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***By email***

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**Re: Supplement to Complaint No. 03NO-21-R6 Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Against the New Mexico Environment Department**

Dear Administrator Regan and Deputy General Counsel Engelman-Lado,

On behalf of the Complainant, Patricia Chillon-Garcia, the New Mexico Environmental Law Center (“NMELC”) submits this supplement to Complaint NO. 03NO-21-R6 (“2021 Complaint”). The 2021 Complaint alleges that the New Mexico Environment Department (“NMED”) violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., and the U.S. Environmental Protection Agency’s (“EPA”) implementing regulations, 40 C.F.R. Part 7, (collectively, “Title VI”), when it failed to provide Ms. Chillon-Garcia, and other persons of limited English proficiency, meaningful access to the public participation process in connection with an air quality permit application.<sup>1</sup>

NMELC respectfully submits this supplement to Ms. Chillon-Garcia’s 2021 Complaint to provide additional relevant factual and legal background and to update the EPA’s External Civil Rights Compliance Office (“ECRCO”) on relevant developments since the filing of the 2021 Complaint. Notably, as discussed in greater detail below, Ms. Chillon-Garcia seeks to provide additional information regarding NMED’s ongoing intentional discrimination against persons with limited English proficiency. Despite the fact that the Associated Asphalt plant was proposed to operate 24 hours a day, 7 days a week;<sup>2</sup> to be sited less than a half mile away from residential communities; and received a massive amount of public opposition, Mr. Gregory Chakalian, the NMED appointed hearing officer, recommended the approval of the plant’s permit in a community where a majority of residents are of Hispanic or LatinX origin and maintain limited

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<sup>1</sup> Letter from Patricia Chillon-Garcia, Complainant, to EPA (Sep. 15, 2021) [hereinafter 2021 Complaint].

<sup>2</sup> See Associated Asphalt and Materials, LLC Letter of Intent to Apply for a New Air Quality Construction Permit (Dec. 13, 2019), <https://www.env.nm.gov/wp-content/uploads/sites/2/2021/02/AQBP-Section-9-Updates-121319.pdf>.

English proficiency. Meanwhile, in a predominantly white community, where no household speaks Spanish, or any non-English language, as the primary household language, Mr. Chakalian honored<sup>3</sup> the public's concerns regarding a proposed cement plant in a predominantly white community in Alto, New Mexico, which was proposed to operate up to 18 hours a day, 7 days a week;<sup>4</sup> to be sited at least a mile away from residential communities; and also received a large amount of public opposition, ultimately recommending the permit's denial.

Accordingly, this Supplement provides additional information and recent developments that further evidence NMED's continued pattern of intentional discrimination against individuals with limited English proficiency and discriminatory treatment on the basis of their national origin.<sup>5</sup> As explained in further detail below, NMED Hearing Officer Gregory Chakalian has treated two similarly situated communities differently in the public permitting process for air quality permits. This Supplement also seeks to provide the EPA with additional history and context relevant to ECRCO's consideration of Ms. Chillon-Garcia's 2021 Complaint, including NMED's history of discrimination against individuals with limited English proficiency and noncompliance with Title VI and a 2017 Informal Resolution Agreement. Accordingly, Ms. Chillon-Garcia and NMELC respectfully submit the following:

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<sup>3</sup> There is even a stark difference in the manner in which Mr. Chakalian refers to the communities in both reports, which may be considered telling of his differential perception and treatment between the Alto residents and the Southside Santa Fe residents. At the outset of the Alto plant report, Mr. Chakalian characterizes the residents of Alto as "retirees who purchased their residential lots based on the extraordinary scenic beauty of the area and the pristine air quality." HO's Report in the Matter of the Application of Roper Construction, Inc. for an Air Quality Permit NO. 9295, Alto Concrete Batch Plant, filed May 6, 2022, at 2 [hereinafter Alto Plant HO Report]. Meanwhile, the first description Mr. Chakalian makes of the affected residents in the Associated Asphalt plant report occurs on page 45 of the 68-page report, in which Mr. Chakalian categorizes the community into "Block Groups," listing their demographics, health statistics, and exposure rates to pollution. *See* HO's Report in the Matter of the Application of Associated Asphalt and Materials, LLC for an Air Quality Construction Permit for a Facility in Santa Fe, New Mexico, at 45-46, filed June 28, 2021 [hereinafter Associated Asphalt Plant HO's Report].

<sup>4</sup> Alto Plant HO's Report at 2.

<sup>5</sup> *See* United States Department of Justice Civil Rights Division, Title VI Legal Manual, at Sec. VI, p. 17 (2021), [https://www.epa.gov/sites/default/files/2021-01/documents/titlevi\\_legal\\_manual\\_rev.\\_ed\\_1.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev._ed_1.pdf) [hereinafter Title VI Legal Manual] (defining intentional discrimination, under the McDonnell-Douglas framework, as instances where "a recipient treated similarly situated individuals differently because of race, color, or national origin").

## I. 2021 COMPLAINT HISTORY

Pursuant to Title VI,<sup>6</sup> on September 15, 2021, Ms. Chillon-Garcia filed an administrative complaint with EPA’s ECRCO, alleging NMED’s discrimination on the basis of national origin in violation of Title VI.<sup>7</sup> The following day, September 16, 2021, EPA, through ECRCO, received the Complaint and assigned to it EPA Complaint NO. 03NO-21-R6.<sup>8</sup> This marks September 16, 2021, as the opening date for the investigation of the Complaint.<sup>9</sup>

On November 2, 2021, EPA informed Ms. Chillon-Garcia that the 2021 Complaint met the jurisdictional requirements of Title VI and that “ECRCO would investigate the following issue:

Whether the New Mexico Environment Department (NMED) discriminated on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964 and EPA’s implementing regulation at 40 C.F.R. Part 7, when NMED failed to provide persons with limited English proficiency meaningful access to the public participation process in connection with the air quality permit application submitted by Associated Asphalt and Materials, LLC.”<sup>10</sup>

On, or near, November 2, 2021, the EPA also notified NMED of the 2021 Complaint, giving NMED thirty days from the date NMED received notice of the 2021 Complaint to send the EPA a response.<sup>11</sup>

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<sup>6</sup> See Title VI, 42 U.S.C § 2000d; 28 C.F.R. § 42.408.

<sup>7</sup> See 2021 Complaint.

<sup>8</sup> Letter from U.S. EPA, External Civil Rights Compliance Office (ECRCO) to Ms. Patricia Chillon-Garcia, at 1 (Nov. 2, 2021); see also EPA External Civil Rights Compliance Office, Case Resolution Manual at 4 (January 2021), [https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf). [hereinafter Case Resolution Manual] (describing that ECRCO will “assign a case number and establish a case file . . . [i]mmediately upon receipt of a complaint”).

<sup>9</sup> See *id.* (the opening date of an investigation of a Title VI complaint is the date EPA receives the complaint).

<sup>10</sup> See Letter from Lilian Dorka, EPA, to James Kenney, NMED (Nov. 2, 2021) [hereinafter EPA Acceptance Letter] (*citing* Title VI, 42 U.S.C. 2000(d) et seq.; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient’s Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a)); see also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (available at <https://www.epa.gov/sites/production/files/2020->).

<sup>11</sup> See 40 C.F.R. § 7.120(d)(ii) (requiring EPA, once the complaint is accepted, to “notify the applicant or recipient complained against of the allegations”).

Within the thirty-day response window, on November 19, 2021, ECRCO representatives met with the NMED Cabinet Secretary and NMED General Counsel, during which ECRCO described the Informal Resolution Agreement (“IRA”) process to NMED.<sup>12</sup> Following this conversation, on November 24, 2021, NMED General Counsel reported to EPA its decision to participate in negotiations aimed at carrying out an IRA.<sup>13</sup> Consequently, as of November 24, 2021, ECRCO and NMED initiated discussions concerning the IRA, suspending the 180-day deadline for issuing preliminary findings as of that date and for the duration of the IRA process.<sup>14</sup> Accordingly, Ms. Chillon-Garcia received a letter (“Tolling Letter”) from ECRCO, on February 14, 2022, notifying her of the suspension of the preliminary findings deadline.<sup>15</sup>

To date, the informal resolution process is ongoing. No IRA has yet been reached between NMED and ECRCO. Notably, EPA and NMED have an existing IRA entered into in 2017, which required NMED to develop and implement a language access policy and public participation policy and procedures in order to ensure meaningful access in the public participation process for persons with limited English proficiency.<sup>16</sup> The discriminatory acts alleged in the 2021 Complaint, thus, also place NMED in violation of the 2017 IRA.

## **II. JURISDICTION AND AUTHORITY TO CONSIDER ADDITIONAL INFORMATION**

Under Title VI, EPA has a responsibility to ensure its funds are not used to subsidize discrimination based on race, color, or national origin.<sup>17</sup> Any person may file administrative

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<sup>12</sup> See Letter from Lilian Dorka, EPA, to Patricia Chillon-Garcia, Complainant (Feb. 14, 2022) [hereinafter Tolling Letter].

<sup>13</sup> See *id.*

<sup>14</sup> *Id.*; see also 40 C.F.R. § 7.115(c)(1)).

<sup>15</sup> See Tolling Letter.

<sup>16</sup> See Informal Resolution Agreement between NMED and EPA at 12 (Complaint No. 09R-02-R6) (Jan. 19, 2017) [hereinafter 2017 IRA].

<sup>17</sup> *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> (last updated Feb. 1, 2023).

complaints that allege discrimination with the federal departments and agencies that provide financial assistance from federal funds.<sup>18</sup> To be accepted for investigation, a Title VI complaint must comply with the following jurisdictional requirements: (1) the complaint is in writing; (2) the complaint alleges discriminatory acts that, if true, violate the EPA's Title VI regulations; (3) the complaint identifies a recipient of EPA funding that committed the alleged discriminatory act; and (4) the complaint is filed within 180 days of the alleged discriminatory act.<sup>19</sup>

Once a complaint is accepted, ECRCO has the jurisdiction to investigate the complaint.<sup>20</sup> A complainant is not required to cite specific evidence supporting the claim of discrimination; however, the complainant may still provide supporting information for the complaint.<sup>21</sup> During the investigation, ECRCO will consider "all necessary information and evidence," which may include the historical background of the events at issue, statements by decisionmakers, and a history of discriminatory conduct.<sup>22</sup>

ECRCO has already determined that the 2021 Complaint met the four jurisdictional requirements and accordingly, accepted the 2021 Complaint.<sup>23</sup> As such, ECRCO now has jurisdiction to investigate the 2021 Complaint, which includes the jurisdiction to consider all relevant information and evidence, including additional factual background information, provided by Ms. Chillon-Garcia or otherwise.

