to downplay the effects from facility trucking is also part of a pattern of disparate impact on Hispanic and Mexican members of the public including Hispanic and Mexican members of Complainants.

GMI also misrepresented the nature of the waste to be received and treated at the facility during at least one public meeting when they assured a cancer survivor twice that "there will be no carcinogens..." in the surface impoundment or at the facility. They also claimed in early press releases, information newsletters about the facility, during at least one public meeting and under oath at the hearing itself that the facility would not accept radioactive waste. Meanwhile they were discussing the possibility of turning the proposed facility into a mixed waste dump with NMED. NMED's Triassic Park permit manager also

denied under oath having discussions about this with GMI. Yet he had initialed a memo which indicated he had been present at just such discussions. The public was unable to cross-examine him or GMI adequately on this point at the hearing, however, because the memo was that document described above (AR 99-086) which was kept from the public in the confidential file until after the hearing was over.

Other information was also kept from the public until after the hearing was over when GMI did not fully disclose its past history of environmental violations to the public. GMI neglected to include its 5/10/88 OSHA Notice of Violation in disclosure statements until 11/9/01. This was a serious violation concerning death and serious injury to workers. GMI claimed not to understand that OSHA is considered an environmental statute. However, it had been NMED's policy that OSHA is an environmental statue for at least three years before the Triassic Park hearing. GMI was represented both by counsel and by a "government affairs representative" whose job it was to be the contact person between GMI and NMED; GMI should have known about this policy and disclosed this violation before the hearing so they could have been questioned about it by the public.

The fact that documents and information were kept from the general public until after their opportunity to comment and cross-examine witnesses was over did not appear to trouble NMED or the Hearing Officer as she stated in her Report that:

> "[t]he public was not denied an opportunity to participate in the process as a result of the record corrections made subsequent to the hearing....Applicant's failure on this point [to include information on OSHA violations] did not diminish the public's ability to participate in the hearing and to explore prior environmental violations."

It is against this generally dismal history of NMED's and GMI's interaction with the public that even more serious violations involving the Spanish-speaking public and Title VI issues must be seen.

I. NMED'S AND GMI'S OBSTRUCTION OF MEANINGFUL PUBLIC PARTICIPATION HAS HAD THE EFFECT OF DISCRIMINATING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

NMED has administered the GMI permitting process in a manner that obstructed and excluded the public, particularly Hispanic and Mexican members of Complainants, from meaningful public participation. NMED's actions have blocked this segment of the population from having an equal opportunity to participate in the permitting process and from having equal access to information in the process. This has had the effect, if not the purpose, of discriminating against Hispanic and Mexican members of Complainants because of their race, color or national origin.

A. NMED'S AND GMI'S FAILURE TO PROVIDE WRITTEN INFORMATION IN SPANISH AND SPANISH TRANSLATIONS OF ORAL PRESENTATIONS IN A TIMELY

MANNER HAS HAD THE EFFECT OF DISCRIMINATING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

EPA's *Final Rule on Expanded Public Participation* encourages permitting agencies and applicants to:

> "...make all reasonable efforts to ensure that all segments of the population have an equal opportunity to participate in the permitting process and have equal access to information in the process. These means may include, but are not limited to, **multilingual notices and fact sheets as well as translators, in areas where the affected community contains significant numbers of people who do not speak English as a first language.**" (*emphasis added*)

NMED was informed throughout the comment period that much of the potentially affected population was poor, disenfranchised and that many had a limited or no understanding of English. NMED also received at least 20 requests during the comment period for multilingual notices, Fact Sheets or other information about the facility, and translators but these were not provided until late in the process. It was only after repeated requests and legal action that the Department finally supplied even the most basic information in Spanish. Public Notices were issued and published in Spanish after June 15th. However, a Spanish Fact Sheet was only available toward the end of August and was not posted on-line as promised until sometime after the hearing as over. The written Spanish Fact Sheet was only mailed to people who had somehow known to request it. A Spanish Fact Sheet was finally sent to the Roswell Public Library in late August. No translations of any presentations were provided until the Hearing when translators were available at the final GMI presentation and the Hearing itself.

