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FORMAL REQUEST FOR AN AFFIRMATIVE COMPLIANCE REVIEW OF THE CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT

On behalf of the Mountain View Neighborhood Association, Mountain View Community Action, and Friends of Valle de Oro (collectively, "Community"), the New Mexico Environmental Law Center ("NMELC") submits this Formal Request for an Affirmative Compliance Review of the City of Albuquerque Environmental Health Department ("EHD") pursuant to 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"). Community formally requests an affirmative compliance review to

determine that EHD is noncompliant with Title VI due to EHD's long history of civil rights violations, intentional discrimination against local communities of color and low-income communities, and ongoing noncompliance with Title VI. Accordingly, NMELC, on behalf of Community, respectfully submits the following:

I. JURISDICTION & AUTHORITY TO CONSIDER COMMUNITY INPUT

A. Jurisdiction to Conduct a Title VI Affirmative Compliance Review

Under Title VI, EPA has a responsibility to ensure that its funds are not used to subsidize discrimination based on race, color, or national origin.[1] This obligation thus requires EPA to maintain an effective program of "post-approval," or post-award, compliance reviews.[2] EPA's External Civil Rights Compliance Office ("ECRCO") initiates all affirmative compliance reviews, which may investigate an EPA funding recipient's programs or activities to determine the recipient's compliance with Title VI at any time.[3] Affirmative compliance reviews exist as part of ECRCO's initiative to enhance its external compliance program by promoting proactive compliance, rather than reactive compliance through responding to and resolving Title VI administrative complaints.[4]

ECRCO has jurisdiction to conduct an affirmative compliance review of EHD because EHD, through the City of Albuquerque, is a recipient of consistent and substantial federal financial

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[1] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7; *see also Title VI and Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice (last updated Feb. 1, 2023).
[2] *See* 28 C.F.R. § 42.407(c); *see also* 40 C.F.R. §§ 7.110, 7.115; 5.605 (authorizing ECRCO to conduct compliance reviews to assess the practices of recipients to determine whether they comply with nondiscrimination statutes and regulations).
[3] *See* External Civil Rights Compliance Office (ECRCO) Process and Criteria for Prioritizing and Selecting Affirmative Compliance Reviews at 1 (January 6, 2022), https://www.epa.gov/system/files/documents/2022-01/01-06-20-ecrco-process-for-prioritizing-and-selecting-affirmative-compliance-reviews.pdf [hereinafter ECRCO Compliance Review Memorandum].
[4] *See* FY 2022-2026 EPA Strategic Plan at 37 (March 2022), https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf [hereinafter EPA Strategic Plan] (emphasis added).

assistance from EPA. In fiscal year 2022, the City and EHD received $334,021 in EPA funding.[5] In fiscal year 2023, the City and EHD received $2,196,822 in EPA funding.[6] As of June 4, 2024, the City and EHD has already received $1,002,963 in EPA funding for fiscal year 2024.[7] Thus, because EHD is a financial recipient of EPA funding, EHD is required to comply with Title VI, and EPA, through ECRCO, has an obligation to ensure EHD is not using its federal funds to subsidize discrimination based on race, color, or national origin. Because a component of EPA's duties under Title VI includes performing affirmative compliance reviews, EPA has the jurisdiction to conduct a compliance review of EHD.

B. Authority to Consider Community Input

When selecting and prioritizing recipients for affirmative compliance reviews, ECRCO has the authority to consider input and information from impacted communities.[8] Additionally, EPA's nondiscrimination regulations afford ECRCO the discretion to define the scope of a compliance review on a case-by-case basis, based on information received.[9]

Here, Community is composed of members of a residential and agricultural community located in the South Valley of Albuquerque and Bernalillo County, New Mexico, that historically and currently bears the disproportionate burdens of pollution.[10] EHD thus directly serves Community, and Community is directly impacted by decisions, actions, inactions, and discriminatory conduct by EHD. As such, ECRCO has the authority to, and certainly should,

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[5] *See* USA Spending, https://www.usaspending.gov/search/?hash=1a443e2d170a0cd545e3ee6188c667c8 (last visited June 4, 2024).
[6] *See id.*
[7] *See id.*
[8] ECRCO Compliance Review Memorandum, *supra* note 3, at 2; *see also* ECRCO Case Resolution Manual at 35 (Jan. 2021), https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf [hereinafter Case Resolution Manual].
[9] *See* ECRCO Compliance Review Memorandum, *supra* note 3, at 1; *see also* Case Resolution Manual, *supra* note 8, at 35.
[10] *Mountain View is City's Industrial Sacrificial Zone*, ABQ Journal (June 28, 2021), https://www.abqjournal.com/news/mountain-view-is-citys-industrial-sacrifice-zone/article_fea747ab-0525-51cf-bda8-5c4fd74c0f7e.html.

consider Community's input as part of this Formal Request and in its selection and prioritization of EHD for an affirmative compliance review.

II. CRITERIA FOR COMPLIANCE REVIEW PRIORITIZATION AND SELECTION

In prioritizing and selecting subjects of affirmative compliance reviews, ECRCO considers the following five factors: 1) noncompliance trends; 2) alignment with EPA priorities; 3) recipient and community characteristics; 4) whether actions by recipient provides opportunities for EPA collaboration; and 5) any history of prior complaints, including noncompliance.[11] As discussed in greater detail below, all five factors significantly and substantially support ECRCO's prioritization and selection of EHD for an affirmative compliance review, as well as support ECRCO's determination that EHD is not in compliance with Title VI.

A. EHD Has Regularly and Consistently Failed to Comply with Title VI

"Trends and, particularly, whether potential noncompliance on a particular issue or by a recipient are increasing in frequency or significance" support the selection and prioritization of a recipient for an affirmative compliance review.[12] EPA's enforcement of Title VI and its implementing regulations includes evaluating the overall discriminatory effects of a recipient's activities and practices, giving ECRCO "the authority to consider cumulative impacts when evaluating whether there is an adverse impact from a recipient's policy or practice."[13] Thus, a recipient's noncompliance with Title VI includes recipient actions that contribute to the worsening cumulative impacts of pollution on communities of color, like discriminatory permitting practices and the failure to consider and address cumulative impacts in these

[11] ECRCO Compliance Review Memorandum, *supra* note 3, at 3-5.
[12] *Id*. at 3.
[13] Office of General Counsel, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum, 45 (Jan. 2023), https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf.

communities.[14] Here, EHD has historically and systematically engaged in discriminatory conduct in its management of, and resistance and outright opposition to addressing, the disproportionate cumulative impacts of pollution on overburdened communities in the City of Albuquerque and Bernalillo County – in violation of Title VI.

EHD's noncompliance with Title VI is a trend that is increasing in both significance and frequency. Further discussed in Section II.C, the geographic jurisdiction EHD serves is home to many polluting sources and continues to receive increasingly worse air quality grades from the American Lung Association, with communities of color and low-income communities bearing the disproportionate burdens of pollution and accompanying adverse health effects.[15] Despite these overburdened communities' consistently raising concerns and providing input in public-permitting processes, EHD continues to issue more air pollution permits for sources to be located in these already overburdened communities. EHD's resistance and opposition to

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[14] *Id.* at 46. EPA's consideration of cumulative impacts in Title VI investigations and compliance reviews "is consistent with case law and the Title VI investigations of sister federal agencies." *Id.* (citing the following): *see, e.g.*, Genesee Letter of Findings from Lilian S. Dorka, Dir., Office of External Civil Rights Compliance, EPA Office of General Counsel, to Heidi Grether, Dir., Mich. Dep't of Env't Quality at 19–23, EPA File No. 01R-94-R5 (Jan. 19, 2017) (consideration of cumulative air toxics data from point sources countywide), https://www.epa.gov/sites/default/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf.; *see also S. Camden Citizens in Action v. N.J. Dep't of Env't. Protec*., 145 F. Supp. 2d 446, 490, 505 (D.N.J. 2001), m*odified and supplemented by* 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd on other grounds*, 274 F.3d 771 (3d Cir. 2001) (interpreting EPA methodology as requiring consideration of the totality of the circumstances and cumulative environmental burdens and finding that plaintiffs demonstrated that permitting and operation of a facility was likely to have adverse impacts in context of "current health conditions and existing environmental burdens" in the community, noting that the operation of the facility would "adversely affect [the plaintiffs'] health to a degree that meets the standard of 'adversity' under Title VI"); *see Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (holding that disruptions and other impacts of planned highway construction would negatively affect communities of color living in the area under construction); *see* Letter from Irene Rico, Assoc. Admin. for Civil Rights, EPA, to James Bass, Exec. Dir., Tex. Dep't of Transp., (Jan. 18, 2017) (Letter of Finding HCR-20 DOT # 2015-0124), https://www.fhwa.dot.gov/civilrights/programs/docs/title_vi_compl_dec/2015-0124.pdf (in response to a Title VI complaint, the Federal Highway Administration (FHWA) found in 2017 that the Texas Department of Transportation (TDOT) discriminated based on race, color, and national origin in violation of Title VI due to disparate impacts including adverse economic, social, and environmental effects arising from TDOT's selection of the location for the Corpus Christi Harbor Bridge Project. Specifically, when comparing severity of adverse impacts arising from TDOT's location selection to impacts of the four build alternatives, FHWA stated that, "specific demographics, historical impacts, cumulative impacts, Section 4(f), connectivity, cohesion, business impact, psychological and physical barriers, access, public services, among other factors, must be assessed between the different build alternatives").

[15] *See* Section II.C.

addressing these issues has only become more frequent in the last decade, with EHD repeatedly interfering with, and actively opposing, all efforts to address these disproportionate impacts of pollution caused by EHD's discriminatory permitting decisions. In 2014, for example, overburdened communities in Albuquerque and Bernalillo County filed a Title VI Complaint against EHD, discussed in greater detail in Section II.E of this Formal Request, highlighting the ongoing and significant trend of EHD's discriminatory conduct in relation to its management of air quality in overburdened communities. Ten years later, EHD has yet to remedy the issues identified in the 2014 Complaint and, in fact, has actively worked against all proposed remedies, despite ECRCO's ongoing investigation into the matter.

The trend of EHD's discriminatory conduct continues to increase in significance and frequency: most recently displayed by EHD's opposition to a rule proposed by and for overburdened communities in Albuquerque and Bernalillo County, known as the Health Environment and Equity Impacts Rule ("HEEI Rule"). Community proposed the HEEI Rule through a petition for rulemaking to the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"). Though the Air Board adopted an HEEI Rule in December 2023, the adopted version of the HEEI Rule is far more limited and less health protective of overburdened communities in comparison to the regulation originally proposed by Community.[16] For its part, EHD was a party to the HEEI Rule Rulemaking Proceeding, but its conduct, actions and, primarily, inaction leading up to and during the rulemaking process emphasizes the increasing significance and frequency with which EHD intentionally discriminates against low-income communities of color and fails to comply with Title VI, as well as the need for ECRCO to conduct a formal affirmative compliance review of EHD in its entirety. Community directs

[16] To compare, *see* Exhibit 1 [Community's Final Version of the Proposed HEEI Rule] and Exhibit 2 [Final Version of Adopted HEEI Rule].

ECRCO's attention to EHD's discriminatory actions leading up to and during the HEEI Rule rulemaking process as an additional example of the increasing significance and frequency at which EHD continuously fails to comply with Title VI. Community further notes that a separate community group consisting of the Los Jardines Institute and the Natural Resources Defense Council has filed an additional Title VI Complaint against EHD based on these incidents[17] and Community has filed a related Title VI Complaint against the City of Albuquerque and the Albuquerque City Council.[18] These additional Complaints only further support the need for ECRCO to conduct an affirmative compliance review of EHD's entire program, as EHD's historical and ongoing intentional discrimination against communities of color and low-income communities can only be meaningfully and effectively remedied by a total compliance review of EHD and its programs.

1. Background of the 2023 HEEI Rule Rulemaking Proceeding

Community are members of a residential and agricultural community of approximately 6,000 residents, adjacent to the Rio Grande and located in the South Valley of Albuquerque, New Mexico.[19] Residents of this community, known as the "Mountain View community," are predominantly Hispanic, at 79.9%, and working-class to low-income.[20] According to EPA's EJScreen, the South Valley is ranked within the 80th to 95th percentile both nationwide and

[17] *See* Complaint by Los Jardines Institute and Natural Resources Defense Council (filed May 30, 2024).
[18] *See* Complaint by Mountain View Neighborhood Association, Mountain View Community Action, and Friends of Valle de Oro (assigned Complaint No. 06RNO-24-R6 and 07RNO-24-R6) (filed May 31, 2024) [hereinafter, Community Complaint].
[19] *Mountain View is City's Industrial Sacrificial Zone*, *supra* note 10.
[20] *Id.*; *see also 87105 Demographics Summary*, New Mexico Demographics, https://www.newmexico-demographics.com/87105-demographics#:~:text=The%20largest%2087105%20racial%2Fethnic,and%20American%20Indian%20(4.0%25) (last visited Feb. 6, 2024) (listing 79.9% of residents in the 87105-area code as Hispanic, and the median household income of the community at $46,124).

statewide for residents identifying as people of color and residents with limited English proficiency.[21]

The Mountain View community has borne the disproportionate share of toxic, hazardous contamination and pollution for decades due to the placement of several major and minor polluting sources in and around the community.[22] Several oil terminals, scrap yards, chemical storage facilities, the municipal sewage plant, and two Superfund sites are located within the Mountain View community and larger South Valley area, while the community also resides downwind from the Kirtland Air Force Base, Sandia National Lab, and the Albuquerque International Sunport airport.[23] The 87105 ZIP code, where the Mountain View community is located, is ultimately inundated by polluting operations within and adjacent to the community.[24] Consequently, Mountain View community members are exposed to a higher concentration of pollutants, as shown by EPA's EJScreen ranking the larger South Valley community, encompassing Mountain View, within the 80th to 100th percentile in Air Toxics Respiratory Hazard Index scores; the 90th to 100th percentile in Diesel Particulate Matter concentration; the 90th to 100th percentile in Ozone concentration; and the 60th to 100th percentile in Air Toxics Cancer Risk in comparison to both the rest of the state of New Mexico and nationwide.[25]

Residents in the Mountain View and the larger South Valley communities thus have an elevated risk of adverse health impacts from air pollution, including, but not limited to, cancer,

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[21] *See (87105) Albuquerque, New Mexico*, EPA's Environmental Justice Screening and Mapping Tool (Version 2.2), https://ejscreen.epa.gov/mapper/ (last visited March 13, 2024) [hereinafter Albuquerque EJScreen].
[22] *Mountain View is City's Industrial Sacrificial Zone*, *supra* note 10.
[23] Austin Fisher, *Albuquerque Plastic Fire Gives Air Regulators Opportunity 'to Make the Right Decision,'* SourceNM (Aug. 17, 2023), https://sourcenm.com/2023/08/17/albuquerque-plastic-fire-gives-air-regulators-this-moment-in-history-to-make-the-right-decision/#:~:text=The%20Mountain%20View%20neighborhood%20and,facilities%2C%20and%20the%20sewage%20plant.
[24] *See* CABQ Air Pollution Sources, https://hub.arcgis.com/datasets/CABQ::air-pollution-sources/explore?location=35.064097%2C-106.669176%2C13.01 (last visited March 15, 2024).
[25] *See* Albuquerque EJ Screen*, supra* note 21.

heart disease, respiratory illnesses, and other chronic illnesses and diseases.[26] The EPA EJScreen currently ranks the South Valley community in the 60-70th percentile for Asthma, with the Centers for Disease Control and Prevention ("CDC") Environmental Justice Index also designating the South Valley community with a "high estimated prevalence of asthma," both in comparison to the rest of the United States.[27] Further, Mountain View residents have a 10- to 24-year shorter life expectancy than more affluent, predominantly white communities in Albuquerque.[28] It is because of these health disparities, as well as the ongoing discriminatory permitting of polluting operations near and adjacent to the Mountain View community, that Community began their efforts to ask the Air Board to adopt a cumulative impacts rule.

On November 21, 2022, Community petitioned the Air Board to adopt a proposed regulation, the HEEI Rule, pursuant to 20.11.82.18 NMAC.[29] Similar to the 2014 ordinance proposed by Community and rejected for consideration by the Air Board, and the subject of the ongoing 2014 Title VI Complaint against EHD,[30] the proposed HEEI Rule sought to address the adverse cumulative impacts of pollution on the City of Albuquerque and Bernalillo County's most

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[26] *Place Matters for Health in Bernalillo County: A Report on Health Inequities in Bernalillo County, New Mexico*, Joint Center for Political and Economic Studies, 17-19 (Sept. 2012), https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf; *see also* Morello-Frosch, R. and Jesdale, B., *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 Environmental Health Perspectives 386 (2006), https://journals.lww.com/epidem/fulltext/2004/07000/separate_but_unequal__residential_segregation_and.347.aspx#:~:text=Estimated%20cancer%20risks%20from%20cumulative,compared%20with%20low%20segregation%20areas; *see* Kampa, Marilena and Castanas, Elias, *Human Health Effects of Air Pollution*, 151 Environmental Pollution 362 (Jan. 2008), https://www.sciencedirect.com/science/article/abs/pii/S0269749107002849; *see* Straif, K., et al., eds., *Air Pollution and Cancer*, International Agency for Research on Cancer, Scientific Publication No. 161 (2013), http://www.iarc.fr/en/publications/books/sp161/index.php; *see* Danesh Yadzi, et al., *Long-Term Association of Air Pollution and Hospital Admissions Among Medicare Participants Using a Doubly Robust Additive Model*, 143 Circulation 1584 (April 20, 2021), https://www.ahajournals.org/doi/10.1161/CIRCULATIONAHA.120.050252.

[27] *See* Albuquerque EJScreen, *supra* note 21; *see Census Tract 40.01, Bernalillo County, New Mexico*, Center for Disease and Control Prevention EJI Index, https://onemap.cdc.gov/portal/apps/sites/#/eji-explorer (last visited March 13, 2024).

[28] *See* Joint Center for Political and Economic Studies, *supra* note 26, at 33; *see Mountain View is City's Industrial Sacrificial Zone*, *supra* note 10.

[29] 20.11.82.18 NMAC ("Any person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board").

[30] *See* Section II.E for further discussion and details.

overburdened communities: typically, communities of color and low-income communities. The proposed rule would have required EHD to consider social determinants of health and quality of life impacts, consistent with EHD's obligations under the New Mexico Air Quality Control Act and the Clean Air Act, when issuing air pollution permits in already overburdened communities. It would have also required EHD to deny air pollution permits in already overburdened communities under certain circumstances.

The year prior to Community filing the petition for rulemaking, at the direction of the Air Board, Community attempted to hold several meetings with EHD and other stakeholders to discuss the promulgation of such a rule. It was during these meetings that Community was consistently met with opposition to any form of cumulative impacts rule by EHD, despite directives from the City of Albuquerque Mayor's Office that EHD assist and work alongside Community in drafting an effective cumulative impacts rule that EHD would implement. EHD rarely attended any meetings requested by Community, while also repeatedly failing to provide Community with requested and EHD-promised materials such as templates, maps indicating where permits had been issued, health data, poverty data, emissions data, and comparable regulations that Community could model a similar regulation after. EHD's repeated lack of engagement, resistance to providing any meaningful support, and intentional interference with Community's efforts to develop a regulation with and alongside EHD ultimately left Community with no choice but to draft and file the HEEI Rule Rulemaking Petition themselves. Once filed, throughout the following year, both the Air Board and Community repeatedly encouraged other parties, including EHD and several industry stakeholders, to informally discuss potential changes to the proposed Rule with Community, which included four additional daylong pre-hearing meetings held on July 31, August 11, August 22, and August 29, 2023. EHD attended these

meetings but offered little feedback on the proposed Rule and ultimately, flatly refused to work with Community on a rule EHD would deem satisfactory. As discussed by the Air Board at the October 11, 2023, Air Board meeting,[31] on October 24, 2023, the Air Board, pursuant to NMSA 1978 § 14-4-5.2 (2021), published a public notice in the New Mexico Register titled, "Albuquerque-Bernalillo County Air Quality Control Board Notice of Rulemaking Hearing to Consider Adopting a New Rule Requiring Review and Consideration of Health Environment and Equity Impacts," setting the date for the Rulemaking Proceeding to begin on December 4, 2023.

In response, on October 16, 2023, an Albuquerque City Council Member introduced a City Resolution, placing a moratorium on the Air Board prohibiting it from promulgating regulations addressing "quality of life" impacts, and a City Ordinance that, among other things, also unilaterally restricted the Air Board's ability to promulgate regulations addressing "quality of life" impacts and dissolved the existing Air Board (collectively, "City Legislation"). On November 8, 2023, the Albuquerque City Council voted 5-4 to pass both the Resolution and the Ordinance. On November 22, 2023, the Mayor of the City of Albuquerque vetoed both the Resolution and the Ordinance based on concerns about interferences with the public's ability to petition the Air Board for rulemaking; the City Legislation's interference with the Air Board's work unilaterally; and the necessity to preserve the public's ability to petition for rulemaking concerning the cumulative effects of pollution and the incorporation of environmental justice principles.[32]

The HEEI Rule Rulemaking Proceeding began, as noticed, on December 4, 2023, and at a regularly scheduled meeting that same evening, the City Council voted 7-2 to override the

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[31] *See* Albuquerque-Bernalillo County Joint Air Quality Control Board October 11 Meeting Minutes, accessible here: https://www.cabq.gov/airquality/air-quality-control-board/documents/2023-10-11-aqcb-meeting-minutes-signed.pdf.
[32] *See Mayor Keeps City-County Joint Board*, City of Albuquerque (Nov. 22, 2023), https://www.cabq.gov/mayor/news/mayor-keeps-city-county-joint-board.

Mayor's veto of the Resolution and 6-3 to override the Mayor's veto of the Ordinance. The Ordinance was published on December 15, 2023, and went into effect on December 20, 2023, although contention remains regarding the City Legislation's official effective date. On December 11, 2023, the Air Board adopted a version of the HEEI Rule, although much less robust in comparison to the HEEI Rule proposed and advocated for by Community throughout the Rulemaking Proceeding, presumably due to the actions taken by the City Council. Notably, EHD appears to have assisted with the drafting of the City Legislation – the degree to which remains unknown, as these actions are currently the subject of a pending records request to the City of Albuquerque. Documents obtained thus far, however, clearly show EHD's involvement and likely collusion with the City Council of Albuquerque to interfere with and halt the Rulemaking Proceeding in its entirety.[33]

Additionally, three related lawsuits were filed during the Rulemaking Proceeding and are ongoing.[34] On December 5, 2023, the Air Board filed the lawsuit, *Albuquerque-Bernalillo County Air Quality Control Board and the Board of County Commissioners of the County of Bernalillo v. City of Albuquerque, New Mexico*, No. D-202-CV-2023-09295, challenging the validity of the City Council's Resolution and Ordinance and the City's illegal interference with the HEEI Rule Rulemaking Proceeding. On December 11, 2023, industrial permittees and commercial associations filed the lawsuit, *GCC Rio Grande, Inc., et al. v. Albuquerque-Bernalillo County Air Quality Control Board, City of Albuquerque*, No. D-202-CV-2023-09435, challenging the validity of the adopted HEEI Rule and the Air Board's

[33] For further discussion regarding the subject and most current results of the pending IPRA request, which has been repeatedly obstructed by the City of Albuquerque, see Section II.A.2.

[34] Additionally, three appeals of the adopted HEEI Rule are also pending before the New Mexico Court of Appeals, but the outcome of any appeal to the substance of the adopted Rule will not address EHD's ongoing discrimination nor the issues raised in this Request – which can only be remedied through ECRCO's prompt and comprehensive Title VI compliance review of EHD.

authority and jurisdiction to adopt the HEEI Rule. On December 11, 2023, Community filed their lawsuit, *Mountain View Community Action et al. v. City of Albuquerque*, No. D-202-CV-2023-09449, also challenging the validity and legality of the City Council's Resolution and Ordinance, as well as the City's illegal interference with the HEEI Rule Rulemaking Proceeding and Community's constitutional right to petition the government. To date, all three lawsuits are ongoing. Most recently, on January 25, 2024, the Air Board received a favorable ruling in the Air Board Case, with the issuance of a preliminary injunction against the City of Albuquerque, enjoining the City from enforcing the Resolution and the Ordinance until the merits of the matter are resolved. Community notes that the pending litigation addresses the validity and legality of the City Council Legislation and associated interferences with the Rulemaking Proceeding, but the pending litigation does not address, nor remedy, EHD's intentionally discriminatory acts and ongoing noncompliance with Title VI. Thus, ECRCO's initiation of an affirmative compliance review of EHD and its permitting program is necessary to address the historic, systemic, and continuing intentional discrimination and Title VI violations against Albuquerque and Bernalillo County's communities of color and low-income communities, and to bring EHD into compliance with Title VI.

