

December 17, 2018

Jennifer Hower, General Counsel
New Mexico Environmental Department
1190 St. Francis Dr., Suite N4050
P.O. Box 5469
Santa Fe, NM 87502-5469

Re: Second Request for Community Input on NMED's Public Participation and Limited English Proficiency Policies

Dear Ms. Hower:

On behalf of over twenty community groups, this letter requests improvements to New Mexico Environment Department's (NMED) Public Participation and Limited English Proficiency (LEP) Policies.¹ Our request follows an invitation by NMED to Citizens for Alternatives to Radioactive Dumping (CARD) to provide suggested changes to the policies on a May 9, 2018, phone call with Lilian Dorka, Director of the External Civil Rights Compliance Office, U.S. Environmental Protection Agency (EPA). This request is also in keeping with the statements in the LEP and Non-Employee Disability policies that they will be annually reviewed and updated as necessary.²

The community organizations signing this letter are: Albuquerque Center for Peace and Justice, Alliance for Environmental Strategies (AFES), Amigos Bravos, Citizen Action New Mexico, Citizens for Alternatives to Radioactive Dumping (CARD), Concerned Citizens for Nuclear Safety (CCNS), Concerned Citizens for Wagon Mound and Mora County, Earthjustice, Gila Resources Information Project (GRIP), Los Jardines Institute, Multicultural Alliance for a Safe Environment (MASE), New Mexico Environmental Law Center, New Mexico Interfaith Power and Light, Partnership for Earth Spirituality (PES), Nuclear Watch New Mexico, Rio Grande Waterkeeper, San Juan Citizens Alliance, Southwest Organizing Project (SWOP), The Sustainable Energy and Economic Development Coalition (SEED), Tewa Women United, Tularosa Basin Downwinders Consortium (TBDC), Western Environmental Law Center and Wild Earth Guardians (collectively, community organizations).

In this letter we first provide context for our request, describing how NMED's Public Participation and Limited English Proficiency (LEP) policies stem from a Title VI complaint

¹ This letter was drafted as part of the legal representation of CARD by Nicole Sanchez, clinical law student at the University of New Mexico Natural Resources and Environmental Law Clinic, working under the supervision of Prof. Gabe Pacyniak, together with Marianne Engelman-Lado, who is of counsel with the Poverty & Race Research Action Council (PRRAC).

² NMED Policy and Procedure 7-10, Non-Employee Disability Accessibility and Outreach Policy 7.1 (Feb. 6, 2018) and NMED Limited English Proficiency ("LEP") Accessibility and Outreach Policy 8.1 (Feb. 6, 2018).

filed by CARD and a resulting Informal Resolution Agreement between EPA and NMED in January 2017. We then describe why, although we have observed some improvements in NMED's public engagement processes, we continue to have serious concerns that NMED's policies fall short of providing a meaningful opportunity for public participation for all New Mexicans based on recent experiences. Finally, we propose specific revisions to NMED's Public Participation and LEP Policies and request a meeting between NMED and community organizations to discuss these recommendations early in the New Year.

Background

NMED adopted its Public Participation and LEP policies on February 6, 2018. The policies were adopted as a result of a 2002 Title VI complaint filed by CARD and other organizations alleging NMED discriminated based on race and national origin in the Triassic Park Waste hazardous waste disposal facility permit process.³ EPA and NMED signed an Informal Resolution Agreement on January 19, 2017,⁴ which committed NMED to implement a variety of actions related to agency process, translation, and notices to ensure compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and EPA regulations, 40 C.F.R. Part 7 and other civil rights laws. These actions include the following:

- Ensure that the NMED public involvement process is available to all persons regardless of race, color, national origin (including limited-English proficiency), age disability, and sex.⁵
- Develop and implement a public participation policy that will require NMED to carry out steps in any action that triggers the public participation process, including: creating a description of the affected community; creating a detailed outreach plan to address concerns; identifying locations of public meetings; identifying appropriate media outlets for announcing opportunities to engage in the public processes; and providing agency contact information to engage the community.⁶
- Develop, publish and implement written procedures to ensure meaningful access to all NMED programs and activities by all persons, including access by individuals who are LEP and individuals with disabilities at no cost to those individuals.⁷
- Provide appropriate auxiliary aids and services, at no cost, to persons with disabilities in a manner that protects the privacy and independence of the individual.⁸

³ EPA Complaint No. 09R-02-R6. The complaint was accepted by EPA on June 27, 2005.