NMED did not follow the guidance described in EPA's *Final Rule on Expanded Public Participation* when it was told early in the comment period that the Hispanic and Mexican community needed more information and help in creating informed public comment but did not respond in an adequate or timely manner. Literally hundreds of people wrote to NMED from all over the state informing the department that there were potential environmental justice problems with facility siting and that these problems included the disenfranchisement of the Spanish-speaking residents who were, "being left out of the process because of a language barrier..." (9AR 01-179) A letter from the Fambrough Water Cooperative near Hagerman stated that:

> "We collectively believe that a sense of disenfranchisement, the prominence of a communication barrier, a lack of effort to overcome it by the NMED and GMI, and a perception of being taken advantage of by this industry are serious concerns." (Attachment G)

NMED's single request to GMI to provide notice in Spanish during the public information meetings was never followed up and was hypocritical since the Department itself was not providing any Public Notice or Fact Sheets in Spanish at the time. When NMED finally did provide a Spanish Fact Sheet, it had an

affirmative duty to seek out Spanish-speakers in the facility area who would benefit from receiving it, but the Department did not follow through on this.

These problems were compounded by the *Hearing Officer's Report* where the Hearing Officer incorrectly referred to "...only two requests for Spanish interpretation..." when there were, in fact, at least 20 requests for various kinds of information in Spanish documented in the Record.

GMI never provided any written presentation materials or fact sheets in Spanish and refused to provide Spanish translations of its oral presentations until the October 15th meeting (on the first day of the hearing) despite earlier promises to do so. At that point it was too late for interested Spanish-speakers to inform themselves to participate effectively in the hearing. GMI refused to use the translator that was present at the July 19 Hagerman public meeting to translate the English presentation despite previous assurances to the public from both NMED and GMI that the presentation would be translated at that meeting. GMI obtusely insisted that the translator was only to be used to translate a question and answer session on an English presentation that people couldn't understand. Unfortunately, because of their lack of English, some people didn't even know that the translator was available for the question and answer portion of the meeting.

B. NMED'S AND GMI'S HARASSMENT AND INTIMIDATION OF THE PUBLIC AND ESPECIALLY HISPANIC AND MEXICAN MEMBERS OF THE PUBLIC, INCLUDING MEMBERS OF COMPLAINANTS HAS HAD THE EFFECT OF DISCRIMINATING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

NMED was facilitating the Hagerman meeting and should have insisted on the translation that they themselves had promised. Instead, the NMED meeting facilitator harassed and obstructed the Hispanic and Mexican public and was so rude to a Spanish-speaking community and religious leader and to other Spanish-speaking members of the public that 50-70 people left the meeting. One commentor who was present stated that the disrespect displayed toward Hispanic and Mexican members of the community "...displayed the malicious intent of GMI's public information meeting..." (AR 01-163)

Again, the Hearing Officer's Report said that "There is no evidence that applicant would not have given a presentation [at the Hagerman meeting] in Spanish if asked..." despite at least 2 Affidavits in the record to the contrary. The Hearing Officer shifted the burden of proof for meeting public participation requirements onto the public in a "blame the victim" approach when she claimed that:

> "...those who would claim that a process does not meet their needs bear some responsibility for timely making their needs known...[T]hey bear some responsibility for assuring their own participation..."

She again chastised the public for protesting the lack of Spanish translation at the Hagerman meeting while incorrectly claiming that the public did not request such a translation.

It was at the July 17, 2001 Sally Port Inn meeting in Roswell that GMI went so far as to threaten and intimidate members of the public, including a member of CURE who is of Mexican descent. GMI's public information officer threatened several people with arrest for passing out information and a petition critical of the facility despite their having permission from the hotel to do so. The public information officer then denied making the threat under oath at the hearing. This type of action has a chilling effect on public participation in government, yet NMED never chastised GMI for this or even seemed to take any notice of the event. To her credit, the Hearing Officer believed CURE's witness on what happened, but stated that she didn't believe that "...this incident represents a violation of the public participation requirements for a RCRA facility..." since some of the CURE members present were able to overcome their feelings about the incident and participate fully in the hearing. She completely ignored information in the record describing how one CURE member was so frightened by the incident that she never participated publicly in the permitting process again.

C. NMED BOTH ACTIVELY AND PASSIVELY OBSTRUCTED HISPANIC AND MEXICAN MEMBERS OF THE PUBLIC INCLUDING MEMBERS OF COMPLAINANTS FROM FULLY PARTICIPATING IN THE PERMITTING PROCESS AND FROM EXERCISING THEIR RIGHTS UNDER TITLE VI OF THE CIVIL RIGHTS ACT WHICH HAS HAD THE EFFECT OF DISCRIMINATING AGAINST HISPANIC AND MEXICAN MEMBER OF COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

40 CFR §25.3(b) states that:

> "...Public agencies...should make special efforts to encourage and assist participation...by others whose resources and access to decision-making may be relatively limited."