2. EHD's Discriminatory Conduct and Interference with the HEEI Rule Rulemaking Proceeding

As mentioned, EHD was a party to the HEEI Rule Rulemaking Proceeding, filing its official entry of appearance on January 10, 2023, and being present at pre-hearing negotiations, meetings, communications, as well as the Rulemaking Proceeding itself.[35] As the government agency responsible for implementing any adopted rule stemming from the Rulemaking Proceeding, EHD's presence and participation were necessary and integral to the promulgation

[35] *See* Dkt. 6 [EHD Entry of Appearance], AQCB Docket No. 2022-3, https://www.dropbox.com/sh/dzxzfu5lkenswc5/AADfoyX4nxQrAqoqjTFhdz6ta?dl=0 [hereinafter AQCB Docket].

of a rule that would be effective in its protection of overburdened communities. EHD's actions and inaction throughout the HEEI Rule rulemaking process, however, effectively resulted in the additional intentional discrimination against communities of color and low-income communities on the basis of race and national origin, signifying an ongoing and escalating trend of noncompliance with Title VI.

EHD's willful disregard of its ongoing noncompliance with Title VI was emphasized on December 11, 2023, the final day of the Rulemaking Proceeding, when EHD's Deputy Director Christopher Albrecht explicitly admitted, under oath, that while EHD has obligations under Title VI to ensure EHD's permitting does not have a discriminatory impact,[36] EHD has no formal procedure in place to analyze whether any discriminatory impacts have occurred from its permitting processes, nor any regulatory mechanism in place to prevent discriminatory impacts from EHD's air pollution permitting.[37] Despite this admission, as further detailed below, throughout the rulemaking process, EHD refused to participate in and, in fact, actively opposed the promulgation of a rule that would help satisfy EHD's Title VI compliance requirements, remedy past instances of discrimination in regards to its permitting processes, and address the discriminatory impacts of its decisions. It is this active resistance to, and interference with, the promulgation of a proposed rule designed to address decades of discrimination that further emphasizes EHD's continued intentional discrimination against the overburdened communities of Albuquerque and Bernalillo County on the basis of race and national origin, and the need for ECRCO to conduct an affirmative Title VI compliance review of EHD and its permitting program.

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[36] *See* HEEI AQCB Volume 6 Petition to Amend Title 20 Chapter 11, Transcript of Proceedings at 1905 (Dec. 11, 2023) [hereinafter Proceedings Transcript].
[37] *Id.* at 1906.

Prior to the HEEI Rule Rulemaking Proceeding, and even prior to the filing of the petition for the proposed HEEI Rule, EHD was encouraged by Community and other parties, including ECRCO,[38] to participate in developing a cumulative impacts rule EHD could and would implement to the benefit of Albuquerque and Bernalillo County's overburdened communities. EHD, however, throughout the year-long collaborative efforts leading up to the Rulemaking Proceeding, actively resisted any meaningful collaboration between stakeholders, objecting to several meetings, restricting and attempting to withdraw City support and resources for the Air Board, and attempting to disqualify Air Board members from overseeing any rulemaking that sought to address Community's concerns about the disproportionate burdens of pollution the region's overburdened communities continue to bear.[39] Midway through these "collaborative" efforts, EHD submitted a draft document entitled "Environmental Justice Concepts," in what appeared to be an attempt to undermine the Rule and process proposed by Community.[40] The proposed concepts were ultimately an ineffective framework purposely designed to give the impression of EHD's efforts to comply with Title VI – while doing little in terms of substantive and effective steps towards addressing the disproportionate impacts of air pollution on the City of Albuquerque and Bernalillo County's most vulnerable communities. In fact, the EHD proposal would have allowed discriminatory permitting to continue unabated. Even EHD tated that these

[38] *See* Exhibit 4 [Draft Informal Resolution Agreement between ECRCO, EHD, and the Air Board].
[39] *See* AQCB Docket, *supra* note 35: Dkt. 27 [EHD Objection to Special Virtual Meeting Scheduled for March 30, 2023]; *see* AQCB Docket, *supra* note 35: Dkt. 34 [EHD Objection to Air Board's April 12, 2023 Meeting Agenda]; *see* Dkt. 66 [EHD's Objections and Statements for the Record Regarding Air Board's June 14, 2023 Meeting Agenda]; *see* AQCB Docket, *supra* note 35: Dkt. 33 [EHD Response to Petitioners' Motion Seeking Alternative Methods of Recording]; *see* AQCB Docket, *supra* note 35: Dkt. 38 [EHD Notice to Parties] (concerning the provision of City support and resources to the Board); *see* AQCB Docket, *supra* note 35: Dkt. 35-36 [EHD communications refusing City resources for HEEI Rule Rulemaking Proceeding]; *see* City of Albuquerque Environmental Health Department's Response to the Petition, filed December 13, 2022, at ¶ 14.
[40] *See* AQCB Docket, *supra* note 35: Dkt. 96 [EHD's Notice of Environmental Justice Concepts]; *see* Exhibit 3 [EHD's Environmental Justice Concepts]; *see* Proceedings Transcript, *supra* note 36, at 1954-55 (discussions between Air Board members and EHD Deputy Director Albrecht on the similarities between the Concepts and proposed HEEI Rule by Community); *id.* at 1959 (EHD Deputy Director Albrecht stating that EHD has no proposed environmental justice or cumulative impacts rule at this time and that the Concepts EHD filed "definitely needs a lot of work and a lot of stakeholder process").

Concepts were in no way a rule in workable or implementable form, nor meant to be.[41] EHD's active resistance and opposition to the HEEI Rule Rulemaking Proceeding is particularly concerning considering the proposed HEEI Rule and associated Rulemaking Proceeding would have addressed concerns raised in a separate, ongoing informal resolution process between EHD and ECRCO, resulting from the 2014 Title VI Complaint against the Air Board and EHD.[42] Notably, the informal resolution process between ECRCO, the Air Board, and EHD were ongoing while "collaborative" efforts on the proposed HEEI Rule were simultaneously occurring. In a letter to EPA dated January 12, 2023, the Air Board raised its concerns surrounding EHD's resistance to participating in these collaborative efforts, in light of the ongoing informal resolution process EHD was purportedly committed to.[43]

Even more alarming, during the time in which EHD was engaged in the informal resolution process with the Air Board and ECRCO to address allegations in the 2014 Complaint, as well as the pre-hearing meetings and hearings related to the HEEI Rule Rulemaking Proceeding, EHD was seemingly involved in the drafting of the Albuquerque City Council Ordinance and Resolution intended to interfere with the HEEI Rule Rulemaking Proceeding and that are now the subject of the litigation mentioned above.[44] A records request made on December 5, 2023, revealed communications between EHD staff and attorneys, City Council attorneys and staff, and City Councilors prior to and near the introduction and passage of the City Resolution and

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[41] *See id.*
[42] *See* AQCB Docket, *supra* note 35: Dkt. 23 (attaching informal resolution settlement discussions between EPA, EHD, and the Air Board, as well as a draft Informal Resolution Agreement).
[43] *See id.* [Letter from Lauren Meiklejohn, AQCB, to Lilian Dorka, EPA, at 2 (Jan. 12, 2023)] ("To the Board's disappointment, EHD has not offered to work with the community group to ensure the rule is effective and workable. Instead, the EHD filed a response that began by pointing out that this was only the second time that a community group had proposed a rule").
[44] Relevant legislative and administrative history can be indicative of discriminatory intent behind an agency's actions and inactions. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 268 (1977); *see also* Civil Rights Division, U.S. Dept. of Justice, Title VI Legal Manual at Sec. VI, p.12, https://www.justice.gov/crt/book/file/1364106/download [hereinafter Title VI Legal Manual] (emphasis added).

Ordinance.[45] Some of these communications, received by NMELC in May 2024, explicitly show EHD's Deputy Director Christopher Albrecht, who also participated at the Rulemaking Proceeding as EHD's sole technical witness, engaging in discussions surrounding the drafting and passage of the City Legislation – while also explicitly advising industry applicants to submit their air quality permit applications to EHD for approval before the Rulemaking Proceeding concluded.[46] The City of Albuquerque, however, continues to withhold the subject and contents of other communications between the parties on the basis that "they contain privileged communications between attorneys in the City Attorney's Office… attorneys in Council Services… Council Services staff…, and City Councilors"[47] without additional explanation or evidence such a privilege applies. Though the majority of the content of these communications is unavailable to Community at this time,[48] the parties involved; the timing of these communications; the revealed communications from EHD's Deputy Director surrounding the drafting and passage of the City Council Legislation – including collusion with industry applicants for air quality permit applications; the City's reluctance to divulge any information surrounding these communications; and EHD's conduct in the HEEI Rule Rulemaking Proceeding, following the City Council's override of the Mayor's vetoes in the midst of the Rulemaking Proceeding, all raise questions as to the significance of EHD's involvement and collusion in the promulgation of the City Resolution and Ordinance intended to stop the community of color-led HEEI Rule Rulemaking Proceeding.

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[45] *See* Exhibit 5 [IPRA Request Communications].
[46] *See* Exhibit 6 [EHD Involvement in City Council Legislation].
[47] *See* Exhibit 5.
[48] While the City of Albuquerque did finally furnish some documents following a follow-up IPRA request by NMELC in April 2023, the City continues to unreasonably withhold communications and documents, leaving the IPRA process ongoing to date. *See* Exhibit 7 [Redacted IPRA Documents] (as an example, some of the documents NMELC has received from the IPRA request unexplainably block out entire documents that are otherwise public information, such as a draft press release for the public) (emphasis added).

EHD's resistance and opposition to the adoption of the proposed HEEI Rule, amounting to intentional discrimination against Albuquerque's communities of color and low-income communities on the basis of race and national origin, and yet another instance of ongoing noncompliance with Title VI, was further evident throughout the week-long Rulemaking Proceeding. Though EHD representatives were physically present the first day of the Rulemaking Proceeding, EHD then withdrew from participation for the remainder of the Rulemaking Proceeding until the appearance of their one technical witness on the final two days of the Rulemaking Proceeding.[49] It was during the testimony of its sole technical witness that EHD requested the Air Board not adopt the proposed HEEI Rule, arguing the proposed Rule was not "in a form that can be implemented" by EHD and that it was unclear if the Air Board had the authority to adopt the Rule.[50] Notably, EHD never raised such an issue in any pre-hearing process or in any discussion with Community prior to the filing of the HEEI Rule petition for rulemaking with the Air Board.

EHD's only active participation in the Rulemaking Proceeding, ultimately, was in its offering of its Deputy Director, Christopher Albrecht,[51] as a technical witness, in a manner different from the Air Board's typical rulemaking hearing procedures. Typically, parties to an Air Board rulemaking proceeding intending to present technical testimony must file Notices of Intent that include a copy of each technical witness's direct testimony.[52] EHD's Notice of Intent, in a deviation from standard procedures, did not include a copy of Deputy Director Albrecht's direct testimony, instead offering its sole technical witness for open cross-examination, in the absence

[49] Deputy Director Albrecht, in fact, did not attend the Rulemaking Proceeding at all, until later in the day on December 8, 2023, after it appeared someone called and requested his presence (emphasis added).
[50] Proceedings Transcript, *supra* note 36, at 1792-93 (Dec. 8, 2023); *see also* AQCB Docket, *supra* note 35: Dkt. 229 [EHD's Legal Memorandum].
[51] *See* AQCB Docket, *supra* note 35: Dkt. 175 [EHD's NOI].
[52] 20.11.82.20 NMAC; *id.* (A)(3).

of any direct examination, by all parties.[53] EHD attorneys, however, raised objections on cross-examination when parties raised questions in relation to EHD's Title VI obligations.[54]

Ultimately, during the final two days of the Rulemaking Proceeding, EHD's Deputy Director, Christopher Albrecht, sat for cross-examination by all parties to the community of color-led rulemaking. During cross-examination, Deputy Director Albrecht spoke to EHD's lack of engagement with the proposed HEEI Rule negotiations and EHD's continued failure to ensure compliance with Title VI in its permitting processes, despite EHD attorney objections.[55] As discussed above, Deputy Director Albrecht also admitted that EHD has obligations, under Title VI, to ensure EHD's permitting is not discriminatory, but despite these obligations, EHD has no mechanism nor process in place to monitor or prevent discriminatory impacts from EHD's permitting processes.[56] Nonetheless, despite not only EHD's obligation under Title VI to ensure EHD's permitting does not have a discriminatory impact, as evidenced further by ECRCO's draft Informal Resolution Agreement with EHD arising from the 2014 Title VI Complaint ongoing resolution process, but also EHD's perpetual lack of proper mechanisms to ensure its permitting practices comply with Title VI, EHD's participation in the HEEI Rule development process and Rulemaking Proceeding, unlike EHD's usual participation in rulemakings, was minimal – except when actively opposing the promulgation of any community of color-led rule.

The HEEI Rule Rulemaking Proceeding concluded on December 11, 2023, and that same day, the Air Board adopted a version of the HEEI Rule. Following the Air Board's publication of the adopted HEEI Rule in the New Mexico Register,[57] EHD appealed the rule in its entirety to the New Mexico Court of Appeals, despite the adopted HEEI Rule requiring much less of EHD

[53] *See* AQCB Docket, *supra* note 35: Dkt. 175, at 2-3 [EHD's NOI].
[54] *See* Proceedings Transcript, *supra* note 36, at 1905 (Dec. 11, 2023).
[55] *See id*. at 1876, 1905–06.
[56] *Id.* at 1905-06.
[57] *See* 20.11.72 NMAC, New Mexico Register Volume XXXV, Issue 1 (Jan. 16, 2024).

than the Rule proposed and advocated for by Community.[58] The HEEI Rule proposed by Community, for example, would have required applicants seeking an air pollution permit to, in some instances, undergo a Health, Equity, and Environment Impact Screening, Analysis, Report, and air-dispersion modeling prior to obtaining a permit from EHD. Then, EHD, in some instances, would have been required to deny, or employ more stringent pollution mitigation measures, on permit applications for new or modified sources that would significantly increase the air toxics cancer risk, air toxics hazard index, or other harmful emission levels within one mile of Albuquerque and Bernalillo County's most overburdened communities. The proposed HEEI Rule also required EHD to provide for meaningful community input, engagement, and participation throughout the public permitting process.[59] In contrast, the adopted HEEI Rule requires EHD to create a map of Albuquerque and Bernalillo County's overburdened communities, relying on the health, pollution, and social determinants of health factors listed in the Community-proposed HEEI Rule, and, in some circumstances, requires a permitted facility to use Best Available Control Technology to minimize the impacts of hazardous air pollutants on overburdened communities, but is likely significantly less health-protective than the HEEI Rule proposed by Community. The adopted HEEI Rule's likely lack of adequate protection of Albuquerque and Bernalillo County's overburdened communities of color from EHD's continued discriminatory air permitting practices is, in significant part, a direct result of EHD's resistance to and interference with the Air Board's attempt to adopt a cumulative impacts regulation.

EHD's conduct throughout the HEEI Rule rulemaking process, from its reluctance to meaningfully participate in any negotiations or formal proceedings, to its active opposition and interference with the community of color-led rulemaking itself, serves as the most recent

[58] *See* EHD Notice of Appeal No. A-1-CA-41669 (Jan. 26, 2024); *see* Exhibit 1 and Exhibit 2.
[59] *See* Exhibit 1 and Exhibit 2 to compare the proposed HEEI Rule and the adopted HEEI Rule more in depth.

example of an increasing and significant trend of EHD noncompliance with Title VI, especially in relation to addressing the cumulative impacts of pollution in communities of color and low-income communities, ultimately rising to the level of intentional discrimination against communities of color and low-income communities on the basis of race and national origin in violation of Title VI.[60] As mentioned above, community members have also filed two additional Title VI complaints, on May 30, 2024, and May 31, 2024, asking ECRCO to address both EHD's and the City of Albuquerque's intentional discrimination and discriminatory impacts of the City's decisions against Albuquerque and Bernalillo County's low-income communities of color that occurred during the HEEI Rule rulemaking process.[61] Community separately submits this Formal Request because, as discussed in depth throughout this Request, EHD's conduct during the HEEI Rule Rulemaking Proceeding is not an isolated incident of intentional discrimination against low-income communities of color and noncompliance with Title VI, but part of a larger pattern of historic and systemic intentional discrimination and Title VI noncompliance that EHD continues to frequently and significantly engage in to the detriment of Albuquerque and Bernalillo County's communities of color and low-income communities. Thus, bringing EHD into compliance with Title VI necessitates more than a Title VI complaint resolution process stemming from one of the many discriminatory acts perpetrated by EHD – it requires a prompt and comprehensive affirmative compliance review of the entirety of EHD's programs, activities,

[60] Agencies may find recipients engaging in intentional discrimination, under the *Arlington Heights* framework, when, alongside a recipient's history of discrimination and conduct with discriminatory effects, the sequence of events; legislative and administrative history; departures from normal procedures; and the current and historical disparate impact on communities of color all support discriminatory purposes behind or coinciding with a recipient's conduct. *See Arlington Heights*, 429 U.S. at 266–68; *see also Faith Action for Cmty. Equity v. Hawai'i*, No. CIV. 13-00450 SOM, 2015 WL 751134, at *7 (D. Haw. Feb. 23, 2015) (Title VI case citing *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–59 (9th Cir. 2013)); *see also Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995) (adding to the *Arlington Heights* factors evidence of a "consistent pattern" of actions of decision-makers that have a much greater harm on minorities than on nonminorities); *see also* Title VI Legal Manual, *supra* note 44 at Sec. VI, p.9-10 (explicitly stating that the *Arlington Heights* framework applies to claims of intentional discrimination under Title VI).

[61] *See* Community Complaint, *supra* note 18; *see* Complaint by Los Jardines Institute, *supra* note 17.

and permitting practices to ensure EHD's historic, systemic, intentional, and pervasive discrimination against low-income communities of color and noncompliance with Title VI is addressed and remedied accordingly.

B. Strategic Significance of Ensuring EHD Compliance Aligns with Agency Priorities

The second factor ECRCO weighs involves the strategic significance of addressing the issue, in consideration of and alignment with EPA's agency priorities.[62] Here, addressing EHD's ongoing discriminatory conduct and Title VI noncompliance in relation to EHD's discriminatory permitting practices and contributions to placing more pollution sources in already overburdened communities of color, and EHD's resistance and explicit opposition to any sort of regulatory mechanism that would reduce the associated adverse health impacts in these communities, aligns with several priorities outlined in EPA's 2022-2026 Strategic Plan – namely, Strategic Goal 2 and Strategic Goal 4.[63]

EPA's Strategic Goal 2 is to "take decisive action to advance environmental justice and civil rights," which includes "strengthening civil rights enforcement in communities overburdened by pollution."[64] Achieving this goal requires ECRCO's enforcement of "federal civil rights laws to their fullest extent, including by fully implementing its authority to conduct affirmative investigations in overburdened communities, issue policy guidance, and secure timely and effective resolutions to address discrimination."[65] An additional part of EPA's strategy to achieve this goal includes increasing the number of affirmative compliance reviews "targeting critical environmental health and quality of life impacts in overburdened communities."[66]

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[62] ECRCO Compliance Review Memorandum, *supra* note 3, at 3.
[63] *See* EPA Strategic Plan, *supra* note 4, at 9.
[64] *Id.* at 27-28.
[65] *Id.* at 28.
[66] *Id.* at 37.

Performing an affirmative compliance review of EHD directly and strategically aligns with EPA's Strategic Goal 2 because EHD continues to violate federal civil rights laws in implementing and enforcing air quality laws and regulations in overburdened communities, and continues to resist and oppose outright any solution addressing the critical environmental health and quality of life impacts caused by EHD's discriminatory permitting decisions. As discussed in Section II.A.2, EHD actively resisted, interfered with, and opposed a regulation, proposed by an overburdened low-income community of color, that was intended to address the critical environmental health and quality of life impacts in overburdened communities within EHD's jurisdiction – while also flatly refusing to work alongside Community in the drafting of such a regulation. Thus, an affirmative compliance review of EHD would both strategically and directly align with EPA's priority, enshrined in Strategic Goal 2, of strengthening civil rights enforcement in communities overburdened by pollution through an increase in affirmative compliance reviews.[67]

EPA's Strategic Goal 4 is to "ensure clean and healthy air for all communities."[68] This includes Objective 4.1 – to improve air quality and reduce localized pollution and health impacts.[69] Satisfaction of this Objective and overall achievement of Goal 4 thus involves addressing the disproportionate impacts of pollution on communities of color and low-income communities through working with these communities and their local and state air agencies to target areas not adequately protected by national standards and assist in reduction strategies and regulation development.[70]

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[67] *Id.* at 27-28.
[68] *Id.* at 47.
[69] *Id.* at 48.
[70] *Id.* at 48-52.

ECRCO's affirmative compliance review of EHD would also both strategically and directly align with EPA's Strategic Goal 4 because Community is formally requesting an affirmative compliance review of EHD's conduct, programs, and practices as they relate to the management of air quality and disproportionate impacts of air pollution on communities of color and low-income communities, including EHD's resistance to any cumulative impacts regulation development and implementation. EHD, through its Air Quality Program, is the administrative agency in the City of Albuquerque and Bernalillo County responsible for implementing and enforcing clean air regulations to protect public health.[71] EHD, however, as discussed above and throughout the entirety of this Formal Request, has actively resisted and opposed any air pollution reduction strategies and regulation development that would address the disproportionate impacts of pollution on communities of color and low-income communities, instead continuing to aggressively permit pollution sources in those same communities of color and low-income communities. It is this repeated, ongoing, and systemic discriminatory conduct that is the basis of Community's Formal Request for ECRCO's affirmative compliance review of EHD. Thus, by conducting an affirmative compliance review of EHD, in relation to its discriminatory permitting practices and its resistance to any protective regulatory measure that would address and reduce the disproportionate impacts of pollution borne by communities of color and low-income communities, ECRCO would be directly acting in alignment and advancing one of EPA's main priorities encompassed in Strategic Goal 4: ensuring healthy and clean air for all communities, which includes addressing the disproportionate impacts of pollution on communities of color and low-income communities.[72]

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[71] NMSA 1978 § 74-2-5.1; Bernalillo County Code, Art. II, Sec. 30-34(a); City of Albuquerque Code of Ordinances § 9-5-1-5(A).
[72] *See* EPA Strategic Plan, *supra* note 4, at 47-52.

C. Community Characteristics Emphasize the Significant Need for a Compliance Review

The consideration of recipient and community characteristics includes discerning whether the recipient's jurisdiction has 1) large geographic boundaries or populations; 2) high levels of pollution or high concentrations of regulated sources; 3) historic discriminatory land use permitting patterns and practices, "including redlining and other forms of segregation;" and 4) "communities with environmental concerns."[73] Here, EHD's jurisdiction and the community characteristics therein affirms the significant and immediate need for an affirmative compliance review of EHD and for ECRCO to formally determine that EHD is not in compliance with Title VI.