⁴ Informal Resolution Agreement, New Mexico Environmental Department and the U.S. EPA 11-12 (Jan. 19, 2017) (EPA File No. 09R-02-R6) (Resolution Agreement).

⁵ *Id.* at Section G.1.

⁶ *Id.* at Section G.2.

⁷ *Id.* at Section H.1.

⁸ *Id.* at Section I.1.

NMED subsequently published Public Participation, LEP, and Non-Employee Disability policies on February 6, 2018. NMED did not solicit *any* input from the public or community groups in developing these policies, despite explicit requests by CARD that it allow community input.⁹

On April 23, 2018, many of our community organizations sent a letter to NMED providing detailed recommendations for improving NMED's public participation and LEP policies and practices. NMED did not respond directly to this letter. NMED did subsequently share with CARD a letter to EPA, dated April 26, 2018, regarding the status of NMED's compliance with the Resolution Agreement. EPA invited CARD to participate on a status update call with NMED on May 4, 2018. On the call, NMED invited CARD to provide specific recommendations on how to improve the policies.

NMED's LEP and Non-Employee Disability policies also state they will be reviewed on an annual basis and updated as necessary.¹⁰ In addition, NMED's LEP Policy states that NMED "shall include in its consideration and decisions regarding public notice, vital documents, community outreach, and community involvement, *the degree to which it may need to modify its communications and public notice practices* so that LEP persons and populations will have *substantially equal opportunities* to learn about and participate in NMED's exchange and interaction with the public" (emphasis added).¹¹

Continued Concerns Based on Recent NMED Permitting Processes

We recognize that NMED has made improvements to its public engagement practices since NMED signed the agreement in January 2017. In general, email and web notices of permitting are being translated into Spanish. In the Waste Control Specialist, LLC's (WCS) draft ground water discharge permit process,¹² NMED translated the public notice, fact sheet and index to the administrative record into Spanish.¹³ NMED also advertised on Spanish language radio station (KPZA-FM (Jal, NM))¹⁴. In addition, at the WCS hearing, NMED provided a translator. During the recent Waste Isolation Pilot Plant (WIPP) draft permit process (public hearing, October 23 – 25, 2018 in Carlsbad, NM), NMED created a Public Involvement Plan (PIP)¹⁵ and translated the notice of public hearing into Spanish.¹⁶

We appreciate NMED's actions that have led to these improvements. At the same time, our organizations believe that NMED is not yet adequately meeting the letter and spirit of the Resolution Agreement. Our community organizations have experienced the following problems with NMED's recent public participation permitting processes:

⁹ Letter from University of New Mexico Natural Resources and Environmental Law Clinic, on behalf of CARD, to Kristine Pintado, Non-Discrimination Coordinator, NMED (April 23, 2018).

¹⁰ Non-Employee Disability Accessibility and Outreach Policy at 7.1 and LEP Policy at 8.1.

¹¹ LEP Policy at 1.2.

¹² NMED groundwater discharge permit, DP-1817.

¹³ NMED, WCS DP-1817, <https://www.env.nm.gov/gwqb/public-notice/>.

¹⁴ Email from Lara Katz, Assistant General Counsel, NMED (Sept. 7, 2018, 08:19 MST) (on file with UNM School of Law NREL clinic).

¹⁵ NMED, Public Involvement Plans, Aug. 6, 2018, <https://www.env.nm.gov/hazardous-waste/wipp/>.

¹⁶ NMED, Public Hearing Notice (Spanish), Aug. 6, 2018 and Sept. 22, 2018, <https://www.env.nm.gov/hazardous-waste/wipp/>.