But NMED did not make any special efforts to encourage and assist participation by these persons whose resources and access to decision-making was limited, including Hispanic and Mexican members of Complainants and other Hispanic and Mexican residents, when it allowed access to even the most basic permit documents to remain so difficult, time-consuming and expensive, and would not provide information about the facility in a language that these people could understand. NMED's apparent acceptance of GMI's harassment of the public and mis-information at the "information" meetings, coupled with NMED's own intimidation and harassment of Hispanic and Mexican participants at the Hagerman meeting show their bias in favor of GMI and industry and against Spanish-speaking members of the public. (see above).

One commentor asked NMED for information about any "...documents, correspondence, guidelines and directives to and from EPA and NMED concerning environmental justice..." but was told that "...few such items existed..." (AR 01-16) No such information or even document names or descriptions were ever provided despite two requests. This type of "passive" obstruction is part of a pattern of refusing to provide information pertinent to Hispanic and Mexican members of the public,

including Complainants, or only providing it so slowly that it becomes almost useless. Historically, if NMED is actually forced to provide such information, only the absolute minimum is provided. There is no good-faith effort to encourage public participation by Hispanic and Mexican members of the public.

This attempt to limit Hispanic and Mexican Complainants' exercise of their rights under Title VI is further illustrated by NMED's neglect in posting an English Fact Sheet but waiting months to post the Spanish Fact Sheet on the website after it was available, their refusal to allow testimony on Title VI and environmental justice issues during the permitting process, and finally by their attempt to block Complainants' filing of this complaint by removing the English and Spanish Fact Sheets from the Triassic Park web page (see above).

II. NMED HAS ESTABLISHED A PATTERN OR PRACTICE OF OBSTRUCTION OF MEANINGFUL PUBLIC PARTICIPATION IN THE PERMITTING PROCESS CREATING AND/OR ADDING TO DISCRIMINATION AGAINST HISPANICS AND MEXICANS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

NMED has also now established a pattern and/or practice of criteria and/or methods of administering its programs, which has the effect, if not the intent, of subjecting individuals to discrimination due to their race or color. Specifically, NMED has established a pattern and practice of obstruction of meaningful public participation in NMED permitting. This pattern and practice of obstruction has had the effect of creating a disparate impact and discriminating against Hispanic and Mexican members of Complainants as well as other Hispanics and Mexicans in the State because of their race, color or national origin. Specific incidents of discrimination include, but are not limited to the following:

A. NMED HAS OBSTRUCTED MEANINGFUL PUBLIC PARTICIPATION IN ADMINISTERING THE WASTE ISOLATION PILOT PLANT PERMITTING PROCESS, DISCRIMINATING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

During the permitting hearing for WIPP, the Hearing Officer again refused to allow the introduction of Title VI or environmental justice issues in even the most minimal way (see above). No notice or Fact Sheets were published in Spanish either in print or on-line. No attempt was made to ascertain if Hispanic and Mexican members of the public could be affected by the facility or by effects from its associated transportation. It is clear that this transportation, at least, goes through and near many Hispanic and Mexican communities in New Mexico.

Again, during the recent Class III permit modification hearing no notice or Fact Sheets were provided in Spanish and no attempts were made to include this portion of the public in the permitting process.

B. NMED HAS OBSTRUCTED MEANINGFUL PUBLIC PARTICIPATION IN ADMINISTERING THE RHINO LANDFILL PERMITTING PROCESS, DISCRIMINAT-

ING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

Similar problems arose during the Rhino Landfill permit process at Chaparral, New Mexico. Despite having large numbers of Mexicans living quite near the proposed site, Title VI and environmental justice issues were not allowed to be raised. Upon information and belief, Chaparral has filed a Title VI complaint with EPA. (see above)

C. NMED HAS OBSTRUCTED MEANINGFUL PUBLIC PARTICIPATION AS DESCRIBED IN THE LA CIENEGA VALLEY CITIZENS FOR ENVIRONMENTAL SAFEGUARDS TITLE VI COMPLAINT, DISCRIMINATING AGAINST HISPANIC AND MEXICAN COMPLAINANTS DUE TO THEIR RACE, COLOR OR NATIONAL ORIGIN.

The La Cienega Valley Citizens for Environmental Safeguards' Title VI complaint is under investigation now by EPA. This complaint details problems, also with Hispanic and Mexican members of Complainants as well as others, where Complainants were not allowed to participate in county meetings or obtain needed public documents in a timely manner. These members of the public were threatened with arrest or arrested at least three times. This pattern of behavior intimidates the public and causes a chilling effect to public participation in government (as it did during the Triassic Park process).