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<sup>18</sup> See Title VI, 42 U.S.C § 2000d; 28 C.F.R. § 42.408.

<sup>19</sup> 40 C.F.R. § 7.120; Case Resolution Manual at 5.

<sup>20</sup> 42 U.S.C. §§ 2000d et seq., 40 C.F.R. § 7.

<sup>21</sup> EPA External Civil Rights Compliance Office, Compliance Toolkit at 3 (Jan. 18, 2017), [https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal\\_letter-faqs.pdf](https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf).

<sup>22</sup> Case Resolution Manual at 18; *id.* at 5.

<sup>23</sup> See EPA Acceptance Letter.

### III. CONTEXT IN WHICH DISCRIMINATORY ACTS OCCURRED

The March 22 and 23, 2021, events during which NMED's discriminatory acts occurred must be viewed and understood in context. This includes the consideration of the state's demographics, but more specifically, the Southside of Santa Fe, New Mexico, where the permitted facility is sited, as well as the already notable presence of polluting operations in the area and the health impacts implicated.

#### A. Community Characteristics

As one of the top ten most diverse states in the country, New Mexico is comprised of a wide range of socio-economic, cultural, economic, household, religious and politically diverse communities.<sup>24</sup> New Mexico is the state with the highest proportion of residents claiming LatinX or Hispanic heritage,<sup>25</sup> with around half of New Mexico's population identifying as Hispanic or LatinX.<sup>26</sup> In the home, 35.7% of New Mexico's population speaks a language other than English, with a majority of these residents identifying as Spanish speakers.<sup>27</sup> In 2021, this amounted to 510,402 households, with family members ages five and over, speaking Spanish at home.<sup>28</sup> Of these households, 27.1% retain limited English proficiency.<sup>29</sup>

The New Mexican residents directly affected by the permitted facility referenced in the 2021 Complaint reside on Santa Fe's Southside.<sup>30</sup> The population of the Southside is primarily

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<sup>24</sup> David Myers, *The Most and Least Diverse States in America*, The Fulcrum (Sept. 19, 2022), <https://thefulcrum.us/most-diverse-states>.

<sup>25</sup> The Associated Press, *The Most Latino State in the Nation? It's Still New Mexico*, NBC News (August 13, 2021), <https://www.nbcnews.com/news/latino/latino-state-nation-still-new-mexico-rcna1673>.

<sup>26</sup> United States Census Bureau, *Quick Facts: New Mexico*, USCB, <https://www.census.gov/quickfacts/NM> (last visited Oct. 26, 2023) (listing 50.2% of New Mexico's population identifying as Hispanic or Latino).

<sup>27</sup> *Id.*

<sup>28</sup> *New Mexico*, Migration Policy Institute, <https://www.migrationpolicy.org/data/state-profiles/state/language/NM> (last visited Oct. 27, 2023).

<sup>29</sup> *Id.* (finding 138,379 households speak English "less than very well" – considered limited English proficiency).

<sup>30</sup> See Air Quality Permit Application 8585, Associated Asphalt and Materials, LLC's Santa Fe Facility at Sec. 3, P. 1 (Nov. 23, 2019) (siting the facility at 86 Paseo de River, Santa Fe, NM – within the Southside Sector of Santa Fe).

Hispanic, with 88.4% of residents claiming Hispanic or LatinX origin.<sup>31</sup> In contrast, within the entire city of Santa Fe, only 56.5% of residents identify as having Hispanic or LatinX origin.<sup>32</sup>

On the Southside, Spanish is the predominant language spoken at home, with 70.7% of households reporting Spanish as the primary household language.<sup>33</sup> Further, the largest concentration of residents with limited English proficiency reside on the Southside, with nearly one-third of Southside residents retaining limited English proficiency.<sup>34</sup>

## **B. Existing Polluting Operations**

The state of New Mexico is also home to nearly 200 major and minor stationary pollution sources, which include fossil fuel operations, mining operations, power plants, landfills, military facilities, and airports.<sup>35</sup> These pollution sources are responsible for 25% of the state's greenhouse gas emissions<sup>36</sup> and other emissions, many of which are carcinogenic or causative of several respiratory, cardiovascular, and other health-related diseases and illnesses.<sup>37</sup> Statewide, these pollutants pose a threat to the health, well-being, and quality of life of New Mexico

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<sup>31</sup> Community Health Profile: Santa Fe Southside Sector Greenway Loop, NPS Rivers, Trails and Conservation Assistance Program Santa Fe Metropolitan Planning Office Santa Fe Public Schools Sustainability Office at 11 (March 2021), [https://santafemetro.org/wp-content/uploads/2021/04/Santa-Fe-Southside-Sector-Greenway-Loop-CHP\\_Final\\_LR-compressed.pdf?fbclid=IwAR3gJyPf39Yf1hd0RjUS1D9nFRk4IkVR6NX\\_JBnAJ\\_hp1vZt2p9tpoWC2AE](https://santafemetro.org/wp-content/uploads/2021/04/Santa-Fe-Southside-Sector-Greenway-Loop-CHP_Final_LR-compressed.pdf?fbclid=IwAR3gJyPf39Yf1hd0RjUS1D9nFRk4IkVR6NX_JBnAJ_hp1vZt2p9tpoWC2AE) (The remaining residents within the Southside Sector identify as white (10.1%), another race (8.6%), multi-racial (2.2%), or Indigenous (1.1%)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (listing 29.5% of Southside residents speaking English “less than very well,” compared to 11.8% within the entire city of Santa Fe); see also 2021 Complaint (“those who are directly affected by the construction of the asphalt plant are the residents of the southern community of Santa Fe where a large majority have Spanish as their mother tongue and where many of us do not have an advanced command of English, not even a level of English to understand or handle the technical vocabulary that was being used in this audience”).

<sup>35</sup> Scott Wyland, *Report: State's Biggest Polluters Disproportionately Affecting Disadvantaged*, Santa Fe New Mexican (Feb. 19, 2023), [https://www.santafenewmexican.com/news/local\\_news/report-states-biggest-polluters-disproportionately-affecting-disadvantaged/article\\_e7830604-a631-11ed-9905-9b1da7d728f5.html](https://www.santafenewmexican.com/news/local_news/report-states-biggest-polluters-disproportionately-affecting-disadvantaged/article_e7830604-a631-11ed-9905-9b1da7d728f5.html); see also Gabriel Pacyniak et al., *Climate, Health, and Equity Implications of Large Facility Pollution Sources in New Mexico*, PSE Health Energy & UNM at 7 (Feb. 1, 2023), [https://www.psehealthyenergy.org/wp-content/uploads/2023/01/FINAL\\_Climate-Health-and-Equity-Implications-of-Large-Facility-Pollution-Sources-in-NM.pdf](https://www.psehealthyenergy.org/wp-content/uploads/2023/01/FINAL_Climate-Health-and-Equity-Implications-of-Large-Facility-Pollution-Sources-in-NM.pdf).

<sup>36</sup> Wyland, *supra* note 35.

<sup>37</sup> Pacyniak et al., *supra* note 35, at 16-17.



residents, with 27 of the state’s largest pollution sources sited in areas where 10,000 people live within three miles.<sup>38</sup> The communities within these areas are largely comprised of people of color or low-income households.<sup>39</sup>

Santa Fe’s Southside is no exception: in Santa Fe, polluting sources are primarily located on the Southside in between residential neighborhoods and schools that serve majority low-income residents and residents of color. The Santa Fe Regional Airport,<sup>40</sup> as well as the Santa Fe Readiness Center Army Aviation Support Facility (AASF),<sup>41</sup> are also located in the Southside – adding noise pollution and additional air pollution to the surrounding community.<sup>42</sup> Meanwhile, multiple industrial sites, from concrete facilities<sup>43</sup> to subsurface contracting,<sup>44</sup> are located nearby. The Naumburg Industrial Park is also located on the Southside, which is home to a multitude of industrial, polluting facilities and businesses such as the Honstein Oil Company, Concrete Pumping, and Roadrunner Redi-Mix.<sup>45</sup> All of these facilities and operations sited within the Southside further attract frequent large truck traffic passing through the surrounding communities.<sup>46</sup>

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<sup>38</sup> Wyland, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> Located at 121 Aviation Dr., Santa Fe, New Mexico.

<sup>41</sup> Located at Heuy Road, Santa Fe, NM.

<sup>42</sup> See Beverly S. Cohen et al., *Airport-Related Air Pollution and Noise*, *Journal of Occupational and Environmental Hygiene*, 5(2), 119–129 (discussing higher rates of exposure to particulate matter concentrations and noise pollution for communities living near an airport, and the detrimental health impacts thereof); see also *Living Near an Airport Could be a Matter of Life and Death*, Camfil USA (Aug. 16, 2017), <https://cleanair.camfil.us/2017/08/16/living-near-airport-matter-life-death/> (citing studies reporting that people living near an airport can experience a higher rate of respiratory problems due to elevated airplane emissions that contain hazardous contaminants).

<sup>43</sup> See *A Photographic Tour of Polluting Industries on Santa Fe’s Southside*, EarthCare (Feb. 15, 2022), <https://www.earthcarenm.org/ejphotos> (showing “Santa Fe Concrete,” a facility located near the Airport on the Southside).

<sup>44</sup> See *id.* (showing “Sub-Surface Contracting,” a business located in the Southside near an Associated Asphalt Materials, LLC facility).

<sup>45</sup> See *id.*

<sup>46</sup> *Id.* (photographers noting that “[t]he amount of truck traffic in the areas we photographed was overwhelming. There was hardly a moment at which huge trucks weren’t passing us in both directions”).