- NMED has not yet fully engaged the community to achieve meaningful involvement. EPA's Public Participation Guidance¹⁷ defines meaningful public involvement as "informing, consulting, and working with potentially affected and affected communities at various stages of the permitting process to address their concerns." Community organizations in potentially affected and affected communities have not been informed, consulted, nor worked with at various stages of the permitting process to address community concerns.
- NMED is not using EPA's Public Participation Guidance¹⁸ on best practices for community engagement and strategies to overcome low turn-out by individuals who are LEP.
- A Public Involvement Plan (PIP) has not been developed for each activity requiring public participation, nor has the community been consulted when a PIP has been developed. A PIP was not created for the draft NMED DP-1132 (Radioactive Liquid Waste Treatment Facility) and DP-1793 (land application for regional aquifer waters of treated chromium/perchlorate/RDX, which are high explosive) ground water discharge permits for Los Alamos National Laboratory (LANL).¹⁹ During the recent WIPP permitting process, NMED developed the PIP without conducting outreach to community groups to provide input in developing the PIP.²⁰ Additionally, NMED limited the affected area to a 15-mile radius, which excluded Carlsbad, the largest city in the area. On February 14, 2014, the WIPP facility affected an area within at least 100 miles with a radioactive and hazardous release.
- NMED only translates vital documents when community organizations file multiple requests. The WCS permit documents were only translated at the threat of CARD filing an additional Title VI complaint against NMED with EPA.²¹ In the LANL ground water discharge permit processes, only notices were translated.²² In the recent WIPP permit modification process, only notices and fact sheet were translated.²³
- Translations of vital documents contain inaccuracies, as do translations of notices to the public about the availability of these documents. The WCS fact sheets provided limited

¹⁷ EPA's Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (EPA Public Participation Guidance) (interpreting obligations under Title VI), 71 Fed. Reg. at 14210 (Mar. 21, 2006).

¹⁸ *Id.* at 14212.

¹⁹ NMED, Public Involvement Plans, <https://www.env.nm.gov/gwqb/public-involvement-plans/#LA>.

²⁰ Hazardous Waste Bureau, NMED, Public Involvement Plan for WIPP (July 1999), <https://www.env.nm.gov/wp-content/uploads/2016/05/FINAL-PIP-WIPP-Class-3-VOR-7-26-2018.pdf>, at 4, Attachment A.

²¹ On April 16, 2018, CARD and NREL clinic filed a Non-Employee Discrimination Complaint with NMED for alleged discrimination based on national origin and against LEP individuals, during the public process for the WCS ground water discharge permit. The complaint claimed NMED failed to provide meaningful access or opportunity for LEP individuals to participate in the permit process. On May 4, 2018, Kristine Pintado, Non-Employee Discrimination Coordinator, NMED determined the complaint merited an investigation. On October 12, 2018, Butch Tongate, NMED Secretary, closed the complaint and found NMED did not cause harm and did not have a discriminatory effect against LEP person in its public notice.

²² NMED, LANL Hazardous Waste Bureau, Permitted Facilities, <https://www.env.nm.gov/hazardous-waste/lanl/>.

²³ NMED, WIPP Hazardous Waste Bureau, Permitted Facilities, <https://www.env.nm.gov/hazardous-waste/wipp/>.

information about the permit and contradicted the draft permit including, discrepancies between the depth of groundwater likely to be affected by the facility²⁴, monitoring plan²⁵ for discharge and the wrong hearing date.²⁶ In addition, NMED does not notify the public when notices, fact sheets, and administrative indexes are revised and reposted to the NMED website. When changes are made to the notices, fact sheets, administrative indexes, and even the draft permits, the NMED does not date the documents as to when they are created and modified. This makes it virtually impossible for the public to know when documents are updated and as a result, it is difficult for the public to know what information is correct.

- Fact sheets were not created for the draft (LANL) ground water discharge permit processes.²⁷ In the Waste Isolation Pilot Plant (WIPP) public process, the August 6, 2018 fact sheet was created but not translated.²⁸
- Fact sheets do not identify which vital documents are translated or where they are available.

Recommendations on NMED's Public Participation and LED Policies

In response to NMED's invitation on the May 19, 2018, call and in light of NMED's stated policy of annually reviewing the LEP and disability policies, our community organizations here provide further specific suggestions on how NMED's policies and implementing practices can be revised to provide meaningful involvement to all New Mexicans and to meet the letter and spirit of NMED's Informal Resolution Agreement with EPA.

Our organizations request the following revisions to NMED's policies and implementing practices:

²⁴ NMED, WCS draft permit at 3; NMED, WCS Public Notice (Aug., 2018), <https://www.env.nm.gov/gwqb/public-notice/> at 2.

²⁵ NMED, WCS draft permit at 3; NMED, WCS Fact Sheet (Aug., 2018) <https://www.env.nm.gov/gwqb/public-notice/>.

²⁶ NMED, WCS Public Hearing Notice (Oct. 2, 2018), <https://www.env.nm.gov/gwqb/public-notice/>, at 7.

²⁷ NMED, LANL Hazardous Waste Bureau, Permitted Facilities, <https://www.env.nm.gov/hazardous-waste/lanl/>.