RELIEF

NMED's discriminatory actions in permitting the GMI facility and especially the discriminatory problems that are pervasive throughout NMED's program must stop and must also be subject to consequences. However, Complainants hesitate to recommend full and immediate removal of Federal funding. NMED's resources are already too limited to fulfill their current obligations adequately. Basic information (like facility locations) is not available; sometimes Class I modifications cannot be reviewed in a timely manner resulting in waste being characterized in an unauthorized fashion. (This happened under the WIPP project.) Also, if NMED is to make Title VI-related improvements in their program, they will need funding to do so.

However, Complainants have no faith that NMED will be able to make adequate Title VI-related improvements to their program without rigorous oversight from EPA. NMED's arbitrary and capricious "consideration" of affected populations described in the *Final Order* permitting GMI's facility only continues NMED's discriminatory actions under the guise of "improvements." Other attempts at improving public participation described in the *Final Order* are commendable but do not go far enough. Even if regulations are written correctly there is no guarantee that they will be implemented correctly and in a non-discriminatory manner. This is particularly true since NMED has never admitted that there is anything wrong with its program and seems to have no real understanding of what their Title VI obligations are.

That the State still does not intend to involve the public adequately in any proposed regulatory changes is shown by their recent actions involving revisions of Air Quality and Drinking Water

regulations. The Environmental Improvement Board ("EIB") creates regulations for NMED and is one of the organizations referred to in the GMI facility *Final Order*. Notices of Public Hearing to consider these revisions state that notices of intent to present technical testimony at the hearings must be received in the Office of the Environmental Improvement Board no later than 5:00 p.m. on August 30, 2002. (Attachment F) Yet these EIB public hearing notices were not even mailed to the interested public until August 29th. It is likely that some notices were not even received until after August 30th. Certainly, few members of the public would be able to provide akk names of their technical witnesses or perhaps even decide whether to present technical testimony or not in such a short period of time.

Complainants would like NMED to be put on notice that they **will** lose their federal funding if they do not make and implement necessary Title VI-related changes to their program **in a timely manner.** Complainants would like EPA to educate NMED on their Title VI obligations, their regulatory authority to fulfill those obligations, and to monitor the State's regulatory changes and their implementation in future permitting closely. Complainants would also like to be involved in oversight of this process along with other members of the affected public to be sure the public's needs are being met. Complainants believe the State also needs education from EPA on ways to fund necessary work adequately through charges to the regulated community. More realistic flat fees for services along with charging an adequate hourly rate for staff time (as is done in some states) would be one method of providing resources and personnel adequate to the tasks NMED must perform.

Regarding the Triassic Park facility individually, Complainants would like a science-based disparate impact study to be performed for the facility. If results of this study show that there would be a significant negative disparate impact on local Hispanic and Mexican residents, including Hispanic and Mexican members of Complainants, we would like the permit for GMI's facility east of Roswell to be vacated permanently. Since this facility would receive waste from all over the United States and is not a facility limited to New Mexico alone, Complainants believe affected populations should be compared to the United States' population as a whole–not just to another population in New Mexico. We also believe the lack of air release monitoring, the inadequate and inappropriate vadose zone monitoring system approved by NMED (see Attachments C and D), and the inability of the facility's designated emergency coordinator to demonstrate even the most basic understanding of the chemicals the facility could receive and their effects (even after having completed several haz-mat trainings) should be taken into consideration when assessing the possible impacts of the Triassic Park Landfill.

In the alternative, if EPA does not direct NMED to vacate the Triassic Park permit permanently, Complainants request that the entire permitting process for the facility be redone in a manner consistent with EPA *Investigations, Recipient* and *Public Participation Guidance*. There continues to be a great need within the public in southeastern New Mexico, including he Spanish-speaking public, to be informed and involved in this process and to know that their situation and needs are truly being considered.

CONCLUSION

Every area has a maximum "carrying capacity" for contamination before human health and the environment are significantly affected. This maximum has already been passed in southeastern New Mexico–especially as it relates to Hispanic and Mexican residents in that area.

Therefore, for the reasons set forth above, Complainants allege that NMED's actions in permitting the GMI landfill and other facilities in this area of New Mexico violate Title VI. Accordingly, Complainants request that EPA accept this complaint and use any means authorized by law to obtain compliance by NMED with Title VI.