In addition to the polluting industries, complexes, and traffic mentioned above, four asphalt plants, owned and operated by Associated Asphalt Materials, LLC, are located and operate on the Southside. Only around a quarter-mile away from the nearest residential area is a 200 ton per hour (TPH) hot mix asphalt plant, as well as a scalping screen plant.<sup>47</sup> Meanwhile, just across the road is a 200 TPH aggregate crushing and screening plant and a 450 TPH hot mix asphalt plant.<sup>48</sup> Southside residents nearby report being able to smell the plants' fumes in their homes frequently, further noting the harmful pollution to the area from these facilities.<sup>49</sup>

The consolidation of these plants, as well as the construction of a 200 TPH aggregate crushing and screening plant, 50 TPH aggregate scalping screen, 150 TPH hot mix asphalt plant, and a 300 TPH hot mix asphalt plant, all within the Southside,<sup>50</sup> was the proposed activity and associated air quality permit that led to the public hearings at issue in the 2021 Complaint.<sup>51</sup> The operations of the current plants, proposed to be joined with more facilities constructed alongside the consolidated operations, had already been flagged for emissions monitoring and reporting deficiencies by NMED's Air Quality Bureau prior to the hearings on the permit application in 2021.<sup>52</sup> Following residents' complaints of foul odors and smoke coming from these plants' operations, an Air Quality Bureau inspection discovered the plant operator and employees were not only keeping inconsistent and inadequate records of baghouse pressures,<sup>53</sup> but the plant

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<sup>47</sup> See Associated Asphalt Plant HO's Report at 6 (plant located at 3810 Oliver Road, Santa Fe, NM).

<sup>48</sup> *Id.* at 6-7 (plants sited at 86 Paseo de River, Santa Fe, NM).

<sup>49</sup> Austin Fisher, *Final Decision on Asphalt Plant on Santa Fe's South Side Expected This Summer*, SourceNM (April 21, 2022), <https://sourcenm.com/2022/04/21/final-decision-on-asphalt-plant-on-santa-fes-south-side-expected-this-summer/>.

<sup>50</sup> Associated Asphalt Plant HO's Report at 8.

<sup>51</sup> See 2021 Complaint.

<sup>52</sup> Katherine Lewin, *Asphalt Company's Plans in the Air*, Santa Fe Reporter (March 25, 2020), <https://www.sfreporter.com/news/2020/03/25/asphalt-companys-plans-in-the-air/>.

<sup>53</sup> *Id.* (Records of baghouse pressures are necessary to measure how many particles from asphalt production are being released into the air. By measuring and recording these pressures, operators are able to determine whether a

operator also lacked knowledge of the proper procedure to implement when a baghouse may be malfunctioning.<sup>54</sup> In addition, the investigation reported Associated Asphalt Materials, LLC, in its thirty years of operations of the four plants located in the Southside, had never submitted a biennial emissions inventory – a requirement mandated by the company’s 1990 operating permit.<sup>55</sup>

### **C. Community Health**

In part because of the polluting operations, facilities, and traffic on Santa Fe’s Southside, as well as the lack of emissions controls and monitoring occurring at these facilities, the community health of Santa Fe’s Southside continues to worsen. The amount of polluting facilities on Santa Fe’s Southside serves as a primary contributor to the Southside community’s health disparities when compared to the rest of the city of Santa Fe, with asphalt processing, manufacturing, and plant operations emitting air pollutants that are inadequately regulated by the NMED.<sup>56</sup> These pollutants cause cancer, central nervous system problems, liver damage, respiratory problems, skin irritation, coughing, wheezing, shortness of breath, headaches, dizziness, nausea, birth defects, and damage to the immune system.<sup>57</sup> Further, although state and federal agencies have established air quality standards in hopes of mitigating such effects on adjacent communities, even if an asphalt plant meets all state and federal air pollution standards one-hundred percent of the time, which rarely happens, communities living nearby are still exposed to these hazardous

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plant is functioning properly, as well as to implement proper procedures to stop pollutants from escaping into the atmosphere and surrounding communities).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *Asphalt Plants*, Center for Health, Environment, & Justice (Aug. 2016), <https://chej.org/wp-content/uploads/Asphalt-Plants-PUB-131.pdf>.

<sup>57</sup> *Id.*

air pollutants at health-adverse levels.<sup>58</sup> Moreover, residents within a community adjacent to these polluting facilities are subject to a greater risk of adverse health effects from hazardous asphalt plant pollutants if those residents have pre-existing health conditions, such as asthma resulting from other pollution sources in the area or lasting health effects from COVID-19.<sup>59</sup>

The communities of Southside Santa Fe are exposed to such air pollutants at a greater amount than the rest of Santa Fe. The two Census Block Groups most impacted by the Associated Asphalt operations at issue in Ms. Chillon-Garcia's 2021 Complaint, Block Group 350490012031 and Block Group 350490012052, in the Southside are in the 76<sup>th</sup> percentile and 85<sup>th</sup> percentile for PM 2.5 exposure – a type of fine inhalable particulate matter containing hundreds of different chemicals and hazardous air pollutants.<sup>60</sup> The residents of Southside Santa Fe also have higher rates of such pre-existing health conditions mentioned above, increasing their susceptibility to additional adverse health effects from air pollutants emitted by the nearby asphalt plants and other polluting industries. The two Block Groups have the third highest adult asthma rate and highest adult asthma rate in Santa Fe County.<sup>61</sup> Block Group 350490012031 also has the highest rate of chronic obstructive pulmonary disease (COPD) in Santa Fe County, at 9.4%, while Block Group 350490012052 has a COPD rate of 6.5%.<sup>62</sup> Further, residents of the Southside were impacted most by the COVID-19 pandemic compared to other residents in Santa Fe, with nearly one third of all cases in Santa Fe reported therein, despite the Southside only comprising of 17% of the city's entire population.<sup>63</sup> During the pandemic, the odds of testing

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<sup>58</sup> *Santa Fe Asphalt Fight Takes Toxic Turn*, The Paper, <https://abq.news/2021/03/santa-fe-asphalt-fight-takes-toxic-turn/> (last updated March 10, 2021).

<sup>59</sup> *Id.*

<sup>60</sup> Associated Asphalt Plant HO's Report at 46; see *Particulate Matter (PM) Pollution*, U.S. Environmental Protection Agency, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics> (last updated July 11, 2023).

<sup>61</sup> Associated Asphalt Plant HO's Report at 46.

<sup>62</sup> *Id.*

<sup>63</sup> Community Health Profile: Santa Fe Southside Sector Greenway Loop, *supra* note 31, at 13.

positive for COVID-19 were twice as high in the Southside than in the rest of the city of Santa Fe.<sup>64</sup>

In addition to being exposed to more pollutants than the rest of Santa Fe, as well as experiencing higher rates of chronic illnesses, diseases, and other health-related issues, the Southside community has inadequate access to proper healthcare to address these health concerns. Only five small medical clinics are located within the Southside, all of which either require insurance or have long waiting lists that result in patients waiting months before seeing a provider and receiving treatment.<sup>65</sup> The lack of adequate, accessible healthcare on the Southside often leads residents to one of two options: “the emergency room or the folks in the neighborhood,”<sup>66</sup> and further exacerbates the health inequities and disparities ongoing on the Southside, placing residents’ health in further jeopardy as multiple polluting operations continue in the community.

#### **IV. NMED’S ACTS OF INTENTIONAL DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN**

Agencies investigating allegations of intentional discrimination, in violation of Title VI, often use the *McDonnell-Douglas* framework when evaluating recipient actions that ultimately result in the treatment of similarly situated individuals differently because of race, color, or national origin.<sup>67</sup> A finding of intentional discrimination under this framework requires agencies to take an “inclusive approach to determining legally sufficient harms,” such that a recipient’s

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<sup>64</sup> *Id.*

<sup>65</sup> *South Side Rising*, Santa Fe Reporter (January 10, 2012), <https://www.sfreporter.com/news/coverstories/2012/01/10/south-side-rising/> (noting roughly 80% of patients at La Familia Medical Center’s Southside Clinic aren’t insured, creating further disparities in access to healthcare in the Southside).

<sup>66</sup> *Id.* (quoting Miguel Acosta, who states in remark to the healthcare inequities in the Southside, “Health care in the south side is handled one of two ways: the emergency room or the folks in the neighborhood”).

<sup>67</sup> See Title VI Legal Manual, *supra* note 5, at Sec. VI, p. 17.

restriction of an individual's ability to enjoy the benefits of, including meaningful access to and participation in, a recipient's administration of a program can be considered a cognizable harm recognized under Title VI.<sup>68</sup> Title VI's plain language further supports this approach.<sup>69</sup>

Here, Ms. Chillon-Garcia alleges that NMED discriminated against her and other Spanish-speaking residents of Santa Fe, New Mexico, on the basis of national origin. Specifically, Ms. Chillon-Garcia alleges that NMED failed to provide meaningful access, including effective interpretation services, to Ms. Chillon-Garcia and other persons with limited English proficiency during a virtual public hearing concerning an asphalt plant air pollution permit, instead requiring Ms. Chillon-Garcia and other individuals provide public comments exclusively in English, despite requests for interpretation.<sup>70</sup> As discussed below, how NMED and Hearing Officer Mr. Chakalian treated and considered public comment in Ms. Chillon-Garcia's community, a predominantly Hispanic community with limited English proficiency, differs immensely in comparison to how NMED and Hearing Officer Mr. Chakalian treated and considered public comment in a predominantly white, affluent, and English-speaking community. Applying the *McDonnell-Douglas* framework shows clearly NMED's intentional discrimination on the basis of national origin against individuals with limited English proficiency, in violation of Title VI.

#### **A. 2021 Complaint Discriminatory Acts Alleged**

On March 22 and 23, 2021, NMED held a virtual public hearing on Associated Asphalt and Materials, LLC's air quality permit application (permit NO. 8585) for a facility proposed to be located on Santa Fe's Southside.<sup>71</sup> The hearing was held pursuant to public participation

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<sup>68</sup> *Id.* at Sec. VI, p.18.

<sup>69</sup> *Id.* (quoting Title VI's statutory language in support: "The statute states that no person shall on the ground of race, color, or national origin 'be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance '42 U.S.C. § 2000d)").

<sup>70</sup> *See* 2021 Complaint.