²⁸ NMED, WIPP Hazardous Waste Bureau, Permitted Facilities, <https://www.env.nm.gov/hazardous-waste/wipp/>.

1. Make the following specific changes to NMED's LEP policy:

- a. Revise LEP policy, Section 3, to require that NMED budget at a programmatic level for providing adequate LEP supports.²⁹
- b. Provide a complete definition of "vital documents" which clearly identifies which documents will be translated. The recommendations below are reflective of EPA's LEP Guidance and our experiences in recent public hearing processes. NMED's definition of "vital documents" should include the following:
 - i. Notice of permits
 - ii. A draft permit or detailed summary of any draft permit, including information on the exposure effects to the affected community from pollutants being addressed
 - iii. An accurate and substantive fact sheet including information on the exposure effects to the affected community from pollutants being addressed
 - iv. An administrative index
 - v. Environmental reports
 - vi. Notice of disciplinary action, notice of deficiency, environmental hazards, or cease and desist orders
 - vii. Consent and complaint forms
 - viii. Written notices of rights, denial, loss or decrease in benefits or services
 - ix. Notices advising persons who are LEP of free language assistance, with notification that translators are available during the entire permitting process not just for the hearing
 - x. Residential Lead-Based Paint Disclosure Program forms and pamphlets
 - xi. Information pertaining to natural disasters and emergency response efforts
 - xii. Settlement agreements and final agency decisions
- c. Include a timely, short, and effective process to appeal NMED's decisions about what constitutes a vital document for each permitting activity.
- d. Include a timely, short and effective process to correct NMED's translations and summaries of vital documents for each permitting activity.
- e. Identify LEP services to be provided on a programmatic level, not only on a project-by-project basis.
- f. Specify in Section 6, Providing Notice to LEP Persons, that radio announcements should be provided on Spanish or Diné radio stations where such stations exist in the affected community.

²⁹ Although EPA's Guidance to EPA Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons makes clear that agencies should budget for their LEP obligations at a programmatic level, NMED's current LEP does not have any language related to programmatic budgeting, and instead allows an "individualized assessment" of NMED's LEP obligations to take into account "the resources available to NMED and the associated costs" as one of four factors. 69 Fed. Reg. 35,602, 35,607 (Jun. 25, 2004) (EPA LEP Guidance). This has the effect of potentially allowing NMED bureaus to deny LEP services due to resource shortages without requiring that NMED appropriately budget for these services.

- g. Specify in Section 5.1, Interpretation, the process for the public to request an interpreter before, during, and after a hearing.
- h. Identify how the public will be involved in providing ongoing input on the NMED LEP policy as part of an annual review.
- i. Include alternatives for rural and/or impoverished communities with limited or no internet access.
- j. Change Section 1, Scope, to specifically apply requirements for LEP Policies to EPA recipients and sub-recipients, including contractors and sub-contractors.
- k. Provide a NMED-specific manual or set of instructions that described how NMED uses EJ Screen in its Public Participation process and how the public can use EJ Screen, and translate this manual into commonly spoken languages. Post all versions on the NMED website.

2. Make the following specific changes to NMED's Public Participation policy:

- a. Revise Section 4 to provide an opportunity for the community to provide input on a draft Public Involvement Plan, as part of the application review process, before the plan is finalized.
- b. Include in Sections 4(b) and 4(d) a requirement that NMED must affirmatively reach out to leaders in communities with substantial LEP individuals to solicit input for the development of PIPs. Public notices are not enough to engage the community.
- c. Revise Section 4 to require that fact sheets include the following information:
 - i. Hearing date, times, and location(s).
 - ii. Discharge and or facility location.
 - iii. Pollutants of concern.
 - iv. Information in the application on the exposure effects from pollutants both from the facility and from facility transportation. Identify how public health and the environment will be protected, as required by 40 C.F.R. § 270.10 Section (j).
 - v. Compliance history of the facility, including links to notices of violation.
 - vi. Bilingual contact person, if a person has questions before, during, and after the hearing process.
- d. Revise Section 4 to include specifications on the format of public notices. Public notices should be brightly colored, recognizable, and have a bigger font to attract people's attention when they are posted.
- e. Revise Section 5 to include specific learning outcomes in NMED's training for employees of EPA recipients and sub-recipients, including contractors and sub-

contractors. Include an effective process both to inform the public of the training curriculum and to incorporate public input into the training process.