EHD serves the largest metropolitan and county populations in the state of New Mexico, as EHD is responsible for both Bernalillo County and the City of Albuquerque.[74] As of 2022, Bernalillo County had a total population of 672,608 residents, with a population density of 582.5 residents per square mile.[75]

In addition to having the largest population and highest population density in the state, Albuquerque and Bernalillo County are also home to fifteen large stationary sources, and hundreds of minor stationary sources.[76] These sources are concentrated in more low-income communities of color than anywhere else in the state, and more residents live near these facilities

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[73] ECRCO Compliance Review Memorandum, *supra* note 3, at 4.
[74] NMSA 1978 § 74-2-5.1; Bernalillo County Code, Art. II, Sec. 30-34(a); City of Albuquerque Code of Ordinances § 9-5-1-5(A).
[75] *Bernalillo County, New Mexico*, United States Census Bureau (July 1, 2022), https://www.census.gov/quickfacts/fact/table/bernalillocountynewmexico/PST045223.
[76] Gabriel Pacyniak et. al., *Climate, Health, and Equity Implications of Large Facility Pollution Sources in New Mexico*, University of New Mexico & PSE Health Energy, 55 (Feb. 2023), https://www.psehealthyenergy.org/wp-content/uploads/2023/02/FINAL_Climate-Health-and-Equity-Implications-of-Large-Facility-Pollution-Sources-in-NM.pdf; *see* Exhibit 8 [Major Pollution Source Map]; *see also* City of Albuquerque, *Stationary Source Program*, https://www.cabq.gov/airquality/air-quality-permits/stationary-source-program (last visited April 16, 2024) (providing a map and legend of minor stationary sources and air quality permits currently active in the City of Albuquerque and Bernalillo County).

than any other residential population in the state of New Mexico.[77] Furthermore, Bernalillo County retains some of the largest total emissions of hazardous air pollutants and particulate matter, compared to other regions of the state.[78] As a result, Bernalillo County and the City of Albuquerque are ranked as having some of the worst air quality in the nation.[79] In the American Lung Association's most recent State of the Air Report released in 2024, Bernalillo County received a Grade F for high ozone days and a Grade F for 24-hour particulate pollution.[80] The year prior, Bernalillo County received a Grade F for high ozone days and a Grade D for 24-hour particulate pollution in the American Lung Association's 2023 State of the Air Report – this year's report ultimately emphasizing the continuous decline of Bernalillo County's already poor air quality and EHD's unwillingness to address the problem.[81] Meanwhile, the Albuquerque metropolitan area has ranked the 24th worst in the nation for high ozone days; 55th worst in the nation for 24-hour particulate pollution; and 63rd worst for annual particulate pollution[82] – despite also being one of the smaller metropolitan areas in the nation.

The concentration of most pollution sources within communities of color and low-income communities in Albuquerque is not an isolated, nor coincidental, incident, but a historical and deliberate practice stemming from the region's extensive history of redlining, segregation, and discrimination against Albuquerque and Bernalillo County's communities of color and low-income communities. As early as the 1920s, when the population of Albuquerque remained

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[77] Pacyniak et al., *supra* note 76, at 55.
[78] *Id.*
[79] *See Albuquerque Ranked 24 in Nation for Ozone Pollution; Report Reveals Nationwide Disparities for People of Color*, American Lung Association (April 18, 2023), https://www.lung.org/media/press-releases/nm-sota-23 (emphasis added).
[80] *See New Mexico: Bernalillo,* American Lung Association (2024), https://www.lung.org/research/sota/city-rankings/states/new-mexico/bernalillo.
[81] *New Mexico: Bernalillo*, American Lung Association (2023) https://www.lung.org/research/sota/city-rankings/states/new-mexico/bernalillo.
[82] *Albuquerque-Santa Fe- Las Vegas, NM*, American Lung Association (2023) https://www.lung.org/research/sota/city-rankings/msas/albuquerque-santa-fe-las-vegas-nm.

below 35,000 residents, restrictive covenants and other property restrictions were incorporated into a majority of property, residential, and commercial documents, prohibiting the sale, lease, or occupation of property by anyone "… not of the white or Caucasian race."[83] These practices continued as the city population grew and, as a result, around 85% of the city has been intentionally racially segregated,[84] the legacy of which remains present in the city today.

This legacy of intentional segregation and systemic discrimination against low-income communities of color continues to be perpetuated through housing and economic opportunities in the city,[85] as well as through EHD's issuance of air pollution permits primarily in and around communities of color and low-income communities, despite most of the city's major emission sources already existing within and near these communities.[86] This trend of discriminatory permitting practices was highlighted recently when EHD approved an air pollution permit in October 2020 for a proposed asphalt batch plant to be located in the already overburdened Mountain View community – despite the respective land being zoned for rural agricultural use with a special use permit for an industrial park of limited uses, none of which included a hot mix

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[83] *See* Larry Barker, *Albuquerque's Dirty Little Secret*, KRQE (Nov. 10, 2010), https://www.krqe.com/news/larry-barker/albuquerques-dirty-little-secret/.
[84] *Id.*
[85] *See Albuquerque Housing and Wealth Equity Report*, Our America ABC (2019), https://ouramericaabc.com/equity-report/albuquerque/wealth (finding segregation and inequity still present in current neighborhood demographics, home-lending practices, income, and homeownership in the City of Albuquerque); *see also* PolicyLink and the Program for Environmental and Regional Equity, *An Equity Profile of Albuquerque* (June 2018), https://nationalequityatlas.org/sites/default/files/ABQ_Profile_Final.pdf; *see also* City of Albuquerque, *City of Albuquerque Housing and Entrepreneurship:Needs Assessment Report* (Oct. 11, 2022), https://www.cabq.gov/office-of-equity-inclusion/documents/221107_abq-housing_needs-assessment_final.pdf.
[86] *See* Complaint by SWOP, Complainant, to EPA at 4-6 (Sept. 15, 2014) [hereinafter 2014 Complaint] (discussing various construction and air quality permits issued in Albuquerque's communities of color and low-income communities); *see also* Pacyniak et al., *supra* note 76, at 55 (noting the location of most Albuquerque pollution sources are within low-income communities); *see als*o Tina Deines, *In Albuquerque, a Pollution Problem All Too Familiar to Communities of Color*, Bitterroot Magazine (May 31, 2019), (https://bitterrootmag.com/2019/05/31/in-albuquerque-a-pollution-problem-all-too-familiar-to-communities-of-color / (detailing the intentional placement of pollution facilities in and near communities of color in Albuquerque, specifically noting that even two major federally-designated Superfund sites exist within a 2.5 square-mile radius of a community of color).

asphalt plant.[87] It was not until years later in February 2023, after an outpouring of community opposition and under the scrutiny of the Air Board, that EHD rescinded the permit.[88]

As a result, Albuquerque and Bernalillo County have a significant number of "communities with environmental concerns," that is, communities "that are or may be experiencing disproportionate adverse impacts from environmental health harms or risks, potentially including communities of color, indigenous populations, communities with a disproportionate number of people with LEP, people with disabilities, communities that have a disproportionate number of children or people who are aging, or that have other vulnerabilities."[89] In assessing Bernalillo County's populations at risk due to air pollution and worsening air quality, the American Lung Association found nearly 63% of Bernalillo County residents identify as people of color; 21% of residents are children under 18; 17% of residents are aging at 65 and older; and 15% of residents live in poverty.[90] Further, many Bernalillo County communities have various diseases and illnesses placing them at risk of further complications due to air pollution exposure, with an estimated 8,870 reported cases of pediatric asthma; 56,103 reported cases of adult asthma; 37,323 reported cases of cardiovascular disease; 28,308 reported cases of chronic obstructive pulmonary disease; and 211 reported cases of lung cancer.[91] The number of Bernalillo County

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[87] *See* New Mexico Terminal Services, LLC., 9615 Broadway Boulevard SE, City of Albuquerque, https://www.cabq.gov/airquality/news/air-quality-permit-application-new-mexico-terminal-services-llc-9615-broadway-boulevard-se-albuquerque-nm-87105 (last visited April 23, 2024); *see also* Dkt. 25.3 at 4-5 [Petitioner's Memo in Support of Motion for Summary Disposition Regarding EHD's Permitting of an Illegal Land Use], AQCB Docket No. 2020-1 (New Mexico Terminal Services), https://www.dropbox.com/sh/ixgnvai4j7pajuw/AADFrrOYsYq_lYQLzfKAUyUVa?dl=0&e=1 (emphasis added).
[88] *See id.* Dkt. 77 [Motion to Dismiss]; *see also* Gwynne Ann Unruh, *South Valley Celebrates Revocation of Asphalt Plant's Permit*, The Paper (Feb. 14, 2023), https://abq.news/2023/02/south-valley-celebrates-revocation-of-asphalt-plants-permit/.
[89] ECRCO Compliance Review Memorandum, *supra* note 3, at 4.
[90] *See New Mexico: Bernalillo, supra* note 81 (reporting that out of Bernalillo County's total population of 674,393 residents, 423,025 residents identify as people of color; 141,116 residents are children; 117,181 residents are aging adults 65 and older; and 100,775 residents live in poverty).
[91] *See id.*

residents with health vulnerabilities, however, is likely higher than reported due to prevalent disparities and inequities in healthcare access in the region.[92]

Due to the historical and intentional placement of polluting sources in and near communities of color and low-income communities in Albuquerque and Bernalillo County, a majority of these adverse health impacts, illnesses, and diseases are experienced by these vulnerable communities.[93] A 2012 study conducted by the Joint Center for Political and Economic Studies reported that the areas with the highest concentrations of pollution and environmental hazards in Bernalillo County also happened to be in communities with the highest percentages of people of color; immigrants; and people living 150% below the federal poverty line.[94] Consequently, these vulnerable communities have decades-shorter life expectancies than those who reside in predominantly white, affluent neighborhoods in Albuquerque.[95] In the South Valley, where more than 80% of residents identify as Hispanic, and nearly 27% of the community lives below the federal poverty level, life expectancy is between 66 and 70 years; meanwhile, in predominantly white, more affluent areas of the city, average life expectancies reach 85 to 94 years.[96]

The characteristics of the communities within EHD's jurisdiction undoubtedly support the significant need for an affirmative compliance review of EHD. EHD not only serves the largest population-dense region in the state of New Mexico, but also the most polluted region in the

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[92] *See* Bernalillo County Community Health Profile at 85-87 (2019), https://www.healthequitycouncil.net/wp-content/uploads/2021/06/BCHP_2021-.pdf (discussing "grave differences to access on healthcare based on race and ethnicity" in Bernalillo County).
[93] *See, e.g., Mountain View is City's Industrial Sacrificial Zone*, *supra* note 10 (reporting extreme health disparities in Mountain View, a predominantly Hispanic community in the South Valley of Albuquerque, who experience high levels of asthma, cancer and other health issues among residents).
[94] *See* Joint Center for Political and Economic Studies, *supra* note 26, at 16-17.
[95] *See id.* at 18-19 (reporting that life expectancies were decades lower in Bernalillo County communities of color and low-income communities, who bear a higher concentration of pollution, than in predominantly white, more affluent communities); *see Mountain View is City's Industrial Sacrificial Zone, supra* note 10 (reporting Mountain View residents have a 10- to 24-year shorter life expectancy than more affluent, predominantly white communities in Albuquerque); *see* Deines, *supra* note 86.
[96] *See id.* (citing a 2015 report from the National Collaborative for Health Equity).

state, with some of the worst air quality in the nation. Further, EHD's jurisdiction encompasses a considerable amount of "communities with environmental concerns," in large part due to the region's historic and systemic segregation and discriminatory land use and permitting practices. Communities of color and low-income communities in Bernalillo County are bearing the disproportionate burden of adverse health effects from pollution as a result of EHD's intentional placement and permitting of pollution sources in and near these communities. These communities have experienced, and continue to experience, higher rates of pollution-related diseases, illnesses, and deaths, than more white, affluent communities in Bernalillo County. It is these jurisdictional and community characteristics that therefore support and necessitate an immediate and comprehensive affirmative compliance review of EHD, who is charged with the primary responsibility and commitment "to protect public health within the boundaries of the City of Albuquerque and Bernalillo County."[97]

The significant and urgent need for ECRCO to conduct an affirmative compliance review of EHD is even more pressing in light of EHD's most recent response to the air quality in Albuquerque's most overburdened communities, following a large salvage yard fire in the South Valley community on May 31, 2024.[98] Following sounds of explosions and views of smoke up to ten miles away, neighbors reported the fire to the Bernalillo County Fire Department, which remained onsite throughout the day to contain and extinguish the explosive fire.[99] When South Valley residents called EHD to request an air quality update, due to the ongoing heavy smoke in the community, EHD responded that there were no unusual air quality readings on EHD's local

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[97] *See Air Quality*, City of Albuquerque, https://www.cabq.gov/airquality/air-quality (last visited Feb. 13, 2024).
[98] *See* Genevieve Glass, *Large Fire Burning at Southwest Albuquerque Salvage Yard*, KOAT Action 7 News (May 31, 2024), https://www.koat.com/article/fire-burning-salvage-yard-albuquerque-smoke-towing-south-valley/60959501.
[99] *See id.; see also* Natalie Wadas and Isaac Cruz, *Large Fire in SW Albuquerque Leaves Damages, Closures in its Wake*, KRQE News (May 31, 2024), https://www.krqe.com/news/albuquerque-metro/fire-crews-on-scene-of-a-fire-in-southwest-albuquerque/.

monitor during the fire and no hazardous smoke alerts were necessary for the South Valley community.[100] EHD staff further stated that potential air quality impacts from the fire were "not EHD's problem, but a County problem"[101] – despite the fact that EHD is responsible for the air quality regulation and protection for communities in both the City of Albuquerque and Bernalillo County.[102] It is clear that EHD does not take responsibility for, and thus neglects and resists, appropriately regulating and protecting the air quality of Albuquerque and Bernalillo County's communities of color and low-income communities; thus, necessitating ECRCO's prompt prioritization of EHD for an affirmative compliance review and a consequent determination that EHD is in noncompliance with Title VI.

D. EHD Actions, Local Environmental Initiatives, and Emerging National Trends Provide Significant Opportunities for EPA Collaboration

The fourth factor involves the consideration of any opportunities for EPA to collaborate with a recipient to ensure new state or local environmental initiatives comply with Title VI, which includes collaboration on a recipient's implementation of any initiative that may be of emerging national significance or trend.[103] Because EHD is the local agency responsible for implementing the newly adopted HEEI Rule,[104] a significant and timely opportunity exists for EPA to collaborate with EHD to ensure EHD meaningfully addresses the disproportionate pollution impacts borne by overburdened communities in Albuquerque and Bernalillo County, in compliance with Title VI. This is especially important considering EHD's historical and ongoing resistance to any sort of meaningful effort to regulate pollution in the region's overburdened

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[100] *See* Exhibit 9 [Salvage Yard Fire EHD Correspondence].
[101] *See id.*
[102] NMSA 1978 § 74-2-5.1; Bernalillo County Code, Art. II, Sec. 30-34(a); City of Albuquerque Code of Ordinances § 9-5-1-5(A) (emphasis added).
[103] ECRCO Compliance Review Memorandum, *supra* note 3, at 4.
[104] *See* Albuquerque-Bernalillo County Air Quality Control Board, Final Order and Statement of Reasons for Adoption of Regulation Concerning Health Environment and Equity Impacts, at 1 (Dec. 19, 2023) (charging EHD with the responsibility to implement the adopted HEEI Rule).

communities, including its continued opposition to the adopted HEEI Rule – which, as discussed above, is likely to be less protective of overburdened communities in significant part due to EHD's obstinance, resistance, and interference with the HEEI Rule rulemaking process, negotiations, and Rulemaking Proceeding. The HEEI Rule, as proposed, would have been the first cumulative impacts regulation to be implemented in the region, consistent with a larger, emerging national trend to address and regulate cumulative impacts in overburdened communities. Five other states – New Jersey,[105] Colorado,[106] New York,[107] California,[108] and Minnesota[109] – have recently adopted a number of laws and regulations centered on environmental justice and cumulative impacts, similar to the proposed HEEI Rule in Albuquerque and Bernalillo County. Many of these laws and regulations, like the proposed HEEI Rule, require state and local permitting agencies, like EHD, to consider a proposed source's cumulative impacts of pollution in already overburdened communities when making a decision on a source's permit application. All serve to address the cumulative impacts of pollution during the permitting process to protect communities of color and low-income communities from further bearing the disproportionate burdens of pollution. While the HEEI Rule adopted by the Air Board is limited in comparison to the Community-proposed HEEI Rule, the promulgation and implementation of the HEEI Rule, even in its limited form, in Albuquerque and Bernalillo County is not an isolated effort, but a part of an emerging and significant national trend to

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[105] *See* N.J.S.A. 13:1D-157, *et seq.* ("Environmental Justice Law") (adopted and effective on Sept. 18, 2020); N.J.A.C. 7:1C ("Environmental Justice Rules") (adopted and effective on April 17, 2023).
[106] *See* HB21-1266 ("Environmental Justice Act") (adopted and effective on July 2, 2021); HB23-1294 ("Protecting Communities From Air Pollution Act") (adopted and effective on June 6, 2023); *see also* 5 CCR 1001-5, 5 CCR 1001-8, and 5 CCR 1001-10 (three regulations adopted on May 17-18, 2023, and effective on July 15, 2023, by the Colorado Air Quality Commission addressing cumulative impacts of air pollution on overburdened communities).
[107] *See* S8330 ("Cumulative Impacts Law") (adopted on December 31, 2022, and effective in late June 2023).
[108] *See* CEQA, Art. 9, § 15130 ("Discussion of Cumulative Impacts") (adopted on Feb. 16, 2010, and effective on March 18, 2010).
[109] *See* SF 466 - Frontline Communities Protection Act ("Cumulative Impacts Law") (adopted in May 2023, effective in April 2026).

address and protect overburdened communities from the cumulative impacts of pollution. It is therefore both timely and advantageous for EPA to collaborate with EHD and to ensure EHD implements the adopted HEEI Rule in a manner that complies with federal civil rights laws and meaningfully serves the communities the Rule was intended to benefit. Doing so would set forth an example and standard for other local and state agencies to follow nationwide, and would help prevent further civil rights issues and violations as more cumulative impacts regulations and laws continue to emerge.

E. EHD has a History of Prior Complaints and Noncompliance with Title VI

The final factor ECRCO considers involves evaluating the number and nature of past and pending civil rights complaints filed against a specific recipient, including consideration of the commonality of specific issue areas, as well as any civil rights findings or recommendations issued from prior reviews and petitions.[110] This factor further includes the evaluation of any ongoing investigations that have not been resolved or resolutions in which implementation has been substantially delayed, as well as the consideration of any pre-existing disadvantages resulting from prior discriminatory practices that have not been fully reconciled, and any other information indicating a possible failure to comply with civil rights laws.[111] Here, EHD has a significant history of noncompliance with Title VI and prior Title VI complaints, including the aforementioned 2014 Title VI Complaint that is currently in the informal resolution process and the recently filed 2024 Title VI Complaint.[112]

As discussed above and throughout this Formal Request, EHD has an extensive history of discriminatorily issuing air quality permits in communities of color and low-income communities across Albuquerque and Bernalillo County, more often than not approving permits

[110] ECRCO Compliance Review Memorandum, *supra* note 3, at 4.
[111] *Id.* at 4-5.
[112] *See* 2014 Complaint, *supra* note 86.

in those communities, while denying permit applications for sources seeking to locate in more affluent, predominantly white neighborhoods in the city.[113] In an attempt to address these ongoing discriminatory permitting practices by EHD, community members, for decades, have engaged in a number of policy initiatives and advocacy efforts, with EHD's continued resistance and interference along the way. In 2007, for exampl, the Air Board created an Environmental Justice Task Force "to identify environmental justice issues related to the Board and [Air Quality] Division's work and make recommendations for change to the Board." The Task Force was unable to fulfill these duties, however, because both the Air Board's legal counsel and EHD employees, who served as Task Force members, continually obstructed every recommendation made by the Task Force.[114] Likewise, in 2014, when community members proposed a cumulative impacts regulation to the Air Board, which became a primary subject of the 2014 Complaint, the proposed regulation never reached fruition because the Air Board, with support from EHD, refused to even grant the community members' a hearing on the petition for the rulemaking.[115]

As a result of the Air Board and EHD's 2014 failure to consider cumulative impacts in permitting decisions, as well as these entities' ongoing failure to adopt or even consider regulations or policy measures addressing discriminatory permitting practices and cumulative impacts of air pollution in overburdened communities, the Air Board and EHD continued to implement the Clean Air Act and New Mexico Air Quality Control Act in a discriminatory manner, violating their obligations under Title VI.[116] As alleged in the 2014 Complaint, the discriminatory practices of EHD and the Air Board, through their permitting decisions and refusal to effectuate any meaningful policy change to address this ongoing discrimination against

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[113] *See id.* at 2-6.
[114] *See id* at 6-7.
[115] *See id.* at 7; 20.11.82.18(A) NMAC.
[116] *See* 2014 Complaint, *supra* note 86, at 8-9, 13-14.

local low-income communities of color, subjected South Valley communities to discrimination on the basis of race and national origin in violation of Title VI.[117]

Thus, pursuant to Title VI, on September 15, 2014, South Valley community residents filed an administrative complaint to EPA, alleging the Air Board and EHD's discrimination on the basis of race and national origin in violation of Title VI.[118] The following day, September 16, 2014, ECRCO received the Complaint and assigned to it EPA Complaint No. 13R-14-R6.[119] This marked September 16, 2014, as the opening date for the investigation of the Complaint.[120]

Nearly two years later, on July 19, 2016, EPA informed the South Valley community members that the Complaint had met the jurisdictional requirements and that ECRCO would investigate the following issues:

"1. Whether the Albuquerque-Bernalillo County Air Quality Control Board's and/or the Albuquerque Air Quality Division's permitting process discriminates against minority residents on the basis of race and/or national origin, in violation of Title VI of the Civil Rights Act and EPA's implementing regulations; and

2. Whether the Albuquerque-Bernalillo County Air Quality Control Board and/or the Albuquerque Air Quality Division discriminated against minority residents on the basis of race and/or national origin in violation of Title VI of the Civil Rights Act and EPA's implementing regulations by refusing to conduct a hearing on an ordinance to consider cumulative impacts in the permitting process."[121]

On July 19, 2016, EPA also notified EHD and the Air Board of the Complaint,[122] giving EHD and the Air Board thirty days from the date the entities received notice of the Complaint to send EPA a response.[123]

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[117] *See* 2014 Complaint, *supra* note 86.
[118] *See* 2014 Complaint, *supra* note 86.
[119] Letter from Lilian Dorka, EPA, to Eric Jantz, NMELC, and Monica Cordova, SWOP, at 1 (July 19, 2016) [hereinafter EPA Acceptance Letter]; *see also* ECRCO, U.S. EPA, Case Resolution Manual, *supra* note 8, at 2 (2017) (describing that ECRCO will "assign a case number and establish a case file . . . [i]mmediately upon receipt of a complaint").
[120] *See id.* (the opening date of an investigation of a Title VI complaint is the date EPA receives the complaint).
[121] EPA Acceptance Letter at 2.
[122] *See* letter from Lilian Dorka, EPA, to Kelsey Curran, the Board, and Mary Lou Leonard, the Division (July 19, 2016).
[123] *See id*. at 2; *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").

Nearly three years later, on March 28, 2019, EPA's Alternative Dispute Resolution Law Office informed ECRCO that EHD, the Air Board, and the South Valley community members had agreed to engage in the Alternative Dispute Resolution Process ("ADR").[124] Accordingly, on April 17, 2019, ECRCO sent letters notifying the parties that ECRCO would be, as of that date, suspending the investigation of the Complaint for the duration of the ADR process.[125]

The ADR process between the parties began on September 26, 2019. One year later, on October 7, 2020, EPA's Conflict Prevention and Resolution Center informed ECRCO that EHD, the Air Board, and South Valley community members "had not been able to reach unanimous agreement on a proposed settlement to resolve the issues of the complaint."[126] Accordingly, on October 16, 2020, ECRCO issued notice to the parties that the ADR process had concluded without resolution and that ECRCO would be resuming investigation of the 2014 Complaint, effective as of the letter's date.[127]

ECRCO then attempted to informally resolve the Complaint individually with the Air Board and EHD.[128] On November 4, 2020, ECRCO held a meeting with EHD and the Air Board, in which ECRCO described the process of developing and executing an Informal Resolution Agreement ("IRA").[129] Subsequently, on November 9, 2020, EHD informed EPA that EHD had formally agreed to enter into the IRA process with ECRCO.[130] Accordingly, as of November 18,

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[124] *See* Letter from Lilian Dorka, EPA, to Susan Chappell (April 17, 2019) [hereinafter Board Tolling Letter]; see Letter from Lilian Dorka, EPA, to Carol Parker, EHD (April 17, 2019) [hereinafter Division Tolling Letter].
[125] *Id.* at 1; Board Tolling Letter at 1.
[126] *See* Letter from Lilian Dorka, EPA, to Susan Chappell, Board, and Joel Young, Division at 1 (Oct. 16, 2020) [hereinafter ADR Closure Letter].
[127] *Id.*
[128] *See* Letter from Lilian Dorka, EPA, to Ryan Mast, Albuquerque Environmental Health Department (Nov. 18, 2020) [hereinafter IRA Initiation Letter]; *see also* 40 C.F.R. § 7.120(d)(2)(i) (ECRCO "shall attempt to resolve complaints informally whenever possible"); *see also* 40 C.F.R. § 7.105 (EPA "shall seek the cooperation of applicants and recipients in securing compliance with" 40 C.F.R. Part 7); § 7.130(a) (EPA may terminate financial assistance "if compliance with this part cannot be assured by informal means"); and § 7.130(b) (EPA shall make a finding of noncompliance if it determines the recipient is in noncompliance and "if compliance cannot be achieved voluntarily").
[129] IRA Initiation Letter at 1.
[130] *Id.* at 1-2.