<sup>71</sup> *See id.*; *see also* EPA Acceptance Letter.

requirements for air quality permit applications submitted to NMED, which require NMED to afford members of the public a meaningful opportunity to participate in the application decision process.<sup>72</sup>

At the beginning of the hearing, on March 22, 2021, NMED gave brief and remedial instructions regarding the availability of an English-Spanish simultaneous interpretation system via the Zoom platform. NMED provided these instructions in English only and included no demonstration, no assurance that the audience understood the instructions, and no practice to ensure the interpretation system was working properly. During the hearing, Ms. Chillon-Garcia contacted multiple Spanish-speaking assistants who were available to aid Spanish-speaking participants in using the interpretation system via telephone for assistance in using the simultaneous interpretation system; however, the Spanish-speaking assistants also did not know how to use the system.

Then, when Ms. Chillon-Garcia sought to provide her public comment in Spanish, the Hearing Officer, Mr. Chakalian, interrupted Ms. Chillon-Garcia to inform her he did not understand Spanish. When NMED staff could not understand their own instructions regarding the setup of the simultaneous interpretation system, Ms. Chillon-Garcia attempted to explain, in English, to Mr. Chakalian and NMED how to work the simultaneous interpretation system. The burden was thus placed on a member of the public to inform and instruct NMED on the use of its own simultaneous interpretation system, so that members of the public could meaningfully understand, participate in, and comment in their language of proficiency.<sup>73</sup>

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<sup>72</sup> NMAC 20.2.72.206(C) (requiring NMED to hold a public hearing if there is a significant public interest in a permit application. At the public hearing, NMED is required to allow “all interested persons” “the reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing”).

<sup>73</sup> *Id.*

Despite Ms. Chillon-Garcia's attempts to instruct Mr. Chakalian and NMED on how to use the simultaneous interpretation system, Mr. Chakalian failed to set up and use the simultaneous interpretation system. Mr. Chakalian then denied Ms. Chillon-Garcia the use of the simultaneous interpretation system, or an English-Spanish interpreter, when he unilaterally and arbitrarily decided Ms. Chillon-Garcia would provide her public comment in English, stating Ms. Chillon-Garcia could "speak English well enough," to provide her public comment in English, based upon her earlier attempts to explain the simultaneous interpretation system to Mr. Chakalian and NMED in English and ignoring Ms. Chillon-Garcia's explicit request to rely on a Spanish interpreter.<sup>74</sup> In making this decision, Mr. Chakalian did not seek Ms. Chillon-Garcia's acceptance, consider Ms. Chillon-Garcia's language preference, nor make any explicit efforts to determine Ms. Chillon-Garcia's English proficiency.<sup>75</sup>

The following day of the public hearing, March 23, 2021, Ms. Chillon-Garcia sought to submit another public comment. Mr. Chakalian again compelled Ms. Chillon-Garcia to make her public comment in English, denying her the use of the simultaneous interpretation system or an English-Spanish interpreter for the second time. Ms. Chillon-Garcia, a Spanish national, retains a Spanish as her primary language and, as such, sought to submit her public comment in her primary language, Spanish. This is especially important given the highly technical nature of the hearing and the information presented to members of the public. Despite this, when Mr. Chakalian compelled Ms. Chillon-Garcia to submit her public comment in English multiple times throughout the two-day hearing, Ms. Chillon-Garcia again had to express herself in a language she was uncomfortable with, in which she "[knew] that [she] cannot defend [her] point

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*



of view with the same conviction and argumentative force with which [she] would do it in [her] mother tongue.”<sup>76</sup> By compelling Ms. Chillon-Garcia to submit her public comment in a language in which she lacked the necessary proficiency to convey her concerns, NMED violated Ms. Chillon-Garcia’s right, as a member of the public, to fully and meaningfully participate and provide comment in the public participation process, as well as the terms of the existing IRA discussed in further detail later in this Complaint. The complete disregard for Ms. Chillon-Garcia’s, and other members of the public, limited command of English, and compulsion to provide public comments in English, during a public hearing conducted in and impacting a community of primarily Spanish speakers, is nothing short of intentional discrimination on the basis of national origin by NMED. This is all the more true when compared to a more recent instance of NMED recommending the denial of an air pollution permit in a predominately white, English-speaking community, as discussed below.

Furthermore, because of Mr. Chakalian and NMED’s actions in compelling Ms. Chillon-Garcia to submit her public comment in English and denying her the use of the simultaneous interpretation system or an interpreter, other affected Spanish-speaking members of the public were discouraged from submitting public comments during the hearing. One member of the public, after witnessing NMED’s discriminatory treatment of Ms. Chillon-Garcia, chose not to provide a public comment during the hearing, even though she had intended to do so when the hearing began. The respective member of the public, included as a witness in the 2021 Complaint, recounted that she withdrew from participating because she was “afraid” NMED would make her participate in English.<sup>77</sup>

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<sup>76</sup> See 2021 Complaint.

<sup>77</sup> See *id.* (recount of the experience of Elizabeth Zambrano, a member of the Spanish-speaking public in attendance at the March 2021 hearing).

This instance of discrimination is certainly not limited to the witness noted above, as a large part of the public in virtual attendance retained Spanish as their native language of proficiency.<sup>78</sup> Mr. Chakalian and NMED's intentional discrimination against Spanish-speaking residents of Santa Fe in compelling Ms. Chillon-Garcia to provide her public comment in a language she was not comfortable with, nor proficient in, served as an act of public intimidation and embarrassment, and, as Ms. Chillon-Garcia noted, such discriminatory acts have developed a "fear and a certain aversion to speaking in public in English."<sup>79</sup> These repeated acts of discriminatory public intimidation and embarrassment by Mr. Chakalian and NMED effectively discouraged other members of the public with limited English proficiency from offering their public comments, ultimately denying these members of the public their right to fully and meaningfully participate in the public participation process.

Further, NMED's intentional discrimination against a community largely composed of individuals with limited English proficiency was not solely limited to NMED's restriction of these community members' ability to meaningfully access and participate in a public permitting process. As discussed below, Mr. Chakalian's characterizations and consideration of the public comment provided by Ms. Chillon-Garcia's community in his written recommendation to approve the air pollution permit, as compared to his characterizations and considerations of public comments provided by a predominantly white community with no residents with limited English proficiency, provide additional insight into NMED's intentional discriminatory acts against communities of limited English proficiency in New Mexico – ultimately, exemplifying

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<sup>78</sup> *See id.*

<sup>79</sup> *See id.* ("In these years living in Santa Fe I have suffered many situations in which I have been judged or discriminated against because of my English to the point of having to excuse myself because of my mother tongue and my accent. Over time I have developed fear and a certain aversion to speaking in public in English, these situations have also come to damage my self-esteem and question my worth as a person").

NMED's discriminatory treatment of similarly situated communities, which rises to the level of intentional discrimination prohibited by Title VI.

**B. Supplemental Information Regarding NMED Hearing Officer Gregory Chakalian's Actions Since the 2021 Complaint**

The intentional discriminatory treatment NMED Hearing Officer Gregory Chakalian engaged in during the 2021 virtual public hearings<sup>80</sup> is further supported by the additional evidence of Mr. Chakalian's consideration of public comments and concerns raised at a different public hearing on a similar permit application raised by predominantly white, English-speaking members of the impacted community. Because NMED and its agents continue to engage in the discriminatory treatment of individuals with limited English proficiency, despite the 2017 IRA, it is vital that ECRCO ensures the IRA process, or in the alternative, the investigation into Ms. Chillon-Garcia's 2021 Complaint, moves forward in a timely manner so as to ensure communities with limited English proficiency are not only afforded access to the public participation process, but also that their comments and concerns are meaningfully considered by NMED when it makes decisions on air pollution permits impacting their communities.

In February 2022, NMED held a virtual public hearing concerning a proposed concrete batch plant in the residential community of Alto, located within the village of Ruidoso, New Mexico ("Alto plant").<sup>81</sup> The residents of Ruidoso are predominantly white, with around 63% of residents identifying as white and only 33% of residents identifying as Hispanic or LatinX.<sup>82</sup>

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<sup>80</sup> See 2021 Complaint.

<sup>81</sup> Reyes Mata III, *Public Hearing on Proposed Concrete Batch Plant in Alto Draws Critics, Supporters*, Ruidoso News (Feb. 23, 2022), <https://www.ruidosonews.com/story/news/local/2022/02/23/alto-concrete-batch-plant-hearing-draws-critics-support/6753434001/>.

<sup>82</sup> United States Census Bureau, *Quick Facts: Ruidoso Village, New Mexico*, USCB, <https://www.census.gov/quickfacts/ruidosovillagenewmexico> (last visited Nov. 7, 2023).

About 71% of Alto residents identify as white.<sup>83</sup> Notably, as of 2021, no household within Ruidoso reported speaking a primary language other than English in the home.<sup>84</sup>

Like the Associated Asphalt plant and its virtual public hearing at issue in the 2021 Complaint, the Alto plant's virtual public hearing included public comment from the community on the Alto plant's air quality permit application (permit NO. 9295).<sup>85</sup> Further, also like the Associated Asphalt plant public hearing, Hearing Officer Gregory Chakalian presided over the Alto plant's public hearing.<sup>86</sup> The Alto plant public hearing brought in strong public opposition, similar to the Associated Asphalt plant public hearing, with around 115 people registering to speak at the hearing or submitting public comments in writing.<sup>87</sup> Unlike the Associated Asphalt plant hearing, however, following the public hearing, Mr. Chakalian recommended the denial of the Alto plant's air quality permit, in a blatant act of intentional discrimination, noting "overwhelming opposition to the permit" in his Hearing Officer's Report.<sup>88</sup>

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<sup>83</sup> *Zip 88313 (Alto, NM)*, Best Places, [https://www.bestplaces.net/people/zip-code/new\\_mexico/alto/88312](https://www.bestplaces.net/people/zip-code/new_mexico/alto/88312) (last updated August 2023).

<sup>84</sup> *Ruidoso, NM*, Data USA, <https://university.datausa.io/profile/geo/ruidoso-nm?redirect=true> (last visited Nov. 7, 2023).

<sup>85</sup> Mata III, *supra* note 81; Jonny Coker, *Proposed Concrete Batch Plant in Alto Causes Drawn-Out Legal Battle*, KRWG (Oct. 13, 2022), <https://www.krwg.org/krwg-news/2022-10-13/proposed-concrete-batch-plant-in-alto-causes-drawn-out-legal-battle> (noting the Alto plant has been seeking an air quality permit from NMED since June 2021).