- f. Include the following statements from EPA's Public Participation Guidance in NMED's Public Participation Policy, Section 4:
 - i. Involve the public early and often throughout the permitting process.
 - ii. Encourage stakeholder, intergovernmental and media involvement.
 - iii. Equip community members with the tools to help ensure informed and effective public involvement, such as holding application, draft permit, and pre-hearing information meetings about the specific draft permits.
 - iv. Make assistance or grants available to the public.
 - v. Use Alternative Dispute Resolution (ADR) techniques.
- g. Identify how the public will be involved in providing ongoing input on the NMED Public Participation policy as part of an annual review.
- h. Include alternatives for rural and/or impoverished communities with limited or no internet access.
- i. Include a notice requirement of no less than 10 days for any pre-hearing meetings or conferences.
- j. Change Section 1, Scope, to specifically apply requirements for Public Participation Policies to EPA recipients and sub-recipients, including contractors and subcontractors.

3. In addition, we request that NMED make the following changes to its practices:

- a. Provide transparency in the permit process. The public should not have to submit an Inspection of Public Records Act (IPRA) request to review permit documents and the administrative record. If NMED retains this practice, then the public notices and notices of hearing must include information about the IPRA process and timelines for reviewing and obtaining documents (NMED has a maximum of 15 days to provide documents following submission of an IPRA request.)³⁰ During 30-day comment periods, there can be delays in mail notification, submitting an IPRA request, and receiving the documents, which can impact a commenter from being able to provide informed public comments about a draft permit.
- b. Host application, draft permit, and pre-hearing informational meetings for community members and LEP community leaders in the affected community to learn about proposed permits. These meetings may need to be one-on-one with a community group or include the larger community and several organizations.

³⁰ NMED Policy and Procedure 01-06 *Inspection of Public Records Policy*, Section V.B.2 (June 2, 2014), https://www.env.nm.gov/OOTS/documents/public_information_request_policy.pdf

During this meeting, NMED staff should be informed and prepared to answer the community's questions fully. The applicants should be invited to attend these meetings.

- c. Provide resources to help the community understand technical data within the permits to understand the potential effects on public health and the environment.
- d. Provide an interpreter at all public meetings and hearings.
- e. Improve audio equipment at public meetings and hearings.
- f. Conduct studies on the cumulative public health impacts of uses proposed to be permitted by NMED throughout New Mexico. Directly address public health disparities and environmental justice issues during permitting processes.
- g. Identify a process to notify the public that notices were amended/modified, republished, and reposted, including to LEP communities. Identify the changes between previous versions and the current version by dating the documents. If changes are corrections or are significant, identify the changes.

Finally, our organizations ask for a meeting between NMED and our organizations to discuss these requests in early 2019. We also ask that NMED commit to meeting with community groups annually as part of NMED's process of reviewing and considering revisions to these policies.

With this second request, we are initiating a good-faith effort to establish a working relationship with NMED to ensure the opportunity for meaningful involvement in NMED activities by all New Mexicans. We look forward to working with NMED to revise and strengthen these policies and practices to this end.

Sincerely,



Susan Schuurman
Albuquerque Center for Peace and Justice



Noel Marquez
Alliance for Environmental Strategies (AFES)

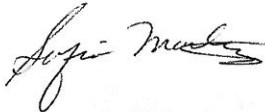
/s/ Rachel Conn
Rachel Conn, Projects Director
Amigos Bravos

/s/ Dave McCoy
Dave McCoy, Executive Director
Citizen Action New Mexico



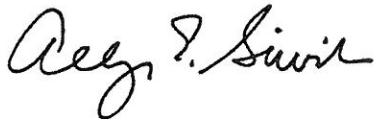
Deborah Reade, Research Director
Citizens for Alternatives to Radioactive Dumping (CARD)

/s/ Joni Arends
Joni Arends, Director
Concerned Citizens for Nuclear Safety (CCNS)



Sofia Martinez
Concerned Citizens for Wagon Mound and Mora County

/s/ Jonathan Smith
Jonathan Smith
Earthjustice



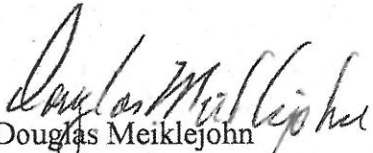
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/s/ Beata Tsosie Peña

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cc: Kristine Pintado, Non-Discrimination Coordinator, NMED

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