2020, ECRCO once again suspended its investigation of the 2014 Complaint for the duration of the IRA process.[131]

To date and to the best of Community's knowledge, the informal resolution process between EHD, the Air Board and ECRCO is ongoing. There has been a proposed IRA, but no formal IRA has been reached between EHD and ECRCO, in part due to EHD's continued resistance to resolving its Title VI violations in any meaningful way.

Relatedly, as mentioned above, a separate community group consisting of Los Jardines Institute and the Natural Resources Defense Council filed an additional Title VI Complaint against EHD, on May 30, 2024, based on the discriminatory conduct by EHD throughout the HEEI Rule rulemaking process ("2024 Title VI Complaint").[132] The 2024 Title VI Complaint against EHD centers on EHD's resistance to and interference with the adoption of the HEEI Rule, and any cumulative impacts rule that would have meaningfully addressed the cumulative adverse health impacts of air pollution on Albuquerque and Bernalillo County's overburdened communities of color. The 2024 Title VI Complaint relies, in part, on the draft IRA stemming from the 2014 Complaint, to assert EHD's obligations to remedy the discriminatory conduct and Title VI violations perpetuated by EHD during the HEEI Rule rulemaking process. Importantly, the 2024 Title VI Complaint does not seek to address, nor remedy, the historical and ongoing intentional discriminatory conduct by EHD that continues to harm Albuquerque and Bernalillo County's low-income communities of color, in violation of Title VI. The 2024 Title VI

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[131] *Id.* at 2.

[132] *See* Complaint by Los Jardines Institute and Natural Resources Defense Council (filed May 30, 2024). As previously mentioned, Community has also filed a Title VI Complaint, on May 31, 2024, against the City of Albuquerque and the City of Albuquerque City Council. While Community's 2024 Title VI Complaint does not name EHD, many of the alleged intentional discriminatory acts and Title VI violations by the named entities within the Complaint are also attributable and in part, a consequence of, EHD's resistance, obstinance, and discriminatory interference with the HEEI Rule rulemaking process. *See* Community Complaint (assigned Complaint No. 06RNO-24-R6 and 07RNO-24-R6) (filed May 31, 2024).

Complaint only asks ECRCO to address the most recent incident of discrimination by EHD. Community asserts that any resolution of the 2024 Title VI Complaint must also address the historic and ongoing discriminatory permitting practices of EHD, as well as EHD's continued resistance to meaningful engagement with communities of color and ultimately, protection of Albuquerque and Bernalillo County's overburdened communities of color from further bearing the disproportionate adverse health impacts of pollution, such that an affirmative compliance review of EHD is justified and necessary.[133] Thus, in order for the historic and ongoing intentional discriminatory practices and conduct perpetrated by EHD to be adequately and meaningfully addressed and remedied, Community submits this Formal Request for an affirmative compliance review of EHD, so that ECRCO may comprehensively evaluate EHD's overall compliance with Title VI, including and beyond EHD's discriminatory conduct during the HEEI Rule rulemaking process, and provided the appropriate remedy.

As discussed throughout this Formal Request, EHD has an ongoing history of Title VI violations, noncompliance, and discriminatory practices, significantly as it relates to EHD's requirement that it address the cumulative impacts of pollution on overburdened communities in Albuquerque and Bernalillo County. Today, EHD continues to interfere with and actively oppose any meaningful attempt to improve the air quality in the overburdened communities it serves, as evidenced by its conduct throughout the HEEI Rule Rulemaking Proceeding and resulting Title VI complaints, intentionally discriminating against Albuquerque and Bernalillo County's low-income communities and communities of color on the basis of race and national origin. The core of EHD's discriminatory behavior is systemic, as shown by the manner in which EHD fails to address pollution in the City of Albuquerque and Bernalillo County; the historic and

[133] *See* Section II.A.2 for further discussion on the adopted Rule's likely lack of adequate protective mechanisms for overburdened communities in Albuquerque and Bernalillo County.

continuous issuance of pollution source permits in already overburdened communities; the support EHD withdraws from other local bodies when they consider cumulative impacts regulations proposed by those overburdened communities; and ultimately, EHD's active interference and resistance to addressing the cumulative adverse impacts of pollution on Albuquerque and Bernalillo County's communities of color and low-income communities – all in noncompliance with the purposes and requirements of Title VI.

Few remedies exist to ensure EHD moves forward with the 2014 Complaint informal resolution process; comes into compliance with Title VI; complies with any IRA reached; and ultimately, discontinues its noncompliance with federal civil rights laws and discriminatory conduct towards local communities of color and low-income communities, beyond requesting EPA's assistance and enforcement in these matters. Thus, Community emphasizes the integral need for ECRCO to conduct a prompt and extensive affirmative compliance review of EHD, to ensure EHD not only comes into compliance with Title VI, but also remains in compliance, while also meaningfully addressing the systemic and disproportionate impacts of pollution the overburdened communities of Albuquerque and Bernalillo County have and continue to bear.

III. RELIEF REQUESTED

Community requests ECRCO conduct an affirmative compliance review of EHD and determine that EHD is in noncompliance with Title VI, given EHD's historical and ongoing conduct of regulating air quality in a jurisdiction that "includes communities with environmental concerns – that is, communities that are or may be experiencing disproportionate adverse impacts from environmental health harms or risks, potentially including communities of color, indigenous populations, communities with a disproportionate number of people with LEP, people with disabilities, communities that have a disproportionate number of children or people who are

aging, or that have other vulnerabilities."[134] As part of the consideration for a compliance review and/or compliance review process, Community respectfully requests ECRCO hold a public listening session and an opportunity to submit public comments on the matter. Should ECRCO initiate a compliance review, which NMELC and Community strongly urge ECRCO to do, Community requests that ECRCO's compliance review of EHD is both prompt and comprehensive, and includes data requests, on-site reviews, and any other investigative measures necessary to ensure EHD's compliance with Title VI.[135] Alongside ECRCO's prompt and comprehensive investigation of EHD's compliance with Title VI, Community further requests ECRCO take all other actions necessary to ensure EHD complies fully with federal civil rights laws and remedies violations of Title VI. Once ECRCO finds EHD in noncompliance with Title VI, Community further urges ECRCO to work alongside community members in remedying the historic and ongoing discrimination by EHD against Albuquerque and Bernalillo County's communities of color and low-income communities. If EHD does not come into compliance voluntarily, Community requests that EPA take all actions necessary to bring EHD into compliance with Title VI.[136] Community recognizes the challenges that come with suspending or terminating financial assistance to EHD, as the main regulatory entity of a large metropolitan area and county. Accordingly, Community would like to provide ECRCO with a list of proposed remedies that would allow EHD to continue operating, but would also meaningfully bring EHD into compliance with Title VI.[137]

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[134] *See* 40 C.F.R. §§ 7.110, 7.115; 5.605; *see also* ECRCO Compliance Review Memorandum, *supra* note 3, at 3-5; *see* Section II.C.
[135] 40 C.F.R. § 7.115(a).
[136] 42 U.S.C § 2000d-1 (Title VI 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"); 40 C.F.R. § 7.130(a) (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").
[137] *See id.*

IV. CONCLUSION

For the reasons outlined above, Community formally requests that ECRCO initiate an affirmative compliance review of EHD, determine that EHD is not in compliance with Title VI, and accordingly, take all actions necessary to bring EHD into compliance with Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations.

Thank you for your consideration of these significant and ongoing issues – we appreciate your prompt and thorough consideration of this Formal Request. We look forward to continuing discussions with ECRCO regarding this matter.

Respectfully submitted on this 28th day of June, 2024,

NEW MEXICO ENVIRONMENTAL LAW CENTER

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Proposed Changes to Petitioners' Amended Exhibit A filed Jointly by
Community Intervenors and Mountainview Coalition and Pueblo of Isleta

TITLE 20 ENVIRONMENTAL PROTECTION

CHAPTER 11 ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

PART 72 HEALTH, ENVIRONMENT AND EQUITY IMPACTS

20.11.72.1 ISSUING AGENCY: Albuquerque/Bernalillo County Air Quality Control Board, P.O. Box 1293, Albuquerque, New Mexico 87102

20.11.72.2 SCOPE:
20.11.72 applies to any applicant seeking a permit for an emissions source subject to 20.11.41, 60 or 61 NMAC, or a modification of an existing permit issued under Title 20, Chapter 11 Parts 41, 60 or 61 that will result in an increase in emissions.

20.11.72.3 STATUTORY AUTHORITY:
20.11.72 is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 §§ 74-2-4, 74-2-5(B), as amended; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 945, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque, 1994 § 9-5-1-4.

20.11.72.4 DURATION: ~~Permanent.~~
Permanent.

20.11.72.5 EFFECTIVE DATE:
_____, unless a later date is cited at the end of a section.

20.11.72.6 OBJECTIVE:
Consistent with the Department's authority to prevent and abate air pollution, the Department shall ensure that the health, environmental and equity impacts of combined air contaminant emissions sources are considered and addressed by the Department such that no neighborhood or population group bears the disproportionate ~~health~~ impacts of air contaminant emissions that may with reasonable probability injure human health or interfere with public welfare, and that ~~all~~the Department's air pollution permitting ~~is consistent with the goals~~does not discriminate based on race, color, or national origin as required by Title VI of the ~~National Integrated Urban Air Toxics Strategy and in the furtherance~~Civil Rights Act of ~~environmental justice.~~ 1964, 42 U.S.C. § 2000d et seq.,, as implemented by the U.S. Environmental Protection Agency pursuant to Executive Order

12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations."

Evaluation of the cumulative and disparate impacts of air contaminant emissions, including the social, environmental and economic context that affects the vulnerability of communities to the health harms of air pollution, such as race, poverty and existing pollution burden, is intended to enable the Department to develop a complete understanding of the current and future effects of permitting actions on human health, plant and animal life, public welfare, or reasonable use of property in Bernalillo County and the City of Albuquerque, to evaluate and recognize the differences, needs, requirements and conditions within the County and parts thereof, and to make permitting decisions that meaningfully consider such cumulative or disparate impacts, including all possible opportunities to mitigate air pollution emissions.

20.11.72.7 DEFINITIONS:
In addition to the definitions in this Section, the definitions in 20.11.1 NMAC shall apply unless there is a conflict between definitions, in which case the definition in this Part shall govern.

A. "Applicant" means the person applying for a permit under this Part.

B. "ADAF" means Age-Dependent Adjustment Factors that shall be applied when assessing cancer risks from early-life exposure.

C. "Air Contaminant" means a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay reaction product thereof;

D. "Air Pollution" means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

~~C.~~E. "Air Toxics Cancer Risk" means the probability of developing cancer over the course of seventy years, assuming continuous exposure. The lifetime cancer risk from inhalation of air toxics is expressed in terms of risk per lifetime per million people.

~~D.~~F. "Best Available Control Technology" or "BACT" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any emitting source, which the Department, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants that will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of Title 42 of the United States Code or any applicable standard established by the Board pursuant to the New Mexico Air Quality Control Act.

G. "Community with Age-Related Vulnerability" means a federally-recognized Tribe, Nation, or Pueblo, or census block group where the percentile of residents aged less than five years old is at or above the 50th percentile for Bernalillo County or the percentile of residents aged more than 64 years old is at or above the 50th percentile for Bernalillo County.

~~E.~~H. "Criteria Air Pollutants" means the air pollutants for which there are national ambient air standards provided for in 40 C.F.R. Part 50.

~~F.~~I. "Community- based Participatory Research" means a collaborative approach to research that equitably involves community members, organizational representatives, and researchers (collectively, "partners") early in all aspects of the research process including methodology. The partners contribute methodology, unique strengths and shared responsibilities to enhance understanding of a given phenomenon and the social and cultural dynamics of the community, and integrate the knowledge gained with action to improve the health and well-being of community members.

~~G.~~J. "Cumulative Impacts" or "Cumulative Effects" means the ~~exposures, public~~ effects on human health and ~~environmental effects~~public welfare from the combined emissions and discharges in a geographic area, including air emissions from all existing and reasonably foreseeable sources, routinely, accidentally or otherwise released and non-chemical stressors. Cumulative Impacts shall take into

account sensitive populations, such as children and the elderly and socio-economic factors and social determinants of health.

~~H.~~K. "EJ database" means the United States Environmental Protection Agency Environmental Justice Screening and Mapping tool or an equivalent tool created or adopted by the Department after approval by the Albuquerque-Bernalillo County Air Quality Control Board.

~~I.~~L. "Emergency generator" means a stationary combustion device, such as a reciprocating internal combustion engine or turbine, that serves solely as a secondary source of mechanical or electrical power whenever the primary energy supply is disrupted or discontinued during power outages or natural disasters that are beyond the control of the owner or operator of a source. An emergency generator operates only during emergencies, for training of personnel under simulated emergency conditions, as part of emergency demand response procedures, or for standard performance testing procedures as required by law or by the generator manufacturer. A generator that serves as a back-up power source under conditions of load shedding, peak shaving, power interruptions pursuant to an interruptible power service agreement, or scheduled source maintenance shall not be considered an emergency generator.

~~J.~~M. "Emissions or Discharges" means chemical or physical agents released in the environment, routinely or accidentally, continuously, intermittently, or cyclically.

~~K. "Environmental Effects" means the adverse environmental conditions caused by emissions, including various aspects of environmental degradation, ecological effects and threat to environment and communities. These effects may be direct, indirect, immediate or delayed.~~

~~L.~~N. "Environmental Risk Factor" means those factors the City of Albuquerque Environmental Health Department has to consider in the Health, Environment and Equity Impact Report under 20.11.72.10.B.1 NMAC.

~~M.~~O. "Exposure" means direct or indirect contact of any magnitude or dose, through inhalation, ingestion or skin absorption, with emissions or ~~pollution,~~air contaminant discharges transported through the air, water or soil. Contact may be continuous, discontinuous but regular, or intermittent.

~~N.~~P. "Hazardous Air Pollutants" or "Air Toxics" means those air pollutants designated pursuant to 40 C.F.R. Part 63 and 20.2.72.502 NMAC.

~~O.~~Q. "Hazard Index (HI)" means the sum of hazard quotients for air toxics that affect the same target organ or organ system.

~~P.~~R. "Hazard Quotient (HQ)" means the ratio of the potential exposure to a substance and the level at which no adverse effects are expected, calculated as the exposure divided by the appropriate chronic or acute value.

~~Q.~~S. "Health" means a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity.

~~R.~~T. "Health Risk ~~Assessment~~Analysis" means the process of conducting an exposure and risk assessment to estimate the extent of public exposure to and risk from emitted substances for potential cancer, non-cancer health hazards for chronic, acute, and repeated 8-hour exposure.

~~S.~~U. ~~"Language spoken in the overburdened community" means a language spoken by 3 percent or more of the population in the overburdened community.~~"HEEI" means Health, Environment and Equity Impacts.

~~T.~~V. "Lowest Achievable Emission Rate" or "LAER" means for any source, that rate of emissions which reflects— (1) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (2) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under any applicable standard established pursuant to section 7411 of Title 42 of the United States Code or any applicable standard established by the Albuquerque/Bernalillo County Air Quality Control Board pursuant to the New Mexico Air Quality Control Act.

~~U.~~W. "Maximum Available Control Technology" or "MACT" means the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions, where achievable) that the Environmental Protection Agency Administrator or the Department, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and

environmental impacts and energy requirements, determines -is- achievable for new -or existing -sources- in the category or subcategory to which such emission standard applies under Section 112(d) of the Clean Air Act, through application of measures, processes, -methods, systems or techniques including, but not limited to, measures which -

(1) reduce the volume of, -or eliminate emissions -of, such -pollutants -through process changes, -substitution of materials- or other modifications, or

(2) enclose systems or processes to eliminate emissions, or

(3) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point, or

(4) are design, -equipment, work-, practice-, or -operational standards (including -requirements -for -operator -training or -certification), or

(5) are a combination of the above.

The maximum degree of reduction in -emissions -that is -deemed achievable -for new sources -in a category or -subcategory shall -not -be less -stringent than -the emission -control that -is -achieved -in -practice -by -the -best controlled similar source, as determined -by the -Department.

~~V.~~X. "Mutagenic Chemical" means a chemical that is expected to cause irreversible changes to DNA, would exhibit a greater effect in early-life versus later-life exposure, including, but not limited to, the chemicals listed in Table 1 in Appendix A of this Part.

~~W.~~Y. "Net decrease in emissions" means a source decreases the total amount of uncontrolled emissions of a criteria pollutant or a hazardous air pollutant.

Z. "Other language spoken in the overburdened community" means a language spoken by 3 percent or more of the population in the census tract in which an overburdened community is located.

~~X.~~AA. "Optimum Emissions Control Strategies" means the more stringent, as appropriate, of Reasonably Available Control Technology, Best Available Control Technology, Lowest Achievable Emission Rate, or Maximum Available Control Technology.

~~Y.~~BB. "Overburdened Community" means a federally-recognized Tribe, Nation, or Pueblo, or census block group that meets the following criteria based on data in an EJ database:

(1) Has ~~two~~one or more environmental risk factors listed in 20.11.72.10.B.~~1that~~1 that are in the -50th- percentile or above of Bernalillo County; ~~or~~and

(2) Meets one or more of the following population vulnerability criteria:

(a) Has ~~two~~one or more health indicators listed in 20.11.72.10.B.3 that are in the 50th ~~-~~ percentile or above of Bernalillo County~~.~~; or

(b) Is a community with age-related vulnerability and is in the 50th percentile compared to Bernalillo County for population at or below 200 percent of the federal poverty level.

If environmental risk or health indicator data for a census block group are unavailable, the value for each risk factor or indicator from the next largest geographic area, such as census tract, small area, or ZIP code in which the census block group is located shall be attributed to the block group.

~~Z. "Pollution" means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.~~

~~AA. "Public Health" means the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society.~~

~~BB.~~CC. "Radius" means the distance measured from the center of the source extending outward in every direction the number of ~~-~~miles provided by this part.

~~CC.~~DD. "Reasonably Available Control Technology" or "RACT" means implementation of the lowest emission limitation that an emission source is capable of meeting by the application of a control technology that is reasonably available, considering technological and economic feasibility. A RACT analysis must include the latest information when evaluating control technologies. Control technologies evaluated for a RACT analysis can range from work practices to add-on controls. As part of the RACT analysis, current control technologies already in use sources can be taken into consideration. To conduct a RACT analysis, a top-down analysis is used to rank all control technologies.

~~DD.~~EE. "Social Determinants of Health" means the nonmedical factors that influence ~~health outcomes. They are the conditions in which people are born,~~

~~grow, work, live and age, and the wider set of forces and systems shaping the conditions of daily life, including economic policies and systems, development agendas, social norms, social policies, racism, climate change and political systems.~~when and how emissions of air contaminants may injure human health or interfere with public welfare as listed in 20.11.72.10.

~~EE.~~FF. "Source" means a structure, building, equipment, facility, installation or operation that emits or may emit an air contaminant.

~~FF.~~GG. "Stressor" means any factor that contributes to increased vulnerability of a community or individual to ~~environmental health~~ harms from air contaminant emissions, including ~~everything~~every factor listed in 20.11.72.~~8.A~~10.B(1)-(3).

~~GG.~~HH. "Tribal Consultation"~~-~~ means an enhanced form of communication that emphasizes trust and respect with Pueblos, Tribes, and Nations. It is a shared responsibility that allows the City, through the Department, and Pueblos, Tribes, and Nations to exchange, in an open and free manner, timely and accurate information and opinions for the purpose of fostering mutual understanding and comprehension. Consultation recognizes Indigenous peoples' specialized expertise in traditional and cultural property and natural resources management and is a mutually satisfying deliberation that results in collaboration and joint decision-making. Consultation is a uniquely government-to-government process and shall occur prior to the issuance of an HEEI permit.

20.11.72.8 PRE-APPLICATION REQUIREMENT:
An applicant seeking a permit pursuant to the Air Quality Control Act shall contact the ~~department~~Department in writing and request a pre-application meeting for information regarding the contents of a health, environment and equity impact report and the health, environment and equity impact permitting process. The meeting may include discussion of approved emissions factors and control efficiencies, air dispersion modeling guidelines, department policies, permit fees, public notice requirements and regulatory timelines.

20.11.72.9 HEEI PERMIT IMPACTS SCREENING.
If the Applicant is able to demonstrate by a health risk ~~assessment~~analysis that its source meets ~~both of~~ the ~~following~~ criteria in paragraph A below, it will not be required to go through any additional HEEI permitting processes. If the Applicant cannot demonstrate its source meets ~~both of~~ the ~~following~~ criteria in paragraph A, the Applicant must comply with the process outlined in Section 20.11.72.10 and obtain an HEEI Permit.

~~A.~~ Criteria for de minimis exemption. Construction and operation of the source will not result in an ~~increased~~ increase in the cancer risk ~~of~~in any overburdened community within a one-mile radius by more than 1 in 1 million, and will not result in an ~~increased~~ increase in the non-cancer respiratory hazard index ~~of greater than 1.0 for any receptor in any overburdened community within a one-mile radius of where the source is located.~~1 or ~~proposed to be located; and~~

~~B. Construction and operation of the source will not increase cancer risk or non-cancer respiratory hazard index above the county average in~~greaterin any overburdened community within a one-mile radius of ~~where the source is located or proposed to be located.~~

A. The standards for emissions equivalent to 1 in ~~1million~~1 million cancer risk and ~~1.~~0.1 non-cancer respiratory hazard index are provided in Table 2 to Appendix A to this Part.

~~A.~~B. The Department's determination that a source is not required to obtain a permit under this Part pursuant to this Section shall constitute a final agency action. The Department shall provide notice, consistent with the requirements of 20.11.72.10.F.1 – 11, of its decision that an applicant is not required to obtain a permit under this Part.

20.11.72.10 HEALTH, ENVIRONMENT AND EQUITY IMPACTS PERMIT PRE-APPLICATION

A. Health, Environment and Equity Impact Analysis and Draft Report.
If the new ~~or proposed~~ source or modification is proposed to be or is located in an overburdened community, or within a one--mile radius of an overburdened community, and the Applicant cannot demonstrate the source meets the requirements of Section 20.11.72.9, the Applicant shall prepare a Draft Health, Environment and Equity Impact Analysis and Report to assess the cumulative effects of the new or modified source on every overburdened community within a one--mile radius of the source.

B. ~~B.~~ Draft Report Requirements.
The Applicant shall prepare a report that assesses the impacts of air emissions from its proposed new or modified source on every overburdened community within a

one-mile radius. The report shall include at a minimum all the requirements specified in this Section. The Applicant may include additional information that may be helpful to the Department's analysis. At any time during this process the Applicant may consult with the Department about the sufficiency of data, HEEI permit application requirements or any other requirement of this Section.

1. ~~1.~~ Environmental Risk Factors:

The draft report shall include the types and amounts of emissions that will be released from the operation of the new or modified source. The draft report shall also include the county percentile and block group percentile for each overburdened community within the one-mile radius of the new or modified source for each of the environmental risk factors listed below~~.~~, and shall note whether each type of air pollutant expected to be released by the construction and operation of the source will be dispersed into that overburdened community as shown by unmitigated air dispersion modeling pursuant to this rule. If no environmental risk data for a census block group are available, the value for each risk factor from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. For each environmental risk factor, the Applicant must indicate from which EJ database the relied upon data was found. The environmental risk factors are the following:

a. Annual PM 2.5 expressed in micrograms per meter cubed (ug/m3); and
b. Annual ozone expressed in parts per million (ppm); and
c. Annual diesel particulate matter expressed in ug/m3; and
d. Annual toxic releases to air expressed in pounds; and
e. Traffic proximity and Volume expressed as daily traffic count divided by the distance to major roads.