<sup>86</sup> Mata III, *supra* note 81.

<sup>87</sup> *Id.*

<sup>88</sup> See Alto Plant HO Report at 1, 52-54. NMED then denied the air quality permit based on Mr. Chakalian's recommendations. NMED Final Order in the Matter of the Application of Roper Construction, Inc. for an Air Quality Permit NO. 9295, Alto Concrete Batch Plant, filed June 22, 2022, at 3-4. The Environmental Improvement Board, however, reversed NMED's denial, ultimately approving the Alto Plant's air quality permit application. See Environmental Improvement Board Final Order in the Matter of the Petition for Hearing on Air Quality Permit NO. 9295, Roper Construction Inc.'s Alto Concrete Batch Plant, filed May 30, 2023, at 1, 24.

### C. Application of the McDonnell-Douglas Framework

As mentioned above, EPA's ECRCO evaluates claims of intentional discrimination under Title VI using the *McDonnell-Douglas* framework.<sup>89</sup> To establish a prima facie case under this framework, a plaintiff or complainant must show that they are a member of a protected group, are eligible for a recipient's program, activity or service, and are otherwise treated in an adverse manner, and that an individual or group who is similarly situated, but is not in the plaintiff's protected group, received better treatment.<sup>90</sup> For Title VI administrative complaint investigations, such as those performed by ECRCO, the *McDonnell-Douglas* framework then shifts to follow a non-adversarial model such that a complaint only needs to provide enough facts for an agency to open an investigation to determine whether evidence exists of similarly situated groups who were treated differently, in violation of Title VI.<sup>91</sup>

Here, the circumstances and facts surrounding the Associated Asphalt plant and the Alto plant show that the Southside Santa Fe community and Alto community are similarly situated, with the Southside Santa Fe community, however, ultimately receiving less consideration and worse treatment by NMED than the Alto plant community for no legal reason. NMED held public hearings, on the matter of whether to approve or deny an air quality permit application for facilities that emit hundreds of tons of similar criteria and hazardous air pollutants per year, in both communities. Both public hearings were held virtually, with Mr. Gregory Chakalian presiding over both hearings as NMED's Hearing Officer. The only difference between the two communities is the communities' demographic makeup and, ultimately, the treatment and

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<sup>89</sup> The elements of a prima facie case are the same under both Title VI and VII. *Paul v. Theda Med. Ctr., Inc.*, 465 F.3d 790, 794 (7th Cir. 2006); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998); *see also* Title VI Legal Manual, *supra* note 5, at Sec. VI p.17.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at Sec. VI p.20.

consideration they received by NMED and Mr. Chakalian. As discussed above, the Southside Santa Fe community is predominantly Hispanic, with 84% of residents claiming Hispanic or LatinX origin, and with 70.7% of households reporting Spanish as the primary household language.<sup>92</sup> Nearly one-third of Southside residents retain limited English proficiency.<sup>93</sup> Meanwhile, nearly three-fourths of the Alto community identify as white, and no household within the larger Ruidoso area speaks a primary language other than English in the home.<sup>94</sup> Beyond Mr. Chakalian's blatant mistreatment of Ms. Chillon-Garcia and restriction of the Southside Santa Fe communities' meaningful access to and participation in the public permitting process, an evaluation of the inconsistencies between the two communities' Hearing Officer reports, as well as the resulting decisions from each,<sup>95</sup> provide sufficient evidence indicative that NMED treated two similarly situated groups differently and discriminatorily, in violation of Title VI.

Unlike in his recommendation for approval of the Associated Asphalt plant, in Mr. Chakalian's report recommending denial of the Alto plant permit, he extensively describes public testimony and opposition to the Alto plant from just the February 2022 public hearing.<sup>96</sup> Mr. Chakalian lists each member of the public that offered sworn non-technical testimony at the public hearing by name, including excerpts of their "relevant testimony."<sup>97</sup> The testimony

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (listing 29.5% of Southside residents speaking English "less than very well," compared to 11.8% within the entire city of Santa Fe); *see also* 2021 Complaint ("those who are directly affected by the construction of the asphalt plant are the residents of the southern community of Santa Fe where a large majority have Spanish as their mother tongue and where many of us do not have an advanced command of English, not even a level of English to understand or handle the technical vocabulary that was being used in this audience").

<sup>94</sup> *Zip 88313*, *supra* note 83; *Ruidoso, NM*, *supra* note 84.

<sup>95</sup> *See* NMED, Deputy Secretary of the Environment Final Order No. AQB 21-57(P) (June 22, 2022), <https://www.env.nm.gov/wp-content/uploads/2022/06/AQB-21-57Final-Order.pdf> (The NMED Deputy Secretary issued a final order on behalf of NMED, denying the Alto Plant air quality construction permit, following Mr. Chakalian's Hearing Officer Report recommending denial).

<sup>96</sup> *See* Alto Plant HO Report at 9-16.

<sup>97</sup> *See id.*

excerpts Mr. Chakalian included to support his recommendation of the denial of the permit vary from lay testimony detailing specific nuisances and detrimental effects imposed by the proposed Alto plant,<sup>98</sup> to simply listing the distance in which members of the public live from the proposed site and/or their residence in Alto.<sup>99</sup> Mr. Chakalian also notes within his report the significance of the proximity of residential subdivisions within a one-mile (5,280 feet) radius of the proposed site.<sup>100</sup> Ultimately, throughout his report and decision-making process regarding the Alto plant's permit, Mr. Chakalian, as an employee and extension of NMED, took great care to consider residential proximity to and residential concerns of the proposed site – concluding the Alto permit should be denied in favor of the community's concerns.

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<sup>98</sup> See *id.* at 9-10 (“Ms. Suzanne Santo testified in opposition to the Draft Permit, and that she lives in the Enchanted Forest and owns three properties approximately 33 linear feet from the Alto CBP site. Ms. Santo retired to Alto N.M. in part because of the clean mountain air. Ms. Santo personally observed the amount of particulate matter released from a Concrete Batch Plant in El Paso. Her husband was a quality control manager for the largest concrete plant in El Paso and witnessed the impact of the 10 surrounding neighborhoods that lived with silica dust which settled over El Paso and adversely impacted residents who suffered from breathing problems. Ms. Santo testified that she would hear the constant noise generated by the Alto CBP and that Lincoln County does not have a noise ordinance to protect residents from the noise from trucks and heavy equipment necessary for operations”); *id.* at 12-13 (“Mr. John Skinner testified in opposition to the Draft Permit as a local resident of 123 Coyote Mesa Trail, Alto N.M. about one mile north/northeast of the Alto CBP. This puts his home directly inline of the prevailing winds. His wife suffers from allergies and dry eye conditions”); *id.* at 14-15 (“Mr. Steven Hightower testified in opposition to the Draft Permit as a commercial pilot who has lived in Lincoln County for fifty (50) years and is familiar with temperature inversions in the valley. Mr. Hightower has flown out of Sierra Blanca airport since its construction in 1987 and objected to the air quality modeling that ignored the unique environment in the valley. He testified that temperature inversions happen on his property every single day in the wintertime. In fact, on the day of the public hearing he recorded a negative 4-degree Fahrenheit temperature near the proposed industrial site. He further testified that along Little Creek, on top of a hill on his property, it was 32 degrees Fahrenheit where a strong temperature inversion takes place every single day. The Alto CBP sits in a bowl, and nothing affects air quality in N.M. as much as a temperature inversion does, and it has not even been considered, therefore disqualifying the emission modeling in his opinion. He testified that Sierra Blanca airport sits on top of a mesa, and the valleys that surround the airport invert nightly based on the fog that forms in the valleys and not on the mesa. Thus, data from Holloman and Sierra Blanca do not fairly represent the air quality at the construction site because inversions trap particulate matter which takes hours to disperse”); *id.* at 16 (“Mr. Dennis Venski testified in opposition to the Draft Permit and challenged the use of water to mitigate the dust and pollutants. Use of water on the haul-roads will wash the pollutants into the ditch and sweeping the haul-roads will put the dust into the air”).

<sup>99</sup> See *id.* at 10 (“Mr. Tom Stewart, a Lincoln County Commissioner, testified that he is personally opposed to the Draft Permit and lives at 116 Tanglewood Lane in Alto NM. The Alto CBP is located approximately 1.2 miles from his residence”); *id.* at 11 (“Ms. Kathleen Weems testified in opposition to the Draft Permit and that she and her husband are retired educators who built their home last year, less than two-tenths of a mile from the construction site”); *id.* at 12 (“Ms. Ellen Hightower testified in opposition to the Draft Permit as a local resident of Alto since 1997”).

<sup>100</sup> *Id.* at 1.

In contrast, Mr. Chakalian’s report for the Associated Asphalt plant, in which he recommended the approval of the permit, does not include any specific section devoted to and detailing public testimony and opposition provided at the March 2021 public hearings, despite similarly high numbers of public comment opposing the plant. Mr. Chakalian’s report for the Associated Asphalt plant states that the written public comments “overlap completely” with the verbal public comment provided, despite the written public comments and community member signatures totaling into the hundreds.<sup>101</sup> The Associated Asphalt report itself devotes only three pages to public comment excerpts from the entirety of the permitting process,<sup>102</sup> most of which were summarized, shortened, and even wrongfully characterized in some circumstances, especially when comments concerned the adverse health effects and detrimental impacts caused by the asphalt plant to the community,<sup>103</sup> ignoring lay testimony providing much more context, evidence, and concerns than what Mr. Chakalian describes.<sup>104</sup> Despite this significant opposition,

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<sup>101</sup> See Associated Asphalt Plant HO’s Report at 3; see also NMED Binder 1 of Associated Asphalt plant permit public comments, <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/02/Binder1.pdf> (includes copies of written public comments and signatures in opposition of the plant) (emphasis added).

<sup>102</sup> See *id.* at 46-49.

<sup>103</sup> See *id.* at 48 (“Domenica Nieto testified that she is with Earth Care and is concerned about the health effects of the asphalt plant on the students of the area”); *id.* (“Adrienne Harvitz testified that she was in solidarity to those public members who spoke before her, and that she is a 15-year Earth Care volunteer. Her concern centered on the children at the local schools”); *id.* at 48-49 (“Juan Rodriguez testified that he is associated with Earth Care and posed four questions that went unanswered. He then asserted that the younger generation will use social media to change the world”).