Respectfully submitted,

Deborah W. Reade — September 12, 2002

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Notes

[1] J. Alex Valdez, Secretary, *1999 New Mexico Selected Health Statistics Annual Report* (The State Center for Health Statistics, Office of New Mexico Vital Records & Health Statistics; October 2001)

[2] Id.

[3] J. Alex Valdez, Secretary, *The State of Health in New Mexico: 2000 Report, Appendix A: How Social Factors Affect Health in New Mexico*, on-line (New Mexico Department of Health, www.health.state.nm.us/stateofnm2000, 2001)

[4] Mary Olguin, *Children's Chronic Conditions Registry Annual Report 2000* (New Mexico Department of Health, Public Health Division, Family Health Bureau, CMS Program; 2001)

[5] *2000 Census*, U.S. Census Bureau

[6] J. Alex Valdez, Secretary, *The State of Health in New Mexico: 2000 Report, Environmental Health,* on-line (New Mexico Department of Health; www.health.state.nm.us/stateofnm2000; 2001)

[7] Betty Hileman, Chief, *Chaves County 1999 County Health Profile* (New Mexico Department of Health, Public Health Division, Office of Information Management, New Mexico Vital Records and Health Statistics; January 1999)

[8] Id.

[9] William F. Athas, Ph.d., *Cancer in New Mexico, Changing Patterns and Emerging Trends,* on-line (New Mexico Department of Health, The University of New Mexico Health Sciences Center, Epidemiology and Cancer Control, New Mexico Tumor Registry; http://hsc.unm.edu/epiccpro/; 2001)

[10] Margaret M. Gallaher, MD. MPH, *Birth Defects in New Mexico 1995-1999 Births* (New Mexico Department of Health, Public Health Division, Family Health Bureau, Children's Medical Services; December 2001)

[11] Mary Olguin, *Children's Chronic Conditions Registry Annual Report 2000* (New Mexico Department of Health, Public Health division, Family Health Bureau, CMS Program; 2001)

[12] J. Alex Valdez, Secretary, *1999 New Mexico Selected Health Statistics Annual Report* (The State Center for Health Statistics, Office of New Mexico Vital Records & Health Statistics; October 2001)

[13] *Environmental Research,* 68(2), (February, 1995)

[14] James VanDerslice, Ph.D., *Analysis of the Relationship Between Proximity to Selected Industrial Facilities and Prevalence of Self-Reported Symptoms in Sunland Park, New Mexico* (New Mexico Department of Health, Public Health Division, Border Health Office, June 30, 2000)

[15] *Environmental Health Perspectives,* 108: Suppl. 1 (March, 2000)

[16] *American Journal of Epidemiology,* (July, 1990)

[17] H Dolk, et al., "Risk of Congenital Anomalies Near Hazardous-Waste Landfill Sites in Europe: the EUROHAZCON Study", (*Lancet* 352, 1998)

[18] M. Vrijheid, et. al., "Chromosomal Congenital Anomalies and Residence Near Hazardous Waste Landfill Sites: the EUROHAZCON Study", (*Lancet* 359, 2002)

[19] Gary S. Guzy, General Counsel, *Memo: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May be Addressed in Permitting* (EPA Office of General Counsel, December 1, 2000)

Attachments

Attachment A:	Map of southeastern New Mexico and west Texas showing some of the contaminated areas and potentially polluting industrial development, including attempted but canceled projects, current and inactive development and proposed future development.
Attachment B:	E-mail correspondence between Complainants and NMED, NMED Triassic Park web page showing date of modification and NMED WIPP web pages showing Fact Sheets still on-line
Attachment C:	*Proposed Findings of Fact and Conclusions of Law of Citizens for Alternatives to Radioactive dumping (CARD)* for the Triassic Park (GMI) facility.
Attachment D:	CARD's *Response to the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law* for the Triassic Park facility
Attachment E:	*Final Order* by the Secretary of the New Mexico Environment Department permitting the Triassic Park facility
Attachment F:	New Mexico Environmental Improvement Board Notices of Public Hearings to consider proposed revisions of 20 NMAC 7.1 *Drinking Water* and Air Quality Regulations.
Attachment G:	Letter from the Fambrough Water Cooperative to New Mexico Environmental Law Center ("NMELC") describing the Hispanic and Mexican population near Hagerman and requesting information in Spanish, translation, help in facilitating public comment and a disparate impact study. Though originally sent to the NMELC, this letter was sent by them to NMED and became part of the Record (AR 01-179)