2. ~~2.~~ Social Determinants of Health:

The draft report shall include the county percentile and block group percentile for each of the social determinants of health listed below. If no data for a particular social determinant of health is available for a census block group, the value for each social determinant of health from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. For each social determinant of health, the Applicant must indicate from which EJ database the relied upon data was found. The ~~environmental risk factors~~social determinants of health are the following:

a. Percent of population ~~that is non-White~~who list their racial status as a race other than white alone and/or list their ethnicity as Hispanic or Latino; and

b. Percent of population in households with total household income below 200% of the federal poverty level for the current year; and

c. Percent of population over age 5 that speaks a language other than English at home and speaks English less than "very well;" and

d. Percent of population 25 and older who do not have a high school diploma or equivalent credential; and

e. Percent of population under age ~~five,~~5; and

f. Percent of population over age 64.

~~3.~~

3. Health Indicators:

The draft report shall include ~~rates of~~data for the following ~~illnesses~~health indicators for each overburdened community within a one-mile radius of the modified or proposed source for the last year for which data are available. ~~-~~If no health indicator data for a census block group are available, the value for each health indicator from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. The health indicators are the following:

a. Adult asthma prevalence; and

b. Pediatric asthma prevalence; and

c. Chronic obstructive pulmonary disease prevalence; and

d. Heart disease 18 and over prevalence~~; and~~.

~~e. Stroke death rate.~~

~~4.~~

4. Other Requirements:

The Applicant must also include the following information in the report:

a. Environmental law and regulation compliance history of the Applicant pursuant to 1978 NMSA Section 74-2-7(P); and

b. Proposed emissions control measures and operation and maintenance procedures and mitigation measures to ensure long-term compliance with permit conditions, should an HEEI permit be issued; and

c. Proposed emissions control measures and operation and maintenance procedures and mitigation measures to ensure compliance with the standards in 20.11.72.~~10(E);~~12(C)); and

d. Unmitigated air dispersion modeling of all hazardous air pollutants expected to be released from the source; and

e. Mitigated air dispersion modeling of all hazardous air pollutants expected to be released from the source; and

f. Air Toxics Cancer Risk Assessment (risk per million); and

g. Air Toxics Respiratory Hazard Index; and

h. A qualitative assessment of ~~Quality of life~~public welfare impacts expected from the construction and operation of the source including but not limited to:

i. Off-site potential for odor generation; and

ii. Off-site potential for dust generation; and

iii. Off-site potential for noise generation; and

iv. Off-site potential for proliferation of other emissions sources in the area; and

v. The health impacts of the proposed new or modified source using the CO-Benefits Risk Assessment (COBRA) screening and mapping tool or an equivalent tool approved by the Department.

C. ~~C.~~ Air Dispersion Modeling.

Any health risk ~~assessment~~analysis required under this Part shall comply with the following criteria:

1. The Applicant shall provide both mitigated and unmitigated air dispersion modeling of all potential emissions of hazardous air

pollutants and toxic air pollutants identified in Section 20.11.72.7(E) and 20.11.72.7(N).

2. The Applicant's potential emissions must be modeled in accordance with the most up-to-date United States Environmental Protection Agency guidelines; and
3. At a minimum, all air dispersion modeling required under this Part shall include:
    a. Receptor Grid Spacing. ~~-~~All receptor grid spacing must be no less than 25 meter spacing out to one mile from the source; and
        i. For a point source, the receptor distance is the distance from the center of the stack to the nearest receptor location; and
        ii. For a volume source, the receptor distance is the distance from the edge of the source to the nearest receptor location; and
    b. Source Specific Emissions.
        i. If the source is an existing source, the Applicant must use data from Continuous Emissions Monitoring Systems, stack testing, or fenceline monitoring if both continuous emissions monitoring systems and stack testing are infeasible, to determine potential emissions; or
        ii. If the source is a new source, the Applicant must rely on data from vendor guarantees and stack test or fenceline monitoring data from similar facilities to determine potential emissions; and
        iii. The Applicant shall not use AP-42 emissions factors unless the Applicant can demonstrate by a preponderance of the evidence that no feasible alternative to the use of AP-42 emissions factors exists; and
        iv. If the Applicant demonstrates that no feasible alternative to the use of AP-42 emissions factors exists, the Applicant shall use the most conservative data for the emissions factors chosen; and
    c. Receptor Height. Receptor heights shall be set at a reasonable human breathing height~~.~~; and
    d. Emissions Rates. The Applicant shall not use multiplying factors to correct for averaging times greater than one hour. The maximum one-hour emissions concentration shall be

assumed to apply for every hour in an averaging ~~periods~~period up to 24 hours; and

e. Operating Schedule. The operating schedule shall be the maximum amount of time the source can operate under the permit application; and

f. Meteorological Data. The Applicant shall collect one year of on-site meteorological and ambient data for use in air dispersion modeling and shall consult with the Department in order to determine meteorological parameters; and

g. Receptor Location. The risk shall- be calculated for the closest residential and sensitive receptor. The greater of the two risks shall be used to determine risk.

D. ~~D.~~ Air Toxics Cancer Risk Assessment.

Any Air Toxics Cancer Risk Assessment required under this Part shall include the following:

1. Hazard Identification. The Applicant shall determine the type of adverse health effect associated with exposures of all hazardous air pollutants emitted by the facility, including whether a ~~HAP~~hazardous air pollutant is considered a human carcinogen or a potential human carcinogen; and
2. Exposure Assessment. The Applicant shall estimate the extent of public exposure to emitted ~~HAPs~~hazardous air pollutants for potential cancer, non-cancer health hazards for chronic and acute, and repeated 8-hour exposures. The Applicant shall estimate long-term (annual), short-term (1-hour maximum) and 8-hour average exposure levels; and
3. Dose-Response Assessment. The Applicant shall characterize the relationship between exposure to a chemical by its modeled concentration. Dose shall be calculated as concentration multiplied by exposure; and
4. Risk Characterization. The Applicant shall assess the total risk to the community by combining the results of the exposure assessment with the dose-response assessment; and
    1. The risk shall be characterized for the receptor location nearest the source (as identified in the Air Dispersion Model); and
    2. The maximum incremental cancer risk within the community shall be assessed using the nearest receptor location to the source; and
    3. The risk shall be calculated in individual age bins (e.g. Third trimester, 0-2 years, etc.) for assessment of residential cancer risk.

The cancer risk shall be calculated in a manner consistent with U.S. EPA's Risk Assessment Guidance for Superfund (RAGS). The Applicant shall rely on the cancer slope factors provided in Table 3 to Appendix A in calculating the cancer risk. The use of the ADAF is required to ensure that sensitive populations are included in the analysis of cancer risk. For mutagenic chemicals, the risk shall be calculated in a manner consistent with the method outlined by U.S. EPA in its Regional Screening Level (RSLs) Guidance. An ADAF of 10 shall be applied for exposures spanning the 2-year interval from birth until second birthday. An ADAF of 3 shall be applied from ages 2 through 16 (i.e., spanning a 14-year interval from second until sixteenth birthday). For mutagenic chemicals, the cancer risk shall be calculated using the ADAF for early life-exposures;

E. ~~E.~~ Air Toxics Respiratory Hazard ~~Assessment.~~ Index.

Any Air Toxics Respiratory Hazard ~~Assessment~~Index required under this Part shall include the following:

1. Hazard Identification. The Applicant shall determine the type of adverse health effect associated with exposures of all hazardous air pollutants emitted by the facility, including whether a ~~HAP~~hazardous air pollutant is considered a human carcinogen or a potential human carcinogen; and
2. Exposure Assessment. The Applicant shall estimate the extent of public exposure to emitted ~~HAPs~~hazardous air pollutants for potential cancer, non-cancer health hazards for chronic and acute, and repeated 8-hour exposures. The Applicant shall estimate long-term (annual), short-term (1-hour maximum) and 8-hour average exposure levels; and
3. Dose-Response Assessment. The Applicant shall characterize the relationship between exposure to a chemical by its modeled concentration. Dose shall be calculated as concentration multiplied by exposure; and
4. Risk Characterization. The Applicant shall assess the total risk to the community by combining the results of the exposure assessment with the dose-response assessment; and
    a. The risk shall be characterized for the receptor location nearest the source (as identified in the Air Dispersion Model; and
    b. The maximum incremental cancer risk within the community shall be assessed using the nearest receptor location to the source; and
    c. The risk shall be calculated in individual age bins (e.g. Third trimester, 0-2 years, etc.) for assessment of residential cancer risk~~.~~; and
5. Shall assess the average concentration and the maximum 8-hour average concentration for each receptor within the air dispersion model.

The Air Toxics Hazard Index is the sum of the hazard quotients for each chemical of concern and shall be calculated in a manner consistent with U.S. EPA's Risk Assessment Guidance for Superfund (RAGS) for inhalation pathway and U.S. EPA

Regional Screening Level (RSL) guidelines. The Applicant shall rely on the Acute Reference Exposure Levels and Chronic Reference Exposure Levels identified in Table 3, Appendix A in calculating the hazard index.

F. ~~F.~~ Notice.

Whenever a health, environmental and equity impact analysis and draft report must be conducted for a permit, notice of the draft report shall be:

1. Provided by certified mail in ~~-~~English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community, to the owners of record, as shown by the most recent property tax schedule, of all properties within one ~~-~~mile of the property on which the source or proposed source is located or proposed to be located; and
2. Posted on the source property in ~~-~~English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community and clearly visible to the public; and
3. Posted in English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community, in at least three other conspicuous places in the immediate vicinity of the source such as a post office, library, or grocery store notice board; and
4. Provided in English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community to all local neighborhood associations, schools and community centers; and
5. Posted in ~~-~~English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community, in an easily accessible location on the Department's website; and
6. Posted in English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community, on all Department social media accounts; and
7. Mailed directly to Pueblo of Sandia, Pueblo of Laguna and Pueblo of Isleta, to the Governor's office, to the ~~director~~Director of the ~~environmental~~Environmental or ~~natural resources department~~Natural Resources Department, and general counsel, with an offer to conduct a tribal consultation on the permit application; and
8. Published in the largest circulation newspaper serving the overburdened community in at least a business card-sized advertisement that appears in a place in the newspaper calculated to give the general public the most effective notice, which shall not be in either the classifieds or the legal advertisement section, and shall be printed in ~~both~~ English, Spanish, and

any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community; and

9. Provided in English, Spanish, and any other language spoken ~~by 3 per cent or more of the population~~ in the overburdened community and any overburdened community within a one-mile radius by certified mail and electronic mail to all residential addresses in the overburdened community.
10. Within three days of receipt of a draft health, environmental and equity impacts report, the Department shall post the draft HEEI report on its website.
11. Any member of the general public may request a copy of the draft health, environmental and equity impacts report by requesting a copy from the Department. Upon receiving a request for a copy of a draft health, environmental and equity impacts report, the Department shall either provide the requestor with a copy of the draft report, free of charge, within fifteen (15) calendar days of receiving the request or direct the requestor to a publicly available copy. If the requestor needs a copy of the health, environmental and equity impacts draft report translated into Spanish or any other language necessary, the Department shall provide an adequate translation of the draft report within fifteen (15) calendar days of the request.
12. The requirements of this Section represent the minimum notice requirements. The Department may provide additional notice in additional forums as identified by either residents of the impacted overburdened communities or the Department.
13. Within forty-five (45) days of the Draft Health, Environment and Equity Impact Report being made publicly available, but no sooner than fifteen (15) days, the Department, upon request, shall hold at least one public meeting to receive public comment on the Draft Report in each overburdened community within a one-mile radius of the source.
14. The Department shall accept written public comments on the Draft Health, Environment and Equity Impact Report for sixty (60) days after the Draft Report is made available to the public. The Department may extend the comment period for an additional thirty (30) days.
15. In the event of a conflict with any other public participation provisions in this Chapter, this provision prevails.

G. Public Hearing.

The Department shall hold a public hearing on the Applicant's Health, Environment and Equity Impact report consistent with the requirements of 20.11.41.15 NMAC, except that:

1. The Department shall follow the notice and comment requirements applicable to the relevant permit application and this section. The Applicant shall be responsible for arranging and paying all expenses of the Public Information Hearing under this part.

2. At the public hearing, community testimony, community based participatory research data and community air monitoring data shall be given the same weight as technical expertise provided by the Department and the Applicant.

20.11.72.11 HEALTH, ENVIRONMENT AND EQUITY IMPACTS PERMIT APPLICATION

A. ~~A.~~ Application contents:

The following are the minimum elements that shall be included in a permit application before the Department can determine ~~whether~~that an application is administratively complete and ready for review. The permit application shall include:

1. A final Health, Environment and Equity Impact Report that shall include:
   a. All elements required in 20.11.72.10.B NMAC;
   b. Proof that the notice and comment provisions in 20.11.72.10.B – G have been satisfied; and
   c. A summary of the public comments received, including any community based participatory research data; and
2. Air dispersion model results pursuant to 20.11.72.10.C NMAC; and
3. Air toxics cancer risk assessment pursuant to 20.11.72.10.D; and
4. Air toxics respiratory hazard ~~assessment~~index pursuant to 20.11.72.10.E; and
5. Any proposed air emissions mitigation strategies informed by the data collected pursuant to Section 20.11.72.10.B(4)(h); and
6. Any proposed ~~quality of life~~public welfare impacts mitigation strategies informed by the data collected pursuant to Section 20.11.72.10.B(4)(h).

~~——~~**B.** Within thirty (30) days of receiving an HEEI permit application, the Department shall review the application and determine whether it is administratively complete.

~~——~~**C.** ~~-~~ If the application is deemed administratively incomplete or the ~~department~~Department determines a different type of permit application is required, the ~~department~~Department shall send a letter by certified mail or electronic mail to the ~~applicant~~Applicant stating what additional information or fees are necessary before the ~~department~~Department can deem the application administratively complete. The ~~department~~Department may require information that is necessary to perform a thorough review of the application including: technical clarifications, emission calculations, emission factor usage, additional application review fees if any are required, and new or additional air dispersion modeling or health risk ~~assessment~~analysis. The letter shall state a reasonable deadline for the ~~applicant~~Applicant to deliver the information, fees, health risk ~~assessment~~analysis or air dispersion modeling. The ~~applicant~~Applicant shall deliver the requested information, fees, health risk ~~assessment~~analysis or air dispersion modeling by the deadline set by the ~~department~~Department. The ~~department~~Department may extend the deadline for good cause as determined by the ~~department~~Department. If the ~~department~~Department does not receive the additional information, fees, health risk ~~assessment~~analysis or modeling by the deadline, the ~~department~~Department may deny the application. If the ~~department~~Department has ruled an application administratively incomplete three times, the ~~department~~Department shall deny the permit application and send a letter by certified mail or electronic mail to the ~~applicant~~Applicant stating that the permit application has been denied. Fees submitted for processing an application that has been denied shall not be refunded. If the ~~department~~Department has denied the application, the ~~applicant~~Applicant may submit a new application and the fee required for a new application.

20.11.72.12 DEPARTMENT DECISION

~~A.~~

A. Department Decision.

Upon determining the application is administratively complete, the Department shall evaluate the application using the process provided for in this Section. The Department shall assign the following numerical values to each environmental risk factor, social determinant of health and health impact above the county average in each overburdened community within one mile of the new or modified source, in the following manner:

1. 90^{th} percentile and above a value of 5;

2. 80^{th} to 89^{th} percentile a value of 4;

3. 70th to 79th percentile a value of 3;

4. 60th to 69th percentile a value of 2;

5. 50th to 59th percentile a value of 1;

6. ~~below~~Below the 50th percentile a value of 0.

B. ~~B.~~ Application Denial.

1. The Department shall deny the application if the new or modified source will increase the air toxics cancer risk above the County mean or median, whichever is more conservative, or increase the air toxics cancer risk beyond 5 in 1~~,000,000~~ million, whichever is lower, in any overburdened community within a one-~~-~~mile radius of the source as long as the unmitigated air dispersion modelling performed pursuant to this rule demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; or

2. The Department shall deny the application if ~~-~~the new or modified source will increase the air toxics hazard index ~~score~~ in any overburdened community within a one-mile radius of the source above the County mean or median, whichever is more conservative, or increase the chronic or acute hazard index by a value of 1.0, whichever is lower as long as the unmitigated air dispersion modelling demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; and

3. The Department may deny the application or require more stringent mitigation measures, including air pollution control measures, than would otherwise be required by this Part if it determines based on the Applicant's health, environment and equity impact assessment and unmitigated air dispersion modeling that the quantity and duration of the emissions from the source would with reasonable probability ~~disproportionately~~ injure human health or unreasonably interfere with public welfare in ~~an~~any overburdened community within a one-mile radius as long as the unmitigated air dispersion modelling demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; and

4. The Department may deny the application or require more stringent mitigation measures, including pollution control measures, than would otherwise be required by this Part if it determines based on information

received from the Public Information Hearing or through public comment, including from community based participatory research, that the quantity and duration of the emissions from the source would with reasonable probability ~~disproportionately~~ injure human health or interfere with public welfare in ~~an~~any overburdened community within a one-mile radius.

A. ~~C.~~ Application Approval.

If the Department does not deny the Application pursuant to 20.11.72.12.B, the Department shall issue the HEEI Permit. In any HEEI permit, the Department shall require emission controls, emissions monitoring and reporting, and ~~quality of life~~public welfare impacts mitigation based on the sum of the values ~~provided in 20.11.72.12.A NMAC and the~~and data collected pursuant to ~~Section~~ 20.11.72.~~10~~12.B~~(4)(h)~~ NMAC for each overburdened community within a one-mile radius of the new or modified source where unmitigated air dispersion modelling demonstrates that emissions of air pollutants will be dispersed to that overburdened community. Where there is more than one overburdened community within a one-mile radius of the new or modified source where the unmitigatedair dispersion modelling demonstrates that emissions of air pollutants will be dispersed to that overburdened community, the Department shall require emission controls, emissions monitoring and reporting and ~~quality of life~~public welfare impacts mitigation based on the overburdened community with the highest total score. Under no circumstances shall the emission control required be less stringent than the emission control required by any applicable provision of federal or state laws, rules, regulations or requirements.

1. If the sum of the values for any overburdened community within a one-mile radius of the source where the unmitigated air dispersion modelling demonstrates that air pollution emissions will be dispersed to that overburdened community is within the upper 25th percentile of the highest possible score for an overburdened community, the Department shall require:

   a. LAER for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

   b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Quarterly stack test or equivalent emissions monitoring of permitted emissions; and

d. -Continuous fenceline monitoring of permitted emissions; and

e. Contemporaneous reporting of permitted emissions; and

f. Provide a plan for off-site odor, light and noise mitigation; and

g. Provide a diesel particulate matter mitigation plan.

2. If the sum of the values for any overburdened community within a one-mile radius of the source is between the 50th and 74th percentile of the highest possible score for an overburdened community, the Department shall require:

———————a. LAER for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

———————b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline monitoring of permitted emissions; and

d. Contemporaneous reporting of permitted emissions; and

e. Provide a plan for off-site odor, light and noise mitigation; and

f. Provide a plan for diesel particulate matter, as appropriate.

3. If the sum of the values for any overburdened community within a one-mile radius of the source is between the 25th and 49th percentile of the highest possible score for an overburdened community, the Department shall require:

a. BACT for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline emissions monitoring of permitted emissions; and

d. Semi-annual permitted emissions reporting; and

e. Provide a plan for off-site odor, light and noise mitigation; and

f. Provide a plan for diesel particulate matter mitigation, if appropriate.

4. If the sum of the values for any overburdened community within a one-mile radius of the source is within the lowest 25th percentile of the highest possible score for an overburdened community, the Department shall require:

a. RACT for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

b. BACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline emissions monitoring of permitted emissions; and

d. Annual permitted emissions reporting; and

e. A plan for off-site odor, light and noise mitigation; and

f. A plan for diesel particulate matter mitigation, if appropriate.

20.11.72.13 MAPPING OF OVERBURDENED COMMUNITIES BY THE DEPARTMENT.

A. Within sixty (60) calendar days of implementation of this Part, the Department shall publish on its website a map of overburdened communities.

B. Within ninety (90) calendar days of implementation of this Part, the Department shall begin developing its own EJ database. The Department shall collect locally-sourced air quality and emissions data including data from community based participatory research and air quality monitoring data and compiling health data and data for social determinants of health from publicly available sources. The database will be updated continually and at a minimum, annually, in order to ensure most up-to-date data is used in all HEEI permit applications.

20.11.72.14 PERMIT CANCELLATION, SUSPENSION OR REVOCATION:

A. The Department shall cancel any permit for any new source that ceases operation for five years or more, or permanently. Reactivation of any source after the five-year period shall require a new permit.

B. For any permit issued under this Part, the Department shall review the permittees' fenceline monitoring data semiannually to ensure efficacy of all control technologies.

C. The Department shall suspend any permit issued under this Part if review of the permittees' fenceline monitoring data show a failure in required control technologies or a violation of any permit condition that persists for more than thirty (30) days.

D. A violation of a requirement of the state act, a board regulation or a condition of a permit that has been issued pursuant to 20.11.72 NMAC may result in a suspension or revocation of the permit. If the Department initiates an enforcement action to suspend or revoke a permit, the Department and the permittee shall comply with the procedures required by 20.11.81. NMAC.

E. Any permit cancellation, suspension or revocation shall be subject to the following procedures:

1. At least thirty (30) days before cancelling, suspending or revoking a permit, the Department shall notify the permittee by certified mail of the impending cancellation, suspension or revocation and the reasons therefor. Construction, modification and, if required, interim operation shall cease upon the effective date of cancellation contained in the notice of cancellation, suspension or revocation. A permittee who has received notice that a permit is or will be cancelled may request a hearing before the Board. Any request for a hearing must be made in writing to the Board within thirty (30) days after the notice of the Department's action has been received by the permittee. Unless a timely request for hearing is made, the decision of the Department shall be final.

2. If a timely request for hearing is made, the Board shall hold a hearing within sixty (60) days after receipt of the request. The hearing shall- comply with the procedures required by 20.11.81 NMAC.

20.11.72.15 EXEMPTIONS.

Exempted from a health, environmental and equity impacts analysis under this part are:

A. Enforcement activities;
B. Emergency permit applications under 20.11.41.24;
C. Purely ministerial actions;
D. Administrative or technical permit revisions, provided such administrative or technical revisions meet the requirements of 20.11.41.28 NMAC;
E. Activities excluded from "modifications" as provided by 20.11.41.7.U(1)-(4) NMAC;
F. Emergency generators;
G. Modifications resulting in a net decrease in emissions.

20.11.72.16 ADMINISTRATIVE APPEALS–JUDICIAL REVIEW.

A. Any person adversely affected by a final action by the Department under 20.11.72 NMAC may file a petition for hearing before the Board for further relief pursuant to 20.11.81.1 *et seq*.

B. Any person who is adversely affected by a final decision of the Board or who participated in an appeal to the Board of a Department decision and who is adversely affected by such action may appeal the Board's final decision to the New Mexico Court of Appeals pursuant to NMSA 1978 § 74-2-9.

20.11.72.17 SEVERABILITY:
If any part or application of this Part is held invalid, the remainder or its application to other situations or persons shall not be affected.

20.11.72.18 CONFLICT:
If any part or application of this Part is in conflict with the requirements found in Title 20, Chapter 11, Part 41, -Part 60, or Part 61, the provision in this Part shall apply.

EXHIBIT 2

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE - BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 72 HEALTH, ENVIRONMENT AND EQUITY IMPACTS

20.11.72.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-1972.
[20.11.72.1 NMAC – N, 1/1/2025]

20.11.72.2 SCOPE:

A. Applicability: Any person who intends to construct a new stationary source or modify an existing stationary source that is subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC.

B. Exemptions: 20.11.72 NMAC does not apply to:

(1) technical permit revisions under Subsection B of 20.11.41.28 NMAC;

(2) administrative permit revisions under Subsection A of 20.11.41.28 NMAC;

(3) emergency permits applications under Subsection A of 20.11.41.24NMAC;

(4) relocations for portable sources under Paragraph (2) of Subsection F of 20.11.41 NMAC;

(5) any source exempt from 20.11.41 NMAC, 20.11.60 NMAC, 20.11.61 NMAC; and

(6) sources within Bernalillo county that are located on Indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction.