<sup>104</sup> See NMED Hearing in the Matter of the Application of Associated Asphalt and Materials, LLC for an Air Quality Construction Permit for a Facility in Santa Fe, New Mexico [hereinafter 2021 NMED Public Hearing], Transcript of Proceedings Day 1 at 55-58 (Domenica Nieto’s testimony actually brings forth the concerns of 319 community members regarding the health impacts of the proposed plant, especially on students in the surrounding five schools, discussing air quality, noise and vehicle traffic, degradation of natural beauty and quality of life, as well as threats to wildlife, historic structures, tourism, water quality, water conservation, and property values. Her testimony further raises concerns regarding the lack of sufficient monitoring of Associated Asphalt’s operations, compliance with appropriate standards, and the necessity for studies regarding the impacts to the community by the operations in the context of COVID-19 and cumulative air quality impacts in the area); see *id.* at 61-63, 71-74 (Adrienne Harvitz’s testimony goes into depth to discuss local schools’ proximity to the proposed plant, as well as highlights the health inequities facing communities of color in New Mexico. Her testimony then provides, in great detail, the connection between air quality, health inequity, income, and academic achievement – requesting the consideration of all these factors when taking into account the proposed plant’s impacts on the surrounding community and youth); see 2021 NMED Public Hearing, Transcript of Proceedings Day 2 at 352-54 (March 23, 2021) (Juan Rodriguez’s testimony in fact does not “assert that the younger generation will use social media to



one of the longest public comment excerpts Mr. Chakalian provided was a rare comment in support of the plant.<sup>105</sup> Further, in support of the Associated Asphalt plant permit approval, Mr. Chakalian notes that the proposed site will be 2,144 feet (less than half a mile) from the closest residential community, listing this distance as “Evidence in Support of AAM’s Burden to Show the Draft Permit Should be Approved and not Denied.”<sup>106</sup>

The inconsistencies between Mr. Chakalian’s recommendation of denial of the Alto plant permit application and his report recommending approval of the Associated Asphalt plant permit are significant. In the Alto plant report, Mr. Chakalian dedicates ample space, time, and consideration to public comments, testimony, and concerns. Many of the excerpts provided from the February 2022 public hearing are detailed in length and content, although even excerpts just remarking a public member’s residency in or near Alto and the proposed site are included. The proximity of the proposed site to residential communities, within a radius of one mile, serves as a measurable factor in Mr. Chakalian’s decision recommending denial of the permit application as well. Mr. Chakalian ultimately expresses sentiment towards the public outcry and concerns in Alto, in turn recommending denial of the Alto plant permit. Meanwhile, in the Associated Asphalt plant report, Mr. Chakalian loosely summarizes what little public comment excerpts he

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change the world,” as Mr. Chakalian describes in his report. Instead, Mr. Rodriguez’s testimony poses questions regarding the city and state’s approval of plants without the consideration of health risks posed to nearby communities, as well as asserts the younger generation’s stake and activism in systemic and ongoing racist and discriminatory practices by state actors).

For the full texts of lay testimony, which spans well over 50 pages, *see* 2021 NMED Public Hearing, Transcript of Proceedings Day 1 at 31-74; *see also* 2021 NMED Public Hearing, Transcript of Proceedings Day 2 at 351-64.

<sup>105</sup> Associated Asphalt Plant HO’s Report at 49 (“Valerie Brown testified that she is a business owner and lives in on the south side. She testified further that she has done an about face, first opposing the draft permit, but now supports the plant. The plant has been here before residents moved in around it, and the new plant under [t]he draft permit will emit less pollution. This company will pave roads that are now dirt and emit less dust. They will use line power instead of diesel generators for power. This is a local business that employs about 50 folks and pays a living wage. This application is not a new plant. “Let’s try to balance our objections with the needs as a community to maintain infrastructure.” I support this application”).

<sup>106</sup> *Id.* at 24, 41.

does provide, despite the permitting process rendering hundreds of detailed public comments in opposition.<sup>107</sup> The only public comment excerpt that Mr. Chakalian does provide within the Associated Asphalt plant report, that seems to render the same attention as those provided in the Alto plant report, is a comment in support of the Associated Asphalt plant. Meanwhile, many of the excerpts of public comments in opposition to the Associated Asphalt plant Mr. Chakalian provides are mischaracterized to diminish the efficacy of the public testimony in opposition. In the Associated Asphalt plant report, Mr. Chakalian even concluded that the proposed plant would “reduce air pollution in the community” by consolidating four existing facilities into one and moving one farther away from neighborhoods because the proposed plant would be sited less than a half mile away from a residential neighborhood<sup>108</sup> – meanwhile, Mr. Chakalian, in his recommendation for the Alto plant’s denial, seems to note the importance of the Alto plant proposed site’s potential air pollution impacts on communities due to the plant’s one mile distance from residential neighborhoods.<sup>109</sup> Despite an overwhelming amount of *documented* public opposition to the Associated Asphalt plant,<sup>110</sup> perhaps even more so than the Alto plant, Mr. Chakalian inexplicably recommended the approval of the Associated Asphalt plant permit.

The inconsistencies between the two reports, and the difference in consideration of and weight given to community concerns is strong evidence of the intentional discrimination against communities of limited English proficiency that NMED continues to engage in. Despite the fact

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<sup>107</sup> See NMED Binder 1, *supra* note 101.

<sup>108</sup> Associated Asphalt Plant HO’s Report at 41.

<sup>109</sup> Alto Plant HO’s Report at 1 (Mr. Chakalian’s report first begins with noting that “[w]ithin a one-mile radius of the site, eleven (11) residential subdivisions radiate out in every direction like bicycle spokes”); *see id.* at 9-16 (the report then lists out some of the members of these residential subdivisions’ concerns, concluding that these public comments support the denial of the permit).

<sup>110</sup> Hundreds of signatures, statements, and comments from the public in opposition of the Associated Asphalt plant were received and documented by NMED. *See* NMED Binder 1, *supra* note 101 (emphasis added).

that the Associated Asphalt plant was proposed to operate 24 hours a day, 7 days a week;<sup>111</sup> to be sited less than a half mile away from residential communities; and received a massive amount of public opposition, Mr. Chakalian recommended the approval of the plant's permit in a community where a majority of residents are of Hispanic or LatinX origin and maintain limited English proficiency. Meanwhile, in a predominantly white community, where no household speaks Spanish, or any non-English language, as the primary household language, Mr. Chakalian honored the public's concerns regarding the proposed Alto plant, which was proposed to operate up to 18 hours a day, 7 days a week;<sup>112</sup> to be sited at least a mile away from residential communities; and also received a large amount of public opposition, ultimately recommending the permit's denial. State agency processes and decisions like these, where the influence of public comments and concerns on permitting decisions is dependent on the demographics of the affected community, only exacerbates the disproportionate burdens historically and deliberately excluded communities bear from polluting industries and should not be accepted by EPA.

When state agencies and their officials do not afford communities' of color and limited English proficiency voices, concerns, and comments the same weight as those voices, concerns, and comments of predominantly white, affluent communities in the public participation process, environmental injustice occurs. An air quality permit application for a plant sited in a predominantly Hispanic and LatinX community that already bears the disproportionate impacts of air pollution,<sup>113</sup> was approved by NMED, despite the plant's close proximity to residents'

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<sup>111</sup> See Associated Asphalt and Materials, LLC Letter of Intent to Apply for a New Air Quality Construction Permit (Dec. 13, 2019), <https://www.env.nm.gov/wp-content/uploads/sites/2/2021/02/AQBP-Section-9-Updates-121319.pdf>.

<sup>112</sup> Alto Plant HO's Report at 2.

<sup>113</sup> See Associated Asphalt Plant HO's Report at 46 (listing the Southside Santa Fe communities [referred to as Block Group 1 and Block Group 2] to have the highest rates of adult asthma and COPD in Santa Fe County, as well as to be in the 76th percentile and 85th percentile for PM 2.5 exposure, respectively. The report also notes that both groups are the "most immediately impacted" by the proposed plant's operations).

homes and schools and overwhelming public opposition, while an air quality permit application for a plant near a predominantly white community was denied by NMED, with public opposition being cited as a determinative factor – NMED’s actions in this instance demonstrate NMED’s complete and ongoing disregard for its requirement to comply with its obligations under Title VI of the 1964 Civil Rights Act and should not be ignored. Based on the above facts characterizing the stark contrast on how NMED and its Hearing Officer Mr. Chakalian treated the communities of Southside Santa Fe and Alto, Ms. Chillon-Garcia has provided sufficient evidence to suggest that NMED has treated two similarly-situated communities differently, in violation of Title VI. Thus, ECRCO should promptly and meaningfully move forward and engage in the informal resolution process with NMED, or, in the alternative, ECRCO should reopen its investigation of NMED, so as to bring NMED into compliance with Title VI.

**V. ADDITIONAL RELEVANT INFORMATION CONCERNING NMED’S HISTORY OF DISCRIMINATION AND NONCOMPLIANCE**

Finally, this supplement seeks to provide ECRCO with additional and relevant information to assist in ECRCO’s prompt and comprehensive investigation of Ms. Chillon-Garcia’s 2021 Complaint, specifically in regards to NMED’s history of discrimination and noncompliance with Title VI. The following thus includes not only a record of NMED’s historical discrimination against persons with limited English proficiency in the public participation process, but also includes an evaluation of NMED’s ongoing failure to comply with the existing 2017 IRA. Notably, the 2017 IRA stems from a past Title VI investigation based on similar discriminatory acts by NMED and NMED’s history of noncompliance with Title VI.

**A. NMED’s Historical Discrimination Against Persons with Limited English Proficiency in the Public Participation Process**

The prompt resolution of this matter is necessary to hold NMED accountable and ensure NMED no longer engages in the ongoing discriminatory treatment against persons with limited

English proficiency. This is especially essential considering NMED has a decades-long recorded history of discriminating against non-English speaking members of the public, limiting meaningful access to and participation in the public participation process for decades.