[20.11.72.2 NMAC – N, 1/1/2025]

20.11.72.3 STATUTORY AUTHORITY: 20.11.72 NMAC is adopted pursuant to the authority provided in Title VI, Sections 74-2-4 and 74-2-5, NMSA 1978 ; Bern. Co. Ord. Ch. 30, Art. II, Sec. 32.
[20.11.72.3 NMAC – N, 1/1/2025]

20.11.72.4 DURATION: Permanent.
[20.11.72.4 NMAC – N, 1/1/2025]

20.11.72.5 EFFECTIVE DATE: January 1, 2025, except where a later date is cited at the end of a section.
[20.11.72.5 NMAC – N, 1/1/2025]

20.11.72.6 OBJECTIVE: To establish additional permitting requirements for new or modified stationary sources of air pollution that are located, or proposed to be located, in or within a one-mile radius of an overburdened area in order to prevent disproportionate health impacts or environmental effects from air emissions on the overburdened area, to protect all residents from certain hazardous air pollutants, and to encourage meaningful public participation in the permitting process.
[20.11.72.6 NMAC – N, 1/1/2025]

20.11.72.7 DEFINITIONS: In addition to the definitions in 20.11.72 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.72 NMAC shall govern.

A. "Best Available Control Technology" or **"BACT"** means the same in 20.11.72 NMAC as it is defined in Subsection M of 20.11.61.7 NMAC.

B. "Environmental Factors" shall include particulate matter 2.5 microns or less (annual average PM 2.5 levels in air), ozone (average of the annual top ten daily maximum 8-hour ozone concentrations in air), diesel particulate matter (diesel particulate matter level in air), annual toxic releases (in pounds), and traffic proximity and volume (count of vehicles (average annual daily traffic) at major roads within 500 meters, divided by the distance in meters).

C. "Health Indicators" shall include asthma prevalence among adults 18 years of age and older, asthma prevalence among children 17 years of age and younger, chronic obstructive pulmonary disease (COPD) prevalence among adults 18 years of age and older, cardiovascular disease prevalence among adults 18 years of age and older, age-adjusted cancer incidence per 100,000 population, persons with disabilities, and life expectancy.

D. "Overburdened Area" means the twenty percent of census block groups in Bernalillo County that experience the highest cumulative environmental and public health stressors (using the most recent version of the Environmental Protection Agency's Environmental Justice (EJ) Screen and New Mexico Department of Health's New Mexico Indicator Based Information System (NMIBIS) as on-line resources), considering at least the

following: environmental factors, health indicators, and social determinants of health indicators as defined in this regulation.

E. "Social Determinants of Health Indicators" shall include percent of population age 25 years and older who do not have a high school diploma or equivalent, percent of households with a total household income below two hundred percent of the federal poverty level, percent of population over the age of five that speak a language other than English at home and who speak English less than "very well", and percent of population that is non-white, and also those who list their ethnicity as Hispanic or Latino.

[20.11.72.7 NMAC – N, 1/1/2025]

20.11.72.8 OVERBURDENED AREA REQUIREMENTS:

A. The City of Albuquerque Environmental Health Department (department) shall, in consultation with the public and using the latest and best available science and data on health and the environment, develop a GIS map, along with map layers displaying environmental factors, health indicators, and social determinants of health indicators, representing overburdened areas in Bernalillo County.

B. The department shall publish and provide public notice of the overburdened areas map developed per section A of 20.11.72.8 NMAC by January 1, 2025 and, for purposes of 20.11.72 NMAC, the map shall go into effect on July 1, 2025. The department may make minor adjustments to correct errors and for other significant concerns based on public input per Subsections A & B of 20.11.72.9 NMAC in the six months before the overburdened area map goes into effect.

C. The department shall require every new or modified stationary source subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC, or 20.11.61 NMAC that is located, or proposed to be located, in or within a one-mile radius of an overburdened area, as indicated by the overburdened areas map in effect as of the permit application date, to apply BACT even if the new or modified stationary source is not a major stationary source.

D. The department shall require BACT for new or modified stationary sources throughout Bernalillo County that emit any one, or combination of, the following fifteen hazardous air pollutants (HAPs): acetaldehyde, acrolein, benzene, 1,3-butadiene, carbon tetrachloride, ethyl benzene, ethylene oxide, formaldehyde, hydrochloric acid, methyl bromide, methylene chloride, naphthalene, toluene, vinyl chloride, and xylenes.

E. The department shall, in consultation with the public and using the latest and best available science on health and the environment, update its overburdened areas map when a change in circumstances warrant or at a minimum of every five years using data from the following on-line sources: U.S. Census Bureau's American Community Survey (ACS) 5-Year Data, U.S. Environmental Protection Agency's Environmental Justice (EJ) Screen, and New Mexico Department of Health's New Mexico Indicator Based Information System (NMIBIS), and provide notice to potentially regulated entities at least six months before an updated overburdened areas map goes into effect.

[20.11.72.8 NMAC – N, 1/1/2025]

20.11.72.9 PUBLIC NOTICE BY DEPARTMENT – PUBLIC PARTICIPATION: In addition to the requirements for public notice by department – public participation set forth under 20.11.72.9 NMAC, the public notice by department – public participation requirements in 20.11.41.14 NMAC apply unless there is a conflict between requirements, in which case the more expansive notice requirements shall govern.

A. The department shall provide notice by regular mail or electronic mail to all individuals, neighborhood associations, and other organizations, and to those persons having stated a desire to receive notices of all applications filed pursuant to 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC as identified on a list maintained by the department, who reside in or represent persons residing in an overburdened area that is within a one-mile radius of a located, or proposed to be located, new or modified stationary source.

B. Public participation shall be encouraged and at least include opportunities for written, live, and on-line public comment and engagement.

[20.11.72.8 NMAC – N, 1/1/2025]

HISTORY OF 20.11.72 NMAC: [RESERVED]

EXHIBIT 3

RECEIVED
By Anita SdeArmijo at 8:59 am, July 18, 2023

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE - BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 72 ENVIRONMENTAL JUSTICE IN AIR QUALITY PERMITTING

20.11.72.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-1972.
[20.11.72.1 NMAC – N, XX/XX/2023]

20.11.72.2 SCOPE:

A. Applicability: A person who intends to construct a new stationary source or modify an existing stationary source that is subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC.

B. Exemptions: 20.11.72 NMAC does not apply to:

(1) technical permit revisions under 20.11.41.28(B) NMAC;
(2) administrative permit revisions under 20.11.41.28(A) NMAC;
(3) emergency permits applications under 20.11.41.24(A)NMAC;
(4) relocations for portable sources under 20.11.41(F)(2)(G) NMAC;
(5) any source exempt from 20.11.41 NMAC, 20.11.60 NMAC, 20.11.61 NMAC; and
(6) sources within Bernalillo county that are located on Indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction.

[20.11.72.2 NMAC – N, XX/XX/2023]

20.11.72.3 STATUTORY AUTHORITY: 20.11.72 NMAC is adopted pursuant to the authority provided in Title VI of the Civil Rights Act of 1964; NMSA 1978 74-2-4(J); NMSA 1978 74-2-5(B)(2); Bernalillo County Code, Ord. No. 94-5 § 4, 2-2-94; S.B. 8, Ch. 133 (Regular Session, Mar. 18, 2021)
[20.11.72.3 NMAC – N, XX/XX/2023]

20.11.72.4 DURATION: Permanent.
[20.11.72.4 NMAC – N, XX/XX/2023]

20.11.72.5 EFFECTIVE DATE: December 1, 2023, except where a later date is cited at the end of a section.
[20.11.72.5 NMAC – N, XX/XX/2023]

20.11.72.6 OBJECTIVE: To establish additional permitting requirements for certain new and modified stationary sources of air pollution that are located or proposed to be located, in whole or in part, in a vulnerable or overburdened community in order to minimize and mitigate any disproportionately high and adverse public health or air pollution on the community and ensure meaningful public participation in the permitting process.
[20.11.72.6 NMAC – N, XX/XX/2023]

20.11.72.7 DEFINITIONS: In addition to the definitions in 20.11.72 NMAC, the definitions in 20.11.1 NMAC and 20.11.41 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.72 NMAC shall govern.

A. "Adverse environmental and public health indicator" is an indicator related to the environment or public health identified in a census tract or block on the map referenced in 20.11.72.12.

B. "Census tract" means a small, relatively permanent statistical subdivision of a county or statistically equivalent entity, established by the Census Bureau and updated every 10 years, for the tabulation and presentation of data from the decennial census and other censuses and surveys.

C. "Census block" is an area defined by the Census Bureau that usually has in the range of 600-3,000 people living in it.

D. "Community" means a group of people who are brought together by something in common, such as cultural background, shared experience, and geographic location. One person can belong to many communities.

E. "Decennial census" means the count of each resident of the country, where they live on April 1, every 10 years ending in zero by the United States Census Bureau.

F. "Department" means the City of Albuquerque Environmental Health Department.

G. **"EJScreen"** means the United States Environmental Protection Agency's ("EPA") web-based Environmental Justice Screening and Mapping Tool, including any updates implemented by the EPA.

H. **"Environmental justice"** means the fair treatment and meaningful involvement of all people regardless of race, color, n (going with federal)

I. **"Environmental justice assessment report"** means the report required pursuant to 20.11.71.15 NMAC and which provides the core information necessary to assess the existing environmental and public health indicators in a vulnerable or overburdened community, how the construction of a new stationary source or modification or relocation of an existing stationary source will impact those indicators, and any measures the source proposes to address those impacts.

J. **"Equity"** means that all people have equal access to the same opportunities.

K. **"Fair treatment"** means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.

L. **"Inclusive community engagement"** means any accommodation that makes it possible for people with different abilities to fully participate, assuring that information is accessible and reaches populations in overburdened communities or vulnerable communities.

M. **"Meaningful involvement"** means

- People have an opportunity to participate in decisions about activities that may affect their environment and/or health;
- The public's contribution can influence the regulatory agency's decision;
- Community concerns will be considered in the decision-making process; and
- Decision makers will seek out and facilitate the involvement of those potentially affected.

N. **"Potential Applicant"** means a person who intends to construct a new stationary source or modify an existing stationary source that is subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC that is located or proposed to be located, in whole or in part, in a overburdened community or vulnerable community.

O. **"Public information meeting"** means a meeting held by the potential applicant pursuant to 20.11.72.16(e) NMAC and during which the applicant describes the source the applicant proposes to construct or modify, provides a detailed presentation on the applicant's environmental justice assessment report, and takes into consideration public comments.

P. "**Optimum control strategy"** means the maximum degree of emissions reduction which can include best management practices, technological advancements, and other innovative emission reduction strategies. Based on the maximum degree of reduction achievable.

Q. **"Overburdened community"** means a census tract in the City of Albuquerque or Bernalillo County identified on the maps published by the department pursuant to 20.11.72.11 NMAC, where the air quality experiences maximum environmental exposures and is most likely to cause the population and environment to be at higher risk for poor outcomes.

R. **"Tribe"** means a state or federally recognized Indian tribe, or pueblo located wholly or partially in the City of Albuquerque or Bernalillo County.

S. **"Vulnerable community"** means a census tract or block in the City of Albuquerque or Bernalillo County identified on the maps published by the department pursuant to 20.11.72.12 NMAC, where the air quality experiences maximum environmental exposures and is most likely to cause the population and environment to be at higher risk for poor outcomes.

[20.11.72.7 NMAC – N, XX/XX/2023]

20.11.72.8 **SAVINGS CLAUSE:** Any amendment to 20.11.72 NMAC that is filed with the state records center and archives shall not affect actions pending for violation of the state act, a city or county ordinance, a prior version of 20.11.72 NMAC, another board regulation or a permit issued by the Department. Prosecution for a violation under prior regulation wording shall be governed and prosecuted by the statute, ordinance or regulation in effect at the time the violation was committed.

[20.11.72.8 NMAC – N, XX/XX/2023]

20.11.72.9 **SEVERABILITY:** If for any reason any section, paragraph, sentence, clause, wording or application of 20.11.72 NMAC or any standard incorporated herein is held to be unconstitutional or otherwise invalid by any court or the EPA, the remainder of 20.11.72 NMAC, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

[20.11.72.9 NMAC – N, XX/XX/2023]

20.11.72.10 DOCUMENTS: Documents incorporated and cited in 20.11.72 NMAC may be viewed at the Department, One Civic Plaza NW, Albuquerque, NM 87102. Information on internet access to these documents may be obtained by contacting the Department at (505) 768-1972.
[20.11.72.10 NMAC – N, XX/XX/2023]

20.11.72.11 INCLUSIVE COMMUNITY ENGAGEMENT REQUIREMENTS:

A. For all inclusive community engagement imposed on the applicant, the following shall apply:

(1) Send via regular mail or e-mail an invitation to all tribes for formal tribal consultation. A tribe may request an extension of any deadline herein if it needs additional time to be able to sufficiently participate in the process. The Department, upon a determination of good cause, may extend any deadline herein for purposes of allowing a tribe additional time to participate; provided however, any extension of a deadline shall not be for more than thirty (30) calendar days.

(2) Inclusive community engagement shall be made available in Spanish and Vietnamese, and any other language upon request or as determined by the Department.

(3) Inclusive community engagement shall be made accessible to those with disabilities.

(4) Inclusive community engagement shall be made accessible to any other persons upon request or as determined by the Department.

B. A potential applicant subject to this rule may request from the Department reasonable assistance to access the process due to a limited ability to speak, write, or understand English, or a disability. Assistance is not reasonable if it fundamentally alters the nature of the program, service, or activity; requires waiver of essential program or licensure requirements; violates accreditation requirements; or poses an undue fiscal or administrative burden on the Department. The Department will take reasonable measures to provide such individuals with access to inclusive community engagement to at no cost to a requesting individual when the request is made to the department at least seventy-two (72) hours in advance of the public information meeting. The Department will consider requests made within seventy-two (72) hours on a case-by case basis. Potential applicants shall fully cooperate to assist and allow the Department to provide reasonable assistance for access to inclusive community engagement. The Department encourages potential applicants to anticipate requests for reasonable assistance for access to inclusive community engagement and for potential applicants to make proper arrangements in advance of the public information meeting.

C. Public participation shall be available to all persons regardless race, color, national origin, sex, age, religion, income, education level, disability, or prior exercise of rights or opposition of actions under federal non-discrimination laws.

D. Informal negotiation between the parties and the potential applicant should be encouraged as the first option in resolving differences.

E. The parties may consider establishing a Good Neighbor Agreement that is to be determined at the time of any negotiation to resolve differences.

F. Nothing herein shall prohibit or limit the Department or potential applicant from conducting additional inclusive community engagement.
[20.11.72.11 NMAC – N, XX/XX/2023]

20.11.72.12 MAPPING OF OVERBURDENED COMMUNITIES AND VULNERABLE COMMUNITIES BY THE DEPARTMENT:

A. Within 60 calendar days of implementation of this Regulation, the Department shall publish on its website a map of overburdened communities and vulnerable communities to go into effect on July 1, 2024.

B. The map shall include indicators for geographic, socioeconomic, demographic, environmental and public health. Indicators shall have a demonstrable nexus with air pollution but shall not be considered standards required to identify quantities and duration of specified air contaminants that constitute air pollution. The Department shall attribute a value to each indicator and may attribute a weight to each indicator. For each indicator, the Department shall provide in a publicly accessible manner the justification, literature, data source(s), methodology, and additional resources supporting inclusion of the indicator on the map. Information regarding the indicators used by the Department shall be based on the latest scientific data. Localized data may be used when it is peer reviewed, and consistent with accepted scientific practices.

C. Recognized neighborhood associations may submit to the Department a description of the community, including demographics, history, background, public notice avenues, and an assessment of how such

information should inform a potential applicant's approach to enhanced public participation for the Department to include as information with the map.

E. Within two years after the U.S. Census Bureau releases the results of each decennial census, the Department shall publish on its website an updated map of overburdened communities and vulnerable communities, to go into effect 90 calendar days after it is published. The updated map shall include updated census tracts or blocks reflecting the most recent decennial census.

F. Within 30 calendar days of publishing on its website a map or updated map of overburdened communities and vulnerable communities pursuant to Subsection A or Subsection B of 20.11.72.11 NMAC, the Department shall publish a notice of availability in the newspaper with the largest general circulation in Bernalillo County and provide a copy of the notice by U.S. Certified mail to all existing sources permitted under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC.

[20.11.72.12 NMAC – N, XX/XX/2023]

20.11.72.13 PRE-APPLICATION ENVIRONMENTAL JUSTICE CONSULTATION WITH THE DEPARTMENT:

After the initial map of overburdened communities and vulnerable communities goes into effect pursuant to 20.11.72.12 NMAC, a potential applicant shall contact the Department in writing and request an environmental justice consultation to discuss whether the potential applicant plans to locate the source or may potentially locate the source, in whole or in part, in an overburdened community or vulnerable community and what, if any, additional permitting requirements apply pursuant to 20.11.72 NMAC before submitting an application to the Department. The potential applicant may request the environmental justice consultation be combined with the pre-application meeting required by Subsection A of 20.11.41.14 NMAC if a pre-application meeting is held, and the Department may agree. At the time the applicant submits a request for an environmental justice consultation, the potential applicant shall also request the initial screening information from the Department pursuant to 20.11.72.14. Upon receipt of a request for an environmental justice consultation, the Department shall schedule the environmental justice consultation to occur within thirty (30) calendar days after the request is received. The potential applicant is required to review the initial screening information provided by the Department and to attend the environmental consultation prior to submitting its application to construct a new stationary source or modify an existing stationary source that is subject to permitting pursuant to 20.11.41 NMAC, 20.11.60 NMAC, or 20.11.61 NMAC. The Department shall not waive the pre-application environmental justice consultation requirement.

[20.11.72.13 NMAC – N, XX/XX/2023]

20.11.72.14 PROVISION OF INITIAL SCREENING INFORMATION BY THE DEPARTMENT:

A. Before conducting the environmental justice consultation required by 20.11.72.13 NMAC, a potential applicant shall request from the Department the initial screening information described in 20.11.72.14(B) NMAC, or gather the screening information from the Department website. The Department shall provide the initial screening information within fifteen (15) calendar days after receiving the request.

B. Initial screening information shall include:

(1) the list of environmental and public health indicators used in developing the latest map of vulnerable and overburdened communities published by the department pursuant to 20.11.72.11 NMAC;

(2) all environmental and public health indicator values for the vulnerable or overburdened community in which the source is located or proposed to be located;

(3) all environmental and public health indicator values for any contiguous vulnerable or overburdened community located, in whole or in part, within a one-half mile radius around the boundaries of the property the source is located or proposed to be located; and

(4) which adverse environmental and public health indicators are present in the overburdened community or vulnerable community in which the source is located or proposed to be located and any contiguous overburdened community or vulnerable community located, in whole or in part, within a one-half mile radius around the boundaries of the property on which the source is located or proposed to be located.

C. The screening information will be available on the Department's website to provide public access.

[20.11.72.14 NMAC – N, XX/XX/2023]

20.11.72.15 ENVIRONMENTAL JUSTICE ASSESSMENT REPORT BY THE APPLICANT:

A. Before proceeding with the enhanced public participation process required by 20.11.72.16 NMAC, a potential applicant shall conduct an environmental justice assessment and document the findings in an environmental justice assessment report. The purpose of the report is for the applicant to document the nature of the

community it proposes to locate in, assess the source's impact on the community, and provide the community with information about the source to facilitate meaningful public outreach. The report shall avoid scientific language to the extent possible and, instead, should use plain language that an average person may easily understand. The potential applicant shall not be required to disclosed information protected from disclosure pursuant to the Air Quality Control Act, NMSA 1978, § 74-2-11, however, the environmental justice assessment shall include:

(1) An executive summary of the information contained in the report;

(2) the initial screening information obtained from the Department pursuant to 20.11.72.14 NMAC;

(3) Copies of all available EJScreen reports for:

(a) a one-half mile radius around the boundaries of the property the source is located or proposed to be located on for all sources subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC, or 20.11.61 NMAC;

(4) a description of the source and related facility, if any; the nature of the business; the process or the change for which the permit is being requested, including a preliminary estimate of the maximum quantities of each regulated air contaminant the source will emit if the permit is issued and the proposed construction or modification is completed; and, if the source is being modified, the net change in emissions.;

(5) a detailed description of the source's purpose and current and proposed operations, including all equipment and processes to be used and anticipated construction schedule;

(6) a Compliance History Form to include a detailed compliance history for the source, including any notices of violation received from, enforcement actions taken by, or settlements reached with federal, state or local regulatory authorities in the past ten years, including the compliance history form as of the date of a potential applicant's request pursuant to 20.11.72.13 NMAC;

(7) an assessment of the source's impact on all adverse environmental and public heath indicators on the list provided by the Department or obtained from the Department's website;

(8) all actions and controls the potential applicant proposes to implement in order to minimize or mitigate the source's impact on adverse environmental and public health indicators in the overburdened or vulnerable community;

(9) a description of the potential applicant's approach to inclusive community engagement and to promote enhanced participation;

(10) a description of the overburdened community or vulnerable community in which the source is located or proposed to be located, including demographics, history, and background, as made aware to the applicant,

(11) the applicant's name and address, and the names and addresses of the owner or operator of the source or proposed source;

(12) the anticipated date the application will be submitted to the Department;

(13) the exact location of the source or proposed source;

(14) the anticipated maximum and normal operating schedules proposed for the source or facility;

(15) the current contact information of the potential applicant to which comments and inquiries may be directed, including the name of a responsible official, phone number, email address, and mailing address;

(16) the applicant's website, if available;

(17) a zoning certification for the proposed location including any special use permits or other authorizations, and

(18) the site plan, if applicable.

B. The applicant may submit the environmental assessment report to the Department for review and recommendations before proceeding with the enhanced public participation process required by 20.11.72.16 NMAC. The Department's review shall be limited to determining whether the environmental assessment report contains all of the information required by Subsection A of 20.11.72.14 NMAC. The Department may identify where information in the environmental justice assessment report appears lacking in sufficient detail. If the source is located or proposed to be located, in whole or in part, in an overburdened community or a vulnerable community, the application may also include an (Optimum Control Strategy) OCS analysis demonstrating the emission reduction strategy is based on the maximum degree of reduction achievable, and any quality of life factors agreed upon with the applicable community. If the permit is granted by the Department, the OCS, if included in the application, shall be incorporated as a permit condition which must be implemented and complied with by the permittee. The Department may provide resources, data and information to applicants to assist them with preparation of the

environmental justice assessment report. Nothing identified by the Department in this optional review of the environmental justice report shall be deemed mandatory nor binding and shall not be used as a basis for appeal of a permit application decision.
[20.11.72.15 NMAC – N, XX/XX/2023]

20.11.72.16 ENHANCED PUBLIC PARTICIPATION:

A. Before submitting an application to the Department, a potential applicant shall comply with the enhanced public participation requirements of Subsections B through H of 20.11.72.16 NMAC.

B. In addition to complying with any other public notice requirements, the applicant shall provide public notice:

(1) through publication in the newspaper with the largest general circulation in Bernalillo county;

(2) to the Department for publishing on the Department's website until the applicant notifies the Department that the enhanced public participation process is complete and distribution on the Department's listserv for persons interested in receiving information about permits;

(3) on the potential applicant's website, if available, which is to be maintained so published such notice until the enhanced public participation process is complete;

(4) by regular mail or e-mail to all owners, as listed in the records of the Bernalillo County Assessor, of property located, in whole or in part, within a one-half mile radius around the boundaries of the property on which the source is located or proposed to be located; and

(5) by regular mail or e-mail to the manager(s) of any federal lands managed by the National Park Service, U.S. Fish and Wildlife Service, or Bureau of Land Management, state parks managed by the New Mexico Environment, Minerals and Natural Resources Department, or city or county parks or open space areas managed by the Bernalillo County Parks and Recreation Department or the City of Albuquerque Parks and Recreation Department located within a one-half mile radius around the boundaries of the property the source is located or proposed to be located on.

C. The public notice specified in Subsection B of 20.11.72.16 NMAC shall include the following:

(1) a brief summary of the environmental justice assessment report prepared in accordance with 20.11.72.15 NMAC and instructions for how interested persons may obtain a copy of the full report;

(2) a statement that a public information meeting will be held if there is significant public interest and inviting submission of public interest for a period of 30 days. Public interest is considered significant if:

(a) five or more individuals, each of whom are residents of the overburdened community or vulnerable community where the source is located or proposed to be located, request a meeting; or

(b) a request for a meeting includes a petition signed by five or more individuals, each of whom are residents of the overburdened community or vulnerable community where the source is located or proposed to be located; or

(c) an elected official, including an elected representative of a Recognized Neighborhood Association or Recognized Coalitions, pursuant to ROA 14-8-2-1 who represents an area in the overburdened community or the vulnerable community where the source is located or proposed to be located requests a meeting;

(d) the potential applicant determines that the public interest is significant;

(e) if the director determines that public interest is significant.

(3) a statement inviting public comment for a period of 30 calendar days, identifying the end date, establishing the end of the comment period as the deadline for requesting a public information meeting, and providing instructions for requesting a meeting or submitting comments to the applicant; and

(4) contact information of the potential applicant and the Department for where to submit public interest and/or public comment.

D. In a circumstance where public notice is provided to a Recognized Neighborhood Association or Recognized Coalitions pursuant to ROA 14-8-2-1 and is returned as undeliverable, the potential applicant shall request contact information and re-send the notice to the updated address, if the Department provides one.

E. After giving notice pursuant to Subsections B and C of 20.11.72.16 NMAC, the potential applicant shall hold a public information meeting if there is significant public interest as defined in Paragraph (2) of Subsection C of 20.11.72.16 NMAC. The public information meeting shall be held in the overburdened community or vulnerable community in which the source is located or proposed to be located unless there is no suitable meeting space in the overburdened community or vulnerable community, in which circumstance the potential applicant may, subject to the Department's approval, hold the meeting in an alternate location within as close proximity as possible

to the overburdened community or vulnerable community, which may include a City-owned property. The meeting shall be made available in a live and video conference format, and in accordance with 20.11.72.11. The meeting shall be held prior to the end of the public comment period on a day and time that is mutually agreeable to all parties and the potential applicant, and an audio recording shall be provided, paid for by the applicant. The potential applicant shall schedule the meeting for a sufficient length of time based on public interest and dedicate enough time to allow description, presentation, and discussion regarding 20.11.72.16.E(1)-(4) NMAC. The potential applicant shall make all arrangements and pay all expenses associated with the meeting. At the public information meeting the potential applicant shall:

(1) describe the source the potential applicant proposes to construct or modify;

(2) provide a detailed presentation on the potential applicant's environmental justice assessment report;

(3) accept written and oral public comments, information, and questions; and

(4) respond to comments and questions with sufficient detail.

F. If a public information meeting is held, the potential applicant shall provide public notice of the meeting at least fifteen (15) calendar days before the meeting. The notice shall be provided in accordance with 20.11.72.11 NMAC and Subsection B of 20.11.72.16 NMAC and shall include:

(1) the date, start time, end time, and location of the public information meeting;

(2) the information required by 20.11.72.11 NMAC and Subsection B of 20.11.72.16 NMAC; and

(3) a statement extending the public comment period at least 15 calendar days beyond the date of the public information meeting.

G. If the potential applicant holds a public information meeting, the potential applicant shall provide written responses to all persons who submitted written comments, information, or questions during the public comment period or provided written comments, information or questions for the public information meeting, before submitting an application to the Department. The Department shall be copied on all such written responses by the potential applicant.

H. The applicant shall provide more than one method for public comment.

[20.11.72.16 NMAC – N, XX/XX/2023]

20.11.72.17 ENVIRONMENTAL JUSTICE ASSESSMENT REPORT UPDATE AND ADDENDUM

A. After the close of the public comment period, the potential applicant shall update its environmental justice assessment report to reflect responses and changes based on the enhanced public engagement process, including an addendum that shall summarize the enhanced public engagement process:

(1) public comments received;

(2) the applicant's responses to comments, information, and questions received as public comments or as part of the public information meeting;

(3) identify any changes the potential applicant made to the environmental justice assessment report following the enhanced public engagement process to address concerns

(4) identify points of agreement and state why a resolution between the parties and potential applicant was not reached during informal negotiations, if applicable; and

(5) proposed permit terms and conditions to minimize or mitigate identified air quality impacts;

B. After the close of the public comment period, the potential applicant shall update its environmental justice assessment report to include documentary proof that the applicant has complied with all public notice requirements in Subsection B of 20.11.72.16 NMAC and also Subsection F of 20.11.72.16 NMAC if a public information meeting was held. Such proof shall include:

(1) for public notice published in the newspaper, an affidavit of publication with a copy of the notice attached;

(2) for public notice published on the department's website, a screenshot of the notice on the department's website or a printout of the web page the notice is displayed on;

(3) for public notice mailed or emailed to nearby property owners as listed in the records of the Bernalillo County Assessor or federal, state or local public land managers, the date(s) on which notice was mailed or emailed, a copy of the notice provided, a list of those addresses and email addresses to which the notice was mailed or emailed, and copies of the return receipt(s) for notice sent by certified mail; and

(4) proof of financial responsibility and pollution liability insurance.

[20.11.72.17 NMAC – N, XX/XX/2023]

20.11.72.18 APPLICATION FOR PERMIT:

A. In addition to all information required pursuant to 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC, as applicable, the applicant shall include the following information in the permit application:

(1) an audio recording of the public information meeting, if held;

(2) a copy of all written comments, information, and/or questions received during the public comment period or provided for or during the public information meeting, and the applicant's written responses to the written comments, information, and/or questions received during the public information meeting;

(3) the final environmental justice assessment report that as described in 20.11.72.17 NMAC;

B. The application may also include an (Optimum Control Strategy) OCS demonstrating the emission reduction strategy is based on the maximum degree of reduction achievable. If the permit is granted by the Department, the OCS, if included in the application, shall be incorporated as a permit condition which must be implemented and complied with by the permittee.

C. To be deemed administratively complete, the application must meet the requirements of Subsections A and B of 20.11.72.16 NMAC in addition to all requirements of 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC, as applicable.

[20.11.72.18 NMAC – N, XX/XX/2023]

20.11.72.19 DEPARTMENT REVIEW AND DECISION:

A. The Department shall consider the environmental justice assessment report, including the environmental justice assessment report update and addendum as provided 20.11.72.17 NMAC when making a final decision regarding the permit application. In addition to any reasons specified in 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC, as applicable, the Department shall deny the application if it determines that the issuance of a permit or permit modification would be discriminatory, either intentionally or in effect, under federal civil rights law, including Title VI of the Civil Rights Act of 1964.

B. If the Department issues a permit or permit modification, pursuant to all requirements under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC, the Department shall issue the permit or permit modification with permit terms and conditions that comply with 20.11.72.19(A).

[20.11.72.19 NMAC – N, XX/XX/2023]

20.11.72.20 APPEAL

A. Appeals under 20.11.81 NMAC shall be based on the permitting action and the administrative record for the same, which may include information as identified herein.

B. Persons alleging issuance of a permit or permit modification would be discriminatory, either intentionally or in effect, under federal civil rights law, including Title VI of the Civil Rights Act of 1964, shall file a complaint with the City nondiscrimination coordinator. Such allegations shall not be actionable claims under 20.11.81 NMAC.

[20.11.72.20 NMAC – N, XX/XX/2023]

HISTORY OF 20.11.72 NMAC: [RESERVED]

AQP EXHIBIT A

EXHIBIT 4

DRAFT/ DELIBERATIVE

INFORMAL RESOLUTION AGREEMENT
between the

CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

and the

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
EPA Complaint No. 13R-14-R6

I. PURPOSE AND JURISDICTION

A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), other federal nondiscrimination laws, and the United States Environmental Protection Agency's (EPA) implementing regulation at 40 C.F.R. Parts 5 and Part 7 prohibit discrimination on the basis of race, color, national origin, disability, sex, age, and retaliation in the programs, services, and activities of applicants for or recipients of federal financial assistance.[1]

B. Federal civil rights laws prohibit recipients from intentionally discriminating based on race, color, national origin, disability, sex, and age. In addition, EPA's implementing nondiscrimination regulation prohibits discriminatory impacts or effects against individuals, through policies, criteria, or methods of administering programs that are neutral on their face but have the effect of discriminating.

C. The City of Albuquerque's Environmental Health Department (EHD) and the Albuquerque-Bernalillo County Air Quality Control Board (AQCB) receive federal financial assistance from EPA and, therefore, must ensure non-discrimination in programs and activities pursuant to the provisions of Title VI, the other federal non-discrimination laws, and EPA's implementing regulation.

Commented [A1]: Noting Director Martinez's email to Lilian Dorka on April 8, 2022, indicating the EHD position that the Air Board is not a recipient of federal funds directly or indirectly

D. On July 19, 2016, EPA's External Civil Rights Compliance Office (ECRCO) accepted Complaint No. 13R-14-R6, brought under Title VI and 40 C.F.R. Part 7, that alleged discrimination based on race and national origin in violation of Title VI.

E. In response to the complaint, EPA accepted for investigation the following issues:

[1] Title VI of the Civil Rights Act of 1964, 42 United States Code §§ 2000d to 2000d-7 (Title VI); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 *et seq.*; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 *et seq.*; Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251 (1972)); 40 C.F.R. Parts 5 and 7.

1. Whether the Albuquerque-Bernalillo County Air Quality Control Board's and/or the Albuquerque Air Quality Division's[2] permitting process discriminates against minority residents on the basis of race and/or national origin, in violation of Title VI of the Civil Rights Act and EPA's implementing regulations; and

2. Whether the Albuquerque-Bernalillo County Air Quality Control Board and/or the Albuquerque Air Quality Division discriminated against minority residents on the basis of race and/or national origin in violation of Title VI of the Civil Rights Act and EPA's implementing regulations by refusing to conduct a hearing on an ordinance to consider cumulative impacts in the permitting process.

F. During the course of EPA's investigation, EHD and AQCB agreed to engage in the voluntary Informal Resolution Agreement (Agreement) process in order to resolve the complaint. This resulting Agreement is entered into voluntarily by EHD, AQCB and EPA.

G. This Agreement is entered into pursuant to the authority granted to EPA under the federal non-discrimination laws, including Title VI, and 40 C.F.R. Parts 5 and 7, and resolves complaint No. 13R-14-R6.

H. This Agreement does not constitute an admission by EHD and/or AQCB of a violation of, or a finding of compliance or noncompliance by EPA with Title VI or 40 C.F.R. Parts 5 and 7.

I. EHD and AQCB are committed to carrying out their responsibilities in a nondiscriminatory manner, in accordance with the requirements of Title VI, 40 C.F.R. Parts 5 and Part 7, and the other federal non-discrimination laws enforced by EPA. The activities detailed in Section III of this Agreement, which EHD and AQCB have voluntarily agreed to undertake and implement, are in furtherance of this ongoing commitment.

II. BACKGROUND

[Placeholder for additional background information relevant to resolution of complaint and commitments, including EHD/AQCB.]

A. The complaint alleges that communities of color and low-income communities in Albuquerque and Bernalillo County, New Mexico, have suffered disproportionate impacts of air pollution since the Clean Air Act, 42 U.S.C., §§ 7401 *et seq.* was enacted in 1970. As a result, these communities suffer a higher risk and rate of disease and death than non-minority communities. The complaint alleges that the air permitting process as implemented by EHD fails to account for the cumulative

[2] Albuquerque's Air Quality Division identified in the complaint acceptance letter is a sub-component of the Albuquerque Environmental Health Department.

impacts of multiple permitted facilities within specific neighborhoods in and around Albuquerque - San Jose, Mountain View and Greater Gardner - and that, as a result, residents of those neighborhoods are disproportionately burdened with facilities emitting air pollutants. The complaint further alleges that San Jose, Mountain View and Greater Gardner are predominately Latino and that, consequently, Latino residents bear a disproportionate burden from manufacturing and other commerce operating within the City and County. The complaint further alleges that the Board had discriminated by failing to set a regulation proposed by the complainants for hearing.

B. The San Jose Neighborhood in ZIP code 87105 consists of block groups 350010013004 and 350010013001. According to the American Community Survey 2019 5-year summary estimates for these block groups, the total population is 2,577, which includes 2,435 persons of color, or 94%. The total Hispanic population is 2,256, or 88%. In these three block groups, 29% of the population ages 5 and older speaks English "less than very well;" compared to the State of New Mexico, where persons of color are 63%, the Hispanic population is 50.1%, and those ages 5 and older who speak English "less than very well" is 8.6%. Compared to the State of New Mexico as whole, these three census block groups rank in the 94th percentile in Diesel Particulate Matter, 99th percentile in Air Toxics Cancer Risk, and 98th percentile in Respiratory Hazard Index according to EPA's 2017 Air Toxics Data Update, which is the Agency's ongoing, comprehensive evaluation of air toxics in the United States.[3]

C. The Mountain View Neighborhood, located in Albuquerque's South Valley in ZIP code 87105, consists of block groups 350010040012, 350010040013, and 350010040011. According to the American Community Survey 2019 5-year summary estimates for these block groups, the total population is 5,112, which includes 4,067 persons of color, or 80%. The total Hispanic population is 4,014, or 79%. In these three block groups, 22% of the population ages 5 and older speaks English "less than very well." Compared to the State of New Mexico as a whole, these three census block groups rank in the 68th percentile in Diesel Particulate Matter, 78th percentile in Air Toxics Cancer Risk, and 87th percentile in Respiratory Hazard Index according to EPA's 2017 Air Toxics Data Update.

D. The Greater Gardner neighborhood of Albuquerque in ZIP code 87107 is comprised of four census block groups, 350010032011,[4] 350010032024, 350010032023, and 350010032021. According to the American Community Survey 5-year summary estimates for these block groups, the total population is 4,828, which includes 4,163 persons of color, or 79%. The total Hispanic population is 3,480, or 72%. In these four block groups, 8% of the population ages 5 and older speaks English "less than very well." Compared to the State of

3 https://www.epa.gov/haps/air-toxics-data-update.

[4] Census block group 350010032011 includes a portion that is outside the Great Gardner boundary, extending west to the MacArthur Elementary School, which is less than 0.2 sq. miles and doesn't' significantly alter the summary statistics in a meaningful way.

New Mexico as a whole, these four census block groups rank in the 97th percentile in Diesel Particulate Matter, 99th percentile in Air Toxics Cancer Risk, and 99th percentile in Respiratory Hazard Index according to EPA's 2017 Air Toxics Data Update.

E. In the 87105 Zip code, where the Mountain View and San Jose neighborhoods are located, as of August 16, 2022, there are 296 total facilities (Source: EPA's Enforcement and Compliance History Online), and the date the source was consulted for this data., of which 105 have an ICIS-Air ID[5]. Of the 105 with an ICIS-Air ID, 2 are major source facilities and 103 are minor source facilities. All 105 facilities are in areas that are at or above the 80th percentile for the nation for at least one of the EJ indexes[6], and 66 of those facilities are located in an area where 10 or more EJ indexes are at or above the 80th percentile for the nation.

F. In the 87107 Zip code, where the Greater Gardner neighborhood is located, as of August 16, 2022, there are a total of 388 facilities (Source: EPA's Enforcement and Compliance History Online), and the date the source was consulted for this data., of which 161 have an ICIS-Air ID. Of the 161 with an ICIS-Air ID, 1 of those is a major air source and the remaining 160 are minor air sources. All of the 161 facilities are in areas that are at or above the 80th percentile for the nation for at least one of the EJ indexes, and 78 of those facilities are located in an area where 10 or more EJ indexes are at or above the 80th percentile for the nation.

G. *Cumulative impacts* refers to the total burden – positive, neutral, or negative – from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time. Cumulative impacts include contemporary exposures in various environments where individuals spend time and past exposures that have lingering effects. Total burden encompasses direct health effects and indirect effects to people through impacts on resources and the environment that affect human health and well-being. Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of the community, *i.e.*, the ability to withstand or recover from additional

[5] This is a unique ID assigned for each record/permit/site/facility within ICIS-Air. These identifiers are for used tracking purposes in the individual data systems. https://echo.epa.gov/help/facility-search/all-data-search-results-help#ejabove80. ICIS-AIR contains compliance and permit data for stationary sources of air pollution (such as electric power plants, steel mills, factories, and universities) regulated by EPA, state, and local air pollution agencies. https://www.epa.gov/enviro/icis-air-overview#:~:text=ICIS%2DAIR%20contains%20compliance%20and,and%20local%20air%20pollution%20agencies.

[6] EJScreen provides screening level indicators, not a determination of the existence or absence of EJ concerns, nor does it designate an area as an "EJ community" or "EJ facility." *See* https://www.epa.gov/ejscreen.

exposures under consideration.[7] Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of the community, *i.e.*, the ability to withstand or recover from additional exposures under consideration.[8] Cumulative impacts are considered when evaluating whether there is an adverse impact from a recipient's policy or practice; *i.e.*, whether any adverse impact caused by a permitting decision – and borne disproportionately by persons on the basis of race, color, national origin, or LEP status – may be even greater considering cumulative impacts from other chemical and non-chemical stressors.

G. AQCB is facilitating a process, including the formation of a "Cumulative Impacts Committee" ("Committee"), for the purpose of developing a potential cumulative impacts regulation ("Regulation") that may be presented to the AQCB for consideration. The process includes a Committee that has representation from the AQCB, the EHD, industry and regulated entities, scientific and academic representatives, environmental justice experts, community stakeholders, including community members from the San Jose, Mountain View, and Greater Gardner neighborhoods (Communities).

H. The Committee is reviewing existing cumulative impacts regulations from other states and municipalities, and regulations and legislation from the State of New Mexico. The Committee is expected to develop a Regulation to be presented to the AQCB for consideration and a vote in **[DATE]** 2022. The Regulation is expected to include consideration of air quality permitting and how a single air quality permit should be reviewed in the context of how it affects a community that may already be overburdened by pollution from multiple or cumulative sources.

III. SPECIFIC EHD AND AQCB COMMITMENTS

AQCB agrees to the following commitment:

A. Cumulative Impacts Regulation: If a cumulative impacts regulation is presented, AQCB will follow established law and procedure set forth in the New Mexico Air Quality Control Act, NMSA 1978, Sections 74-2-4 and 74-2-5, AQCB's Rulemaking Procedures in Section 20.11.82 of the New Mexico Administrative Code (NMAC), Revised Ordinances of Albuquerque §§ 9-5-1-5 and -6; and the Bernalillo County Code of Ordinances, Art. II §§ 30-34 and -35 to determine whether and how to receive public comment and conduct a hearing on the proposed cumulative impacts regulation. The AQCB will present to the Committee for review and consideration the relevant statutes and rules, as well as

[7] Cumulative Impacts Recommendation for ORD Research EXTERNAL REVIEW DRAFT, January 2022, p. 6.
[8] Cumulative Impacts Recommendation for ORD Research EXTERNAL REVIEW DRAFT, January 2022, p. 6.

the AQCB's Rulemaking Process Guidebook, to facilitate a general understanding of the rulemaking process.

EHD agrees to the following commitments:

B. Local Air Quality Monitoring: After consultation and engagement with Communities, EHD will develop and implement a local air quality monitoring program (Program) plan that includes monitoring for hot spots at the neighborhood level and includes a response and enforcement plan and commitments based on monitoring data.

1. Within 30 days of executing this Agreement, EHD will meet with Community members to determine how best to include them in developing a Program plan, including establishing a schedule, methods of engagement and the manner for receiving Community members' input, as well as identifying and discussing subject areas for inclusion in the Program plan, including:

   a. Types of pollutants to be monitored (*e.g.*, VOC, HAP, PM10, PM 2.5);

   b. Types of monitoring technologies (*e.g.*, PurpleAir monitors);

   b. Locations of monitors (*e.g.*, fence line monitoring around polluting facilities including asphalt refineries, cement manufacturers, cement processing, recycled asphalt processing, aggregates recycling facilities, and railroad offloading stations);

   c. Availability and opportunities for grant assistance from state and/or federal governments, or other sources, for improved monitoring;

   d. How EHD will provide and make available monitoring data to the public, and

   e. How EHD will respond to any elevated levels or leaks brought to light by monitoring data in a timely and effective manner.

   f. How EHD will utilize the monitoring data based on the requirements of the cumulative impacts regulation. (*See* Section III.A.)

2. Within 180 days of executing this Agreement, after consultation and engagement with Community members, EHD will finalize the Program plan and will provide a copy to EPA for its review. EPA will provide EHD with any feedback or technical assistance regarding the Program plan

within 30 days of receiving a copy from EHD. Within 30 days of receiving EPA feedback or technical assistance, EHD will implement the Program plan, with an effective date, and share it with the public, in a manner accessible to individuals with limited English proficiency and with disabilities, including by prominently posting it on EHD's website.

3. Within 60 days of implementing the Program plan, EHD will ensure that all staff who are involved in the Program plan are trained on the plan.

C. Protocol for Deployment of Infrared Cameras: EHD has thermal imaging/infrared camera(s) that are capable of visualizing volatile organic compound emissions.

1. Within 120 days of executing this Agreement, EHD will develop a Protocol, through consultation and engagement with Communities, for deploying infrared cameras to respond to complaints from the public about a particular stationary source or about air quality in a particular area.

2. Within 30 days of executing this Agreement, EHD will meet with Communities to determine how best to include them in developing the Protocol, including establishing a schedule, methods of engagement and the manner for receiving Community input, as well as identifying and discussing subject areas for inclusion in the Protocol, such as:

    1. The categories of stationary sources and types of equipment that are appropriate to evaluate with the infrared camera;

    2. The types of environmental complaints that may warrant deployment of the infrared camera and the timing of the deployment in response to complaints;

    3. The technical and logistical limitations of using the infrared camera to evaluate public complaints and equipment compliance;

    4. EHD's process for follow-up with sources where infrared images of volatile organic compound emissions are observed;

    5. EHD's process for providing the public with information when the infrared camera is deployed to evaluate public complaints.

3. Within 30 days of developing the Protocol, EHD will provide a copy to EPA for its review. EPA will provide EHD with any feedback or technical assistance regarding the Protocol within 30 days of receiving a copy from EHD. Within 30 days of receiving EPA feedback or technical assistance, EHD will implement the Protocol with and effective date, and share it with the public, in a manner accessible to individuals with limited English proficiency and with disabilities, including by prominently posting it on EHD's website.

4. Within 60 days of implementing the Protocol, EHD will ensure that all appropriate staff who may are adequately trained on the use of the infrared camera and the interpretation of the results of its use.

AQCB and EHD agree to the following commitments:

D. Screening Analysis in Air Quality Permitting Decisions: EHD shall adopt a routine process of screening for EJ and civil rights concerns as part of its air permitting process,[9] to indicate

1. whether a permitting decision has the potential to cause or contribute to significant public health or environmental impacts;
2. whether the community may be particularly vulnerable to any adverse effects of the proposed permitting action;
3. whether the community is already disproportionately bearing public health or environmental burdens;
4. whether there are residents of the affected community who could be disproportionately subjected to adverse health, environmental and/or quality of life impacts on the basis of race, color, or national origin (including LEP status);[10] and
5. to provide valuable information for the development of plans to meaningfully involve the affected community.

E. Civil Rights Analysis in Air Quality Permitting Decisions/Actions: If the screening analysis in III.D. above indicates that a proposed air permitting action has EJ concerns and possible issues of civil rights compliance, *i.e.*, questions about whether EHD's permitting decision may violate Title VI and EPA implementing regulations by disproportionately subjecting persons to adverse health, environmental and/or quality of life impacts on the basis of race, color, national origin (including LEP status), EHD will undertake a disparate impact analysis to evaluate whether permitting decisions/actions have an unjustified

[9] Geographic Information System (GIS) tools such as EPA's EJScreen or state EJ mapping tools can be used as a starting point to assess whether the permitting action raises environmental justice or civil rights concerns, using indicators of community characteristics and existing conditions in the potentially affected community. Considered together with readily available information on community concerns, these tools can help the permitting program quickly assess and document the extent of community vulnerability and pollution burden and the associated potential for disproportionate impacts.