In 2002, Citizens for Alternatives to Radioactive Dumping (CARD) filed an administrative complaint against NMED with the EPA, alleging violations of Title VI by NMED during the public hearing process for a proposed commercial hazardous-waste disposal site in Chaves County, New Mexico (“2002 Complaint”).<sup>114</sup> Specifically, the 2002 Complaint alleged NMED failed to provide members of the public with limited English proficiency meaningful access to the public participation process by obstructing these individuals from participating in the public permitting process for the facility, denying them access to documents containing vital concerns, and refusing to consider social and discrimination concerns when deciding whether to approve the permit.<sup>115</sup> The basis for the complaint arose out of a 2001 public meeting NMED held regarding the permit for the proposed site. The meeting was held in English, despite most of the county’s residents identifying as Hispanic and more than a third reportedly speaking a language other than English at home. When a member of the public asked if the presentation would also be available in Spanish, NMED informed the public that a Spanish-English interpreter was present, but the services would only extend to translate attendees’ questions into English. At one point, NMED staff requested the respective member of the public to “sit down and shut up.”<sup>116</sup> NMED continued this discriminatory conduct throughout the permitting process for the site, despite the

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<sup>114</sup> Talia Buford, *Thirteen Years and Counting: Anatomy of an EPA Civil Rights Investigation* (Aug. 7, 2015), <https://publicintegrity.org/environment/pollution/environmental-justice-denied/thirteen-years-and-counting-anatomy-of-an-epa-civil-rights-investigation/>.

<sup>115</sup> See CARD, AFES, and CCNS, Title VI Complaint at 19 (June 3, 2019) (assigned Complaint NO. 02NO-19-R6) [hereinafter 2019 NMED Complaint] (detailing the 2002 Title VI complaint against NMED).

<sup>116</sup> Buford, *supra* note 114.

public's several requests to NMED for multilingual notices and language services.<sup>117</sup> In 2005, the EPA accepted the 2002 Complaint against NMED for discrimination on the basis of race and national origin in violation of Title VI,<sup>118</sup> and in 2017, NMED and ECRCO executed an IRA on the matter.<sup>119</sup> The purpose of the IRA, in part, was to ensure NMED provided persons with limited English proficiency meaningful access to the public participation process.<sup>120</sup>

Two years later, however, NMED had another Title VI complaint filed against it for discrimination on the basis of national origin. On June 3, 2019, CARD, along with the Alliance for Environmental Strategies (AFES) and Concerned Citizens for Nuclear Safety (CCNS), filed an administrative complaint with the EPA, alleging NMED violated Title VI during the public participation process for a groundwater discharge permit, as well as in NMED's continued pattern and practice of discrimination in permitting and other related activities ("2019 Complaint").<sup>121</sup> The 2019 Complaint detailed NMED's discriminatory actions against individuals with limited English proficiency during the public participation process on several occasions, ultimately denying members of the public meaningful access to and participation in the process. For the first five years of the six-year permitting process, NMED only provided public notices in English, despite 54% of the nearest municipality's residents identifying as Hispanic and 45% of residents speaking Spanish at home.<sup>122</sup> At the end of the permitting process, only 17 pages of information, plus the Index of the Administrative Record, were translated into Spanish and made available to the public, notably at significantly later dates than

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<sup>117</sup> *Id.* (noting organizers for the public submitted at least twenty requests for multilingual notices and language services, yet the absence of Spanish versions of the permit, fact sheets, and meeting notices continued).

<sup>118</sup> Letter to Butch Tongate, NMED, from Lilian Dorka, EPA (Jan. 19, 2017).

<sup>119</sup> *See* 2017 IRA.

<sup>120</sup> *See id.* at 12.

<sup>121</sup> *See* 2019 NMED Complaint.

<sup>122</sup> *Id.* at 3; *see id.* at 18.

the English versions; meanwhile, English speakers had access to nearly 4,000 pages of information, including all three draft permits.<sup>123</sup> Of the documents provided in Spanish, many included multiple omissions and mistakes in comparison to the documents provided in English.<sup>124</sup> Despite ECRCO's closure of the 2019 Complaint in late 2019 for lack of sufficient evidence,<sup>125</sup> NMED's conduct in the respective groundwater discharge permit process serves as an example of NMED's continued practice of denying New Mexico's Spanish-speaking population meaningful access to and participation in the public participation process.

Although over half of New Mexico's population identifies as Hispanic or LatinX,<sup>126</sup> with over a quarter of New Mexico households speaking Spanish as their primary language,<sup>127</sup> NMED continues to provide minimal opportunities for Spanish-speaking persons to meaningfully engage in the public participation process. From the provision of only a few translated documents and notices to a lack of English-Spanish interpretation services at public hearings, NMED has historically and systemically engaged in discriminatory conduct against persons with limited English proficiency by effectively limiting their ability to meaningfully understand, participate, and engage in the public participation process. Even though NMED has implemented corrective policies, at the directive of ECRCO, aimed at ensuring persons with limited English proficiency have meaningful access to the public participation process, NMED continues to engage in its systemic discriminatory conduct, as described in the 2021 Complaint and this Supplement, in violation of Title VI.

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<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 44.

<sup>125</sup> See letter to James Kenney, NMED, from Lilian Dorka, EPA (Dec. 18, 2019).

<sup>126</sup> See United States Census Bureau, *supra* note 26.

<sup>127</sup> *New Mexico*, DataUSA, <https://datausa.io/profile/geo/new-mexico> (last visited Oct. 26, 2023) (citing U.S. Census Bureau's ACS 5-Year Estimate) (noting 25.7% of households in New Mexico, in 2021, reported speaking Spanish as the primary language at home).

## **B. NMED's Noncompliance with 2017 IRA**

NMED's refusal to meaningfully engage in the informal resolution process regarding the 2021 Complaint is not surprising, as NMED has a history of noncompliance with both Title VI and informal resolution processes, including its ongoing failure to implement and abide by the terms of the 2017 IRA.

As part of the informal resolution of the 2002 Complaint described above, NMED and ECRCO entered into the 2017 IRA. The 2017 IRA required NMED to develop and implement a language access policy and public participation policy and procedures in order to come into compliance with federal civil rights law, specifically to ensure meaningful access in the public participation process for persons with limited English proficiency.<sup>128</sup> NMED has since created its Limited English Proficiency Policy,<sup>129</sup> ("the Policy"), which provides standards for which interpretation and translation services be provided at public hearings, as well as notice provisions requiring "public notice should, at minimum, be provided to LEP individuals in the same manner in which it is required by statute or regulation for non-LEP individuals."<sup>130</sup> The Policy further requires "adequate" translation and interpretation services, especially for "scientific and technical terminology" often discussed throughout the permitting process, "so that LEP individuals receive the most accurate interpretation possible."<sup>131</sup>

NMED, however, has failed to follow its own Limited English Proficiency Policy, as required by the 2017 IRA. In April 2018, a complaint was filed with NMED for its failure to

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<sup>128</sup> See 2017 IRA at 12.

<sup>129</sup> New Mexico Environment Department, Policy and Procedure 07-11 "Limited English Proficiency ("LEP") Accessibility and Outreach Policy" (Feb. 6, 2018), <https://www.env.nm.gov/wp-content/uploads/sites/10/2018/02/NMED-Policy-and-Procedure-07-11.pdf> [hereinafter NMED LEP Policy].

<sup>130</sup> See *id.* at 8-9.

<sup>131</sup> NMED LEP Policy at 8.



implement the 2017 IRA.<sup>132</sup> The 2018 complaint alleged NMED continued to permit hundreds of facility and discharge permits without meaningfully providing access to persons with limited English proficiency in the public participation processes, including the failure to provide interpretation and translation services and adequate public notices in Spanish, in violation of its own Limited English Proficiency Policy and the 2017 IRA.<sup>133</sup> NMED ultimately investigated and dismissed the complaint against itself months later, though the contents and extent of the investigation appear to not be public, with NMED concluding it had not caused harm or discriminated against persons with limited English proficiency.<sup>134</sup> Ultimately, NMED's implementation of the 2017 IRA has been primarily performative – not active, concrete, or meaningful, as there continues to be a lack of proper English-Spanish interpretation and translation services throughout the public participation process.<sup>135</sup>

By failing to follow its own Limited English Proficiency Policy, NMED has violated the terms of the 2017 IRA and continues to violate the requirements of Title VI. NMED's continued discriminatory acts, as alleged in the 2021 Complaint and this Supplement, further emphasizes NMED's ongoing failure to comply with both the 2017 IRA and Title VI of the 1964 Civil Rights Act and the need for additional investigation by ECRCO.

## **VI. NMED'S FAILURE TO TIMELY AND MEANINGFULLY ENGAGE IN THE 2021 COMPLAINT'S INFORMAL RESOLUTION PROCESS**

The effective enforcement of Title VI requires agencies to “take prompt action to achieve voluntary compliance in all instances in which noncompliance is found.”<sup>136</sup> Thus, ECRCO is

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<sup>132</sup> See 2019 NMED Complaint at 21.

<sup>133</sup> *Id.* at 21-22.

<sup>134</sup> *Id.* at 22.

<sup>135</sup> See 2019 Complaint; see 2021 Complaint.

<sup>136</sup> 42 U.S.C § 2000d; 28 CFR § 42.411(a) (emphasis added).

required by regulation to resolve complaints informally, but also promptly, whenever possible.<sup>137</sup>

Following the commanding statute and implementing regulations, once the IRA process has begun, ECRCO is to ensure the IRA process “occurs promptly and without undue delay.”<sup>138</sup> If the IRA process is not complete and successful within a reasonable period of time, ECRCO is to initiate appropriate enforcement procedures to avoid unnecessary delay in resolving noncompliance.<sup>139</sup> Appropriate enforcement procedures include the resumption of the complaint investigation and process of issuing preliminary findings.<sup>140</sup>

The IRA process between NMED, ECRCO, and Ms. Chillon-Garcia began over two years ago, on November 24, 2021.<sup>141</sup> In these two years, little to no progress has been made in developing and reaching an IRA, seemingly in part due to the minimal effort to engage in the process by NMED. Only one meeting between ECRCO, NMED, and Ms. Chillon-Garcia has occurred since the filing of the 2021 Complaint, during which NMED staff argued that the discriminatory acts were simply a result of a Zoom technical issue and wouldn’t happen again, and asserting that additional meetings with Ms. Chillon-Garcia and her representatives were unnecessary.

NMELC, on behalf of Ms. Chillon-Garcia, attempted multiple times to contact the ECRCO case manager assigned to the 2021 Complaint in an attempt to move the IRA process forward in a timely and meaningful manner, with only a recent response from EPA informing NMELC that

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<sup>137</sup> 40 C.F.R. § 7.120 (commanding the “prompt” investigation of all complaints filed under this section); *see id.*(d)(2)(i) (“OCR shall attempt to resolve complaints informally whenever possible”); *see also* Case Resolution Manual at 22.

<sup>138</sup> *Id.*; *see also* Tolling Letter (assuring Ms. Chillon-Garcia that “ECRCO will ensure that this process is carried out without unnecessary delay”).

<sup>139</sup> 42 U.S.C § 2000d; 28 CFR § 42.411(a).

<sup>140</sup> *See* 1965 Attorney General Guidelines, 28 CFR § 50.3; *see* 40 C.F.R. § 7.115(c); *see* Case Resolution Manual at 23; *see also* Tolling Letter.

<sup>141</sup> *See id.* (marking the date of the IRA process beginning on Nov. 24, 2021).

the 2021 Complaint has been assigned a new case manager and inquiring as to whether Ms. Chillon-Garcia wishes to continue to pursue her Complaint. Though we appreciate ECRCO's re-engagement in this process, it is not clear why the process has stalled unnecessarily, and one can only assume that NMED's obstinance is almost certainly one reason why the process has been delayed – allowing NMED to continue to discriminate against communities of color and people with limited English proficiency in the meantime.

Although NMED has had over two years to resolve this Title VI complaint by developing and implementing an IRA, NMED has failed to make any significant and meaningful progress towards doing so, and has, in fact, engaged in additional intentional discrimination, as explained above. Further, NMED's actions, or lack thereof, indicate NMED does not intend to timely and meaningfully engage in the informal resolution process. Ms. Chillon-Garcia thus requests ECRCO takes prompt action to ensure no further unnecessary delay in the IRA process, and issue findings of discrimination against NMED if necessary.

## **VII. EPA AUTHORITY AND RESPONSIBILITY TO ENSURE RECIPIENT COMPLIANCE WITH TITLE VI**

Under Title VI, all federal agencies, including the EPA, are required to ensure that federal funds do not subsidize programs or activities that discriminate on the basis of race, color, or national origin.<sup>142</sup> Title VI thus authorizes federal agencies, including EPA, “to effectuate the provisions of Title VI” and ensure compliance through “the termination of or refusal to grant or to continue assistance” to a noncompliant recipient “or by any other means authorized by law.”<sup>143</sup> EPA's Title VI implementing regulations further solidify this authority, and charge EPA with the duty to “promptly investigate” all Title VI complaints and bring recipients into

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<sup>142</sup> 42 U.S.C § 2000d; *id.* § 2000d-1.

<sup>143</sup> *Id.*

compliance.<sup>144</sup> EPA’s implementing regulations authorize ECRCO to “terminate or refuse to award or to continue assistance...” or “use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.”<sup>145</sup>

Because EPA is the federal enforcement agency responsible for ensuring federal funds, issued from EPA, do not subsidize programs or activities that discriminate on the basis of race, color, or national origin, EPA has the statutory and regulatory authority to diligently pursue this matter against NMED and ensure NMED comes into and remains in compliance with Title VI. Title VI sets forth this enforcement mechanism to ensure individuals and communities, like Ms. Chillon-Garcia and her community, are not “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin...”<sup>146</sup> The proper remedy, thus, to ensure Ms. Chillon-Garcia and individuals with limited English proficiency can meaningfully participate in the air pollution permitting process process and decisions, and rectify the intentional discrimination by NMED, as required by Title VI, is for ECRCO to promptly and effectively bring NMED into compliance with Title VI.

NMED and the State of New Mexico are purported to be committed to “equity for all New Mexicans, including the protection of public health and the environment.”<sup>147</sup> This includes, as NMED has stated on its public website, “the fair treatment and meaningful involvement of all

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<sup>144</sup> 40 C.F.R. § 7.120; *id.* § 7.130.

<sup>145</sup> *Id.* § 7.130(a).

<sup>146</sup> 40 C.F.R. § 7.30.

<sup>147</sup> *Equity*, New Mexico Environment Department, <https://www.env.nm.gov/general/environmental-justice-in-new-mexico/#:~:text=New%20Mexicans%20must%20have%20fair,affiliation%2C%20income%20or%20educational%20level> (last visited Nov. 14, 2023); *see also* State of New Mexico, Exec. Order No. 2005-056 (Nov. 18, 2005) (charging the State of New Mexico and NMED with the commitment to addressing environmental justice issues and ensuring all residents are afforded fair treatment and meaningful involvement in environmental laws, regulations, policies, and processes, as well as equitable treatment in the protection of human health and the environment).

people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies,” further describing “fair treatment” to mean “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”<sup>148</sup> NMED, however, continues to operate in a manner adverse to the environmental justice principles it has adopted and committed to, through the actions of its officers, like Mr. Chakalian, who continue to engage in the discriminatory treatment of communities of color and limited English proficiency, as well as in its permitting decisions.

Notably, EPA has committed to similar principles, as demonstrated by its adoption of environmental justice policies, practices, and regulations to ensure federal and state agencies are providing minority and low-income communities meaningful access and opportunities to participate in matters relating to human health and/or the environment, with the goal to achieve environmental justice.<sup>149</sup> EPA is obligated “to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects.”<sup>150</sup> To properly carry out this federal directive, EPA, under Title VI and its implementing regulations, must ensure recipients of its funds, like NMED, do not engage in discrimination on the basis of race, color, or national origin in their programs or activities.<sup>151</sup> This requires EPA, through ECRCO, to take prompt action to achieve voluntary compliance in all instances in which

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<sup>148</sup> New Mexico Environment Department, *supra* note 147.

<sup>149</sup> See *Learn About Environmental Justice*, U.S. Environmental Protection Agency, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#epa> (last visited Nov. 14, 2023); see also Exec. Order No. 12898, 59 C.F.R. 7629 (1994); see also President William Clinton, Presidential Memorandum on Executive Order for Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994).

<sup>150</sup> *Id.*

<sup>151</sup> 42 U.S.C. § 2000d; 40 C.F.R. § 7.30; *id.* § 7.35.

a funding recipient is engaging in discriminatory treatment of a community in violation of Title VI, and to issue findings of discrimination when voluntary compliance is not achievable.<sup>152</sup>

Because the EPA is charged by Title VI and has adopted environmental justice principles into its policies and practices, committing to ensuring communities of color no longer bear a disproportionate amount of environmental harm and adverse human health effects from pollution, and NMED and its officials, like Mr. Chakalian, continue to engage in the intentional discriminatory treatment of communities of color, ECRCO must take prompt action to ensure the 2021 Complaint IRA process with NMED, or in the alternative, the investigation into the allegations made by Ms. Chillon-Garcia in her 2021 Complaint, moves forward in a timely manner. Ensuring the IRA process, or the investigation into and issuance of findings of discrimination, with NMED moves forward in a timely manner is the only way to ensure NMED is held accountable to its obligations under Title VI, thereby ensuring that communities of color, including those with limited English proficiency, are not only afforded access to the public participation process, but also that these communities are no longer subject to the adverse impacts of permitting decisions that affluent, white communities are exclusively protected from.

### **VIII. RELIEF REQUESTED**

Ms. Chillon-Garcia requests that NMED's actions and inactions during the informal resolution process, NMED's history of discrimination against persons with limited English proficiency, NMED's history of resistance to meaningful engagement in Title VI informal resolution processes and ongoing failure to comply with the 2017 IRA, and NMED's actions during the Alto concrete plant permitting process in comparison to the Associated Asphalt plant public participation process at issue in the 2021 Complaint, be included and

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<sup>152</sup> 28 CFR § 42.411(a).

considered by ECRCO during the informal resolution process and investigation into the 2021 Complaint.

Further, Ms. Chillon-Garcia requests that ECRCO promptly and comprehensively investigate the allegations in the 2021 Complaint and this Supplement, take specific actions discussed within this Supplement, and take all other actions necessary to ensure that NMED complies fully with the law and remedies its ongoing violations of Title VI. If NMED does not come into compliance voluntarily, Ms. Chillon-Garcia requests that the EPA suspend or terminate financial assistance to NMED, at least regarding any discretionary funding requested by NMED that would not directly benefit public health,<sup>153</sup> until NMED comes into compliance with the requirements of Title VI.

Finally, Ms. Chillon-Garcia requests that ECRCO initiate an affirmative compliance review of NMED, given NMED's historical and ongoing discriminatory conduct and noncompliance with Title VI, including NMED's failure to implement and comply with the 2017 IRA.<sup>154</sup> An affirmative compliance review of NMED's programs and activities would serve as a holistic and extensive investigation and evaluation into past and ongoing discrimination by NMED, so as to ensure NMED no longer fails to comply with Title VI on a consistent basis. As part of this consideration for a compliance review and/or compliance review process, Ms. Chillon-Garcia respectfully requests ECRCO holds a public listening session and provide an opportunity to submit public comments on the matter. Should ECRCO initiate a compliance review, Ms. Chillon-Garcia requests that ECRCO's compliance review of NMED is both prompt and comprehensive, and includes data requests, on-site reviews, and any other investigative

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<sup>153</sup> See 40 C.F.R. § 7.130.

<sup>154</sup> See 28 C.F.R. § 42.407(c); see also 40 C.F.R. §§ 7.110, 7.115; 5.605 (permitting ECRCO to conduct compliance reviews to assess the practices of recipients to determine whether they comply with nondiscrimination statutes and regulations).

measures, including meetings with communities impacted by NMED's discriminatory permitting decisions, necessary to ensure NMED's compliance with Title VI.<sup>155</sup>

## **IX. CONCLUSION**

For the reasons outlined above, Ms. Chillon-Garcia requests that ECRCO bring NMED into compliance with Title VI of the Civil Rights Act of 1964 and the EPA's implementing regulations.

Thank you for your consideration of this additional information. We look forward to continuing discussions with ECRCO regarding this matter.

Respectfully submitted,

*/s/ Patricia Chillon-Garcia*  
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<sup>155</sup> 40 C.F.R. § 7.115(a).



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