[10] Other information relevant to screening for disproportionate impacts includes consideration of other permitted facilities in the area, including whether these facilities are major or minor sources of pollution and contribute to community risk; applicant's compliance record; demographic data; environmental data that reflects pollutant measurements; health data; data on unhoused populations and healthcare access; and local knowledge and information from past community engagements.

disparate impact prohibited by Title VI,[11] including an analysis of whether there is:

1. **Adversity** – an adverse impact of the air permitting decision/action, considering

   a. potential impacts of a proposed permit on those living, working, attending school, and engaging other activities in proximity to the facility, considering potential pathways of exposure to the pollutants of concern and non-health harms (*e.g.*, economic, traffic, odors, noise, vermin), as well as

   b. the cumulative impact of the proposed permit considering environmental exposure to chemical and non-chemical stressors (*see* Section II.G. and H. above) in the impacted community, including from all new and existing sources, regulated or unregulated.[12]

   Disproportionality – the adverse impacts of the air permitting action fall disproportionately on a race, color, or national origin (including LEP status) group;) evaluating disparities by comparing whether the racial composition of the affected population is significantly different than the racial or ethnic composition of the population that is not adversely affected.[13]

2. **Causation** – there is a causal link between the air permitting action and the adverse impacts.

3. **Justification** – If responses to Sections III.E.1-3 are affirmative, the substantial legitimate justification for the air permitting action.[14]

[11] Methodologies for making these determinations may be qualitative and quantitative, though the question of disproportionality (Section III.a.2.) will generally involve quantitative analysis.
[12] EPA considers whether any adverse impact caused by the permitting decision – and borne disproportionately by persons on the basis of race, color, or national origin (including LEP status) – may be even greater considering cumulative impacts from other chemical and non-chemical stressors.
[13] The comparator population will vary depending on specific facts and circumstances of the permitting action.
[14] Determining a substantial legitimate justification is generally a fact-specific inquiry. EPA will generally consider whether the recipient can show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's) institutional mission." EPA will evaluate whether the policy was "necessary" by requiring that the justification bear a "manifest demonstrable relationship" to the challenged policy. As part of its assessment, EPA will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether a permitted facility, for example, will provide direct, economic benefits to that community. ECRCO's Toolkit Chapter I and FAQs at: https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

4. **Less discriminatory alternative** – If there is a substantial legitimate justification (*see* Section III.E.3. above) for the air permitting action, consider the alternatives that would achieve the same legitimate objective but with less of a discriminatory impact (*e.g.*, mitigation measures that can be voluntarily included and incorporated as enforceable air permit terms or by means of another enforceable mechanism - even if not required by local, state, or federal environmental laws - that would address the disparate impacts[15]).

F. Notice of Non-Discrimination

1. EHD and AQCB will post a notice of non-discrimination (Notice) on the City of Albuquerque's website homepage, in all EHD and AQCB offices and facilities, and general publications that are distributed to the public (*e.g.*, public outreach materials, such as brochures, notices, fact sheets or other information on rights and services; applications or forms to participate in or to access EHD and AQCB programs and activities).

2. EHD and AQCB will ensure that the Notice is accessible to individuals with limited-English proficiency (LEP) and individuals with disabilities, including ensuring that the Notice posted on the City of Albuquerque's website homepage is accessible to persons with impaired vision and/or impaired hearing. The Notice will contain, at a minimum, the following text:

   a. EHD and AQCB do not discriminate on the basis of race, color, national origin, disability, age, or sex in administration of its programs or activities, and EHD and AQCB do not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.

   b. [Insert name and title of non-discrimination coordinator] is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7 (Non-Discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title IX of the Education

[15] If there are no mitigation measures that can address the unjustified disparate impacts, denial of the permit may be the only means of avoiding a Title VI violation. However, this will be a fact-specific determination.

Amendments of 1972; and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination laws).

c. If you have any questions about this notice or any of EHD's and AQCB's non-discrimination programs, policies, or procedures, you may contact:

(Name)
(Position)
(Organization/Department)
(Phone Number)
(Email)

If you believe that you have been discriminated against with respect to an [insert EHD/AQCB] program or activity, you may contact the [insert title of non-discrimination coordinator] identified above or visit our website at [insert Recipient website address] to learn how and where to file a complaint of discrimination.

d. Within 30 days after the effective date of this Agreement, EHD and AQCB will submit to the EPA for review a draft copy of their Notice. ECRCO will review the draft Notice and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD will prominently publish in print and on the City of Albuquerque's website the final Notice.

G. Grievance Procedures

1. EHD and AQCB will post grievance procedures to promptly and fairly process resolve discrimination complaints filed under federal non-discrimination statutes and the EPA's implementing regulations at 40 C.F.R. Parts 5 and 7 on the City of Albuquerque's website homepage, in all EHD's and AQCB's offices and facilities, and in their general publications as appropriate that are distributed to the public. EHD and AQCB will ensure that the grievance procedures are accessible to individuals with LEP and individuals with disabilities, including ensuring that the grievance procedures, as posted on the websites, are accessible to individuals who have impaired hearing and/or vision.

2. The grievance procedures will:

a. Clearly identify the non-discrimination coordinator, including name and contact information;

b. Explain the role of the non-discrimination coordinator relative to the coordination and oversight of the grievance procedures;

c. State who may file a complaint under the grievance procedures and describe the appropriate bases for filing a complaint;

d. Describe which processes are available, and the options for complainants in pursuing either;

e. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;

f. Contain assurances that intimidation and retaliation are prohibited and that claims of intimidation and retaliation will be handled promptly and fairly pursuant to the grievance procedures in the same manner as other claims of discrimination;

g. Assure the prompt and fair resolution of complaints which allege violation of federal non-discrimination laws;

h. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.

i. Be reviewed on an annual basis (for both in-print and online materials), and revised as necessary, to ensure prompt and fair resolution of discrimination complaints.

3. Within 120 days after the effective date of this Agreement, EHD and AQCB will submit to the EPA for review a draft copy of its grievance procedures. ECRCO will review the draft grievance procedures and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD and AQCB will prominently publish in print and on their website the final grievance procedures.

4. EHD and AQCB will review and revise as necessary the grievance procedures on an annual basis to ensure prompt and fair resolution of discrimination complaints.

H. Designation of Non-Discrimination Coordinator

1. EHD and AQCB will designate at least one non-discrimination coordinator to ensure compliance with the federal non-discrimination laws, who will:

a. Provide information to individuals internally and externally that EHD and AQCB do not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of EHD's and AQCB's programs or activities, and that EHD and

AQCB do not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights;

b. Provide notice of EHD's and AQCB's grievance processes and the ability to file a discrimination complaint;

c. Establish a mechanism (*e.g.*, an investigation manual) for implementation of EHD's and AQCB's Grievance Procedures to ensure that all discrimination complaints filed with EHD and AQCB under federal non-discrimination laws and the EPA implementing regulations 40 C.F.R. Parts 5 and 7 are processed promptly and fairly. One element of any policy and procedure or mechanism must include providing meaningful access for individuals with limited English proficiency and individuals with disabilities to EHD's and AQCB's programs and activities;

d. Track all complaints filed with EHD and AQCB under federal non-discrimination laws, in order to identify any patterns or systemic problems;

e. Conduct semiannual reviews/analysis of all complaints filed with EHD and AQCB under the federal non-discrimination laws identified within this Agreement, and/or any other discrimination complaints independently investigated by EHD and AQCB covering these laws, to identify and address any patterns, systematic problems or any trends identified;

f. Ensure that appropriate training is provided for EHD and AQCB staff in the processes available to resolve complaints filed with EHD and AQCB under federal non-discrimination laws;

g. Ensure that appropriate training is provided for EHD and AQCB staff on EHD's and AQCB's non-discrimination policies and procedures, as well as the nature of EHD's and AQCB's obligations to comply with federal non-discrimination laws;

h. Ensure that complainants are updated on the progress of their complaints filed with EHD and AQCB under federal non-discrimination laws and are promptly informed as to any determinations EHD and AQCB have made;

i. Undertake periodic evaluations of the efficacy of EHD's and AQCB's efforts to provide services, aids, benefits, and participation in any of EHD's and AQCB's programs or activities without regard to race, color, national origin, disability, age, sex or

prior exercise of rights or opposition to actions protected under federal non-discrimination laws.

2. The non-discrimination coordinator will not have other responsibilities that create a conflict of interest (*e.g.*, serving as non-discrimination coordinator as well as legal advisor or representative on civil rights issues).

3. Within 90 days after the effective date of this Agreement, EHD and AQCB will identify at least one individual who will serve as non-discrimination coordinator(s) consistent with the regulatory requirements of 40 C.F.R. § 5.135, § 7.85(g), and § 7.95(a).

4. Within 90 days of appointment of a non-discrimination coordinator, EHD and AQCB will forward to ECRCO documentation that the responsibilities have been included in the incumbent's statement of duties and that the incumbent has accepted the duties.

I. Public Participation

1. EHD and AQCB understand that meaningful public participation consists of informing, consulting, and working with potentially affected communities at various stages of the environmental decision-making process to address their questions and concerns. Therefore, EHD will:

   a. Ensure that its public involvement plan is available to all persons regardless of race, color, national origin, disability, age, sex, or prior exercise of rights or opposition to actions protected by 40 C.F.R. Parts 5 and 7 and the federal non-discrimination laws;

   b. Ensure that the factors used to determine the appropriate time, place, location, duration, and security at public meetings are developed and applied in a non-discriminatory manner;

   c. Develop, publicize, and implement a written public participation plan and/or specific plans as necessary for specific EHD actions (*e.g.*, for a particular permitting action) (consistent with the federal civil rights laws and the EPA's Public Participation Guidance found at 71 F.R. 14207, 14210-11 (March 21, 2006)),[16] that includes consideration of the following steps for effective public participation that is accessible to all persons regardless of race, color, national origin (including LEP), disability, age, and sex *each time* EHD engages in a public participation process:

[16] https://www.govinfo.gov/content/pkg/FR-2006-03-21/pdf/06-2691.pdf

- Develop a description of the relevant/affected community (including demographics, history, and background, for example/such as, percentage of the area that includes people of color, has less than a high school education, has members of households who speak a language other than English and/or speak English less than very well, has a history of filing complaints, has an inability to access traditional communication channels, internet, *etc.*);[17]
- Provide a contact list for relevant staff members on the recipient's website, including phone numbers and email addresses, to allow the public to communicate via phone or internet;
- Develop a list of past and present community civil rights concerns (including any complaints filed under the federal non-discrimination laws), and actions undertaken in response to such concerns;
- Develop and implement a detailed plan of action (including outreach activities) the recipient will take to address concerns raised by the public;
- Develop and implement a contingency plan for unexpected events that impact public meetings or other public participation avenues;
- Identify location(s) where public meetings will be held (considering the availability and schedules of public transportation), and ensure that public meetings are held at times and in locations that allow for meaningful involvement by individuals with LEP and individuals with disabilities;
- Develop and maintain a plan for providing reasonable modifications and auxiliary aids and services at no cost for individuals with disabilities and language assistance services for limited-English proficient persons, including translation of documents and/or interpreters for meetings;
- Develop and maintain a list of appropriate local media contacts (based on the cultural and linguistic needs of the community); and
- Develop guidance to help ensure the meaningful involvement of individuals with limited English proficiency and individuals with disabilities at any in-person public meetings and when in-person meetings are not possible due to national, state, or local emergencies;

Also, to be most effective, the public participation plan and any public participation process should consider the following:

[17] *See* EPA LEP Guidance at: https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi.

- How EHD and AQCB will meaningfully engage the public prior to and during significant activities (*e.g.*, how the public can request a public hearing and criteria for determining whether public hearings will be held);
- How EHD and AQCB will effectively communicate and engage with the public regarding its programs and activities (e.g., public notice procedures for submitting public comment during permit comment periods); and
- What methods EHD and AQCB will implement to ensure the public can access publicly available information and documents regarding its programs and activities.

d. Develop the public participation plan with public input – plan and process should be prominently highlighted online for the benefit of interested residents and should explain how interested community members can provide input on the development of the public participation plan.

e. Ensure that the public participation plan available in areas that are easily accessible to the community (*e.g.*, libraries, community centers, *etc.*).

f. EHD and AQCB will, during times of national, state, or local emergency, ensure that any public meetings occurring virtually are held in such a manner as to ensure the meaningful participation/involvement of individuals with limited English proficiency and individuals with disabilities.

g. EHD and AQCB will ensure that a public participation plan developed pursuant to this Agreement is prominently highlighted on EHD and AQCB's website for the benefit of interested residents, which will explain how interested residents can participate in the air permitting process under various environmental laws.

2. EHD and AQCB will provide a process for the public to access relevant hard copy information in a centralized public location near to a proposed activity in question in addition to providing the public with website information relating to that activity;

3. Within 120 days of the effective date of this Agreement, EHD and AQCB will submit to EPA for review a draft copy of its public participation plan developed. ECRCO will review the draft plan and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD

and AQCB will prominently publish in print and on their website the final public participation plan.

J. Plan to Ensure Meaningful Access to Programs and Activities for Persons with Limited English Proficiency (LEP)

1. EHD and AQCB will conduct an analysis as described in EPA's LEP Guidance found at 69 F.R. 35602 (June 25, 2004)[18] and http://www.lep.gov, to identify the appropriate language groups and determine what language services or mix of language services EHD and AQCB needs to provide (e.g., interpreters and translators), to ensure that limited-English proficient individuals can meaningfully participate in EHD's and AQCB's programs and activities.

2. EHD and AQCB will develop, publicize, and implement a Language Access Plan to ensure meaningful access to all EHD and AQCB programs and activities for individuals with LEP, at no cost to those individuals.

3. EHD and AQCB will develop the language access plan with public input – plan and process should be prominently highlighted online for the benefit of interested residents and should explain how interested community members can provide input on development of the language access plan.

4. EHD and AQCB will Ensure that the language access plan is available in areas that are easily accessible to the community (*e.g.*, libraries, community centers, *etc.*).

5. EHD and AQCB will ensure that the language access plan developed pursuant to this Agreement is prominently highlighted on EHD and AQCB's websites for the benefit of interested residents, which will explain how interested residents can participate in EHD's and AQCB's programs and activities.

6. Within 120 days of the effective date of this Agreement, EHD and AQCB will submit to EPA for review a draft copy of its written language access plan developed with public input. ECRCO will review the draft language access plan and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD and AQCB will prominently publish in print and on their website the final language access plan.

K. Plan to Ensure Meaningful Access to Programs and Activities for Persons with Disabilities

[18] https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf

1. EHD and AQCB will develop, publicize, and implement a disability access plan to ensure meaningful access to all EHD and AQCB programs and activities for individuals with disabilities.[19]

2. EHD and AQCB will provide, at no cost, auxiliary aids, and services to individuals with disabilities, (including, but not limited to, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals, as necessary), to ensure effective communication and an equal opportunity to participate fully in benefits, activities, programs, and services provided by EHD in a timely manner in such a way as to protect the privacy and independence of the individual.

3. EHD and AQCB will ensure that its facilities and other facilities utilized by EHD and AQCB (*e.g.*, if EHD and AQCB hold a public hearing at a school or recreational center) are physically accessible to, individuals with disabilities).

4. EHD and AQCB will develop the disability access plan with public input – plan and process should be prominently highlighted online for the benefit of interested community members and should explain how they can provide input on the development of the disability access plan.

5. EHD and AQCB will ensure that the disability access plan is available in areas that are easily accessible to the community (*e.g.*, libraries, community centers, *etc.*).

6. EHD and AQCB will ensure that the disability access plan developed pursuant to this Agreement is prominently highlighted on EHD and AQCB's websites for the benefit of interested residents, which will explain how interested residents can participate in EHD's and AQCB's programs and activities.

7. Within 120 days of the effective date of this Agreement, EHD and AQCB will submit to ECRCO for review a draft copy of its disability access plan developed with public input. ECRCO will review the draft Disability Access Plan and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD and AQCB will prominently publish in print and on their website the final disability access plan.

J. Training

1. Within 180 days of the effective date of this Agreement, EHD and AQCB will ensure that all its staff has been appropriately trained on federal non-discrimination obligations and all obligations of this Agreement, including

[19] *See* Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

providing community members with opportunity for input on the information provided in the training for staff, as well as plans, policies and procedures developed implemented as part of the Agreement. EHD and AQCB will provide EPA with confirmation that this training has been completed.

2. Within 120 days of the effective date of this Agreement, EHD and AQCB will forward to EPA for review a draft plan of ensuring that such training is a routine part of the on-boarding process for new employees and is given regularly as refresher training to all employees. ECRCO will review the draft training plan and provide comments within 30 days. Within 30 days of receiving ECRCO's comments, EHD and AQCB will forward a final copy of the training plan to ECRCO and implement the above plan.

IV. GENERAL CONSIDERATIONS

A. In consideration of EHD and AQCB's implementation of commitments and actions described in Section III of this Agreement, ECRCO will end its investigation of Complaint No. 13R-14-R6 and not issue a decision containing findings on the merits of the complaint.

B. ECRCO will monitor the implementation of the commitments in Section III of this Agreement, as appropriate, to ensure they are fully implemented. Once the terms of this Agreement are satisfied, ECRCO will issue a letter documenting completion of the commitments, closure of its monitoring actions and closure of Complaint No. 13R-14-R6 as of the date of that letter.

C. If not otherwise specified herein, ECRCO will review and provide feedback about any documentation submitted by EHD and AQCB demonstrating completion of each commitment and will provide an assessment, to include verbal and/or written feedback, as to whether the documentation satisfies the commitment within 30 days of receipt of each such submission.

D. EPA will, upon request, provide technical assistance to EHD and/or AQCB regarding any of the civil rights obligations previously referenced.

V. COMPUTATION OF TIME AND NOTICE

A. As used in this Agreement, "day" will mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal or City of Albuquerque holiday, the period will run until the close of business of the next working day.

B. Service of any documents required by this Agreement may be made by mail or email. Electronic documents submitted by EHD and AQCB to the EPA via email will be sent to the following email address: Dorka.Lilian@epa.gov., as well as a

copy to Senior Advisor, Kurt Temple, at temple.kurt@epa.gov. Documents mailed by EHD and AQCB to the EPA will be sent to the Director, U.S. EPA External Civil Rights Compliance Office, Office of General Counsel (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460.

C. Documents submitted by EPA to EHD will be sent to Angel Martinez, Director, City of Albuquerque Environmental Health Department, Civic Plaza NW, 3rd Floor, Room 3023, Albuquerque, NM 87102 and to AQCB to _____.

VI. EFFECT OF THE AGREEMENT

A. EHD and AQCB understand that, if necessary, ECRCO may visit EHD and/or AQCB, interview staff, and request such additional reports or data as are necessary for ECRCO to determine whether EHD and/or AQCB have fulfilled the terms of this Agreement.

B. EHD and AQCB understand that the EPA will not close its monitoring of this Agreement until ECRCO determines that EHD and AQCB have fully implemented this Agreement and that a failure to satisfy any term in this agreement may result in the EPA re-opening an investigation.

C. If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to EHD's or AQCB's program or authorities, or for other good cause, the Party seeking a modification will promptly notify the other in writing, setting forth the facts and circumstances justifying the proposed modification. Any modification(s) to this Agreement will take effect only upon written agreement by the Director of EHD, the AQCB _____, and the Director of ECRCO.

D. This Agreement constitutes the entire Agreement between EHD, AQCB and the EPA regarding the matters addressed herein, and no other statement, promise, or agreement, made by any other person will be construed to change any commitment or term of this Agreement, except as specifically agreed to by EHD and AQCB and the EPA in accordance with the provisions of Section V(C) above.

E. This Agreement does not affect EHD's or AQCB's continuing responsibility to comply with Title VI or other federal nondiscrimination laws and the EPA's regulations at 40 C.F.R. Parts 5 and 7, nor does it affect the EPA's investigation of any other Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement.

F. The effective date of this Agreement is the date by which all Parties have signed the Agreement. This Agreement may be signed in counterparts. The Director, in their capacity as an official of EHD, and the Attorney, in their capacity as an

official of AQCB, have the authority to enter into this Agreement for purposes of carrying out the activities listed in these paragraphs. The Director of ECRCO has the authority to enter into this Agreement.

On behalf of the City of Albuquerque Environmental Health Department,

_____ _____

Angel Martinez, Director
Environmental Health Department
City of Albuquerque Air Quality Program
1 Civic Plaza Albuquerque, New Mexico 87102

Date

On behalf of the Albuquerque-Bernalillo Air Quality Control Board,

_____ _____

[Authorized Signatory]

Date

On behalf of the Environmental Protection Agency,

_____ _____

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel
Mail Code 2310A
U.S. Environmental Protection Agency
2450 WJCN Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Date

EXHIBIT 5

New Mexico Environmental Law Center

Ethan Watson
City Clerk
Office of the City Clerk
600 Second Street NW, Albuquerque NM 87102
505-924-3650
ewatson@cabq.gov

April 18, 2024
Sent via email and U.S. Mail

Re: IPRA Request # 23-11777

Mr. Watson:

As you know, on December 5, 2023, the New Mexico Environmental Law Center submitted the following New Mexico Inspection of Public Records Act ("IPRA") request:

> "Any and all electronic messages, e-mail messages, text messages, documents or other communications to or from City Councilor Dan Lewis regarding the drafting, promoting, and passing of Resolution **R-23-176,** *Establishes a moratorium for the AQCB to make any regulation or standard addressing quality of life impacts until February 2024* and/or **O-23-88**: *Repeals the current AQCB ordinance and abolish the current Board; Creates a new ordinance with more specific requirements regarding the Board composition, as well as establishes the Board's lack of authority to make any regulation addressing quality of life impacts and provide advice/recommendations on air quality matters to pretty much any entity.*"

Your office provided a response on January 12, 2024, stating that it was necessary to withhold the production of certain emails responsive to the request because the emails were exempt from disclosure pursuant to the attorney-client privilege exception to the Inspection of Public Records Act, NMSA 1978 § 14-2-1(F) (attorney-client privilege) and NMSA 1978 § 14-2-1(L) (as otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege).

I then submitted a letter on January 29, 2024, included as Attachment 1, explaining that, while the substance of the withheld emails may be exempt from disclosure due to the attorney-client privilege, facts, such as the name of the attorney communicating, as well as the email addresses

of the sender and recipient, the dates of the communication, and the subject heading are not privileged simply because they are communicated to a lawyer by a client. *S.F. Pac. Gold Corp. v. United Nuclear Corporation,* 2007-NMCA-133, ¶ 13, 143 N.M. 215; *See also, Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

Your office provided little additional substantive information in response to this letter, simply providing a list of the names of individuals, including some attorneys employed by the City of Albuquerque, that engaged in the sought-after communications. Specifically, your office responded stating:

> "Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney's Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors."

Importantly, your office failed to provide <u>any</u> explanation of how it was determined that the attorney-client privilege applied to each individual communication. As such, I submitted a second letter, dated February 22, 2024 and included here as Attachment 2, again asking for the email communications with privileged information redacted.

Again, rather than meaningfully responding to the request, your office simply closed the request, stating that, "the City had made all responsive (non-exempt) records available to you … Your request will remain closed."

This letter serves as our final attempt to retrieve the 13 email records we are entitled to under the New Mexico Inspection of Public Records Act. Based on the responses to our request provided by your office, it is impossible to determine whether the 13 email messages withheld actually fall under the attorney-client privilege exception to IPRA, because you have provided <u>no</u> information about the content of the communications withheld.

Because the City's responses failed to include the name and title of the person who determined that the attorney-client privilege exception applies to these withheld records, violating NMSA 1978 § 14-2-11(B), I cannot reach out directly to whoever made the determination that the emails are protected under attorney-client privilege, since the city unlawfully deprived us of that information. As such, I am sending this letter directly to you.

New Mexico
Environmental Law Center

Additionally, the City's blanket assertion that the attorney-client privilege exempts these emails from disclosure, without any description of the contents of the emails, is a direct violation of NMSA 1978 § 14-2-11(B), which requires the records custodian to provide a written explanation of any denial under IPRA – this includes a description of the records withheld.

In *Tawater v. Bd. of Commissioners for Cnty. of Sandoval*, 2023-NMCA-052, the New Mexico Court of Appeals discussed at length the attorney-client privilege exception under IPRA, as it related to three emails withheld by Sandoval County under the attorney-client privilege exception. The *Tawater* Court described, in detail, the exempted emails as emails from the Public Information Officer to the county manager that contained summaries of conversations between the Public Information Officer and county attorneys that related to the IPRA lawsuit brought by the plaintiff. In doing so, the Court discussed the attorney's interpretation of the scope of the IPRA request and direction on responding to the request, as well as the Public Information Officer's concerns with the attorney's interpretation and direction. *Id.* at ¶¶ 12–15.The Court went on to describe one email as containing a summary of a conversation between the Public Information Officer and county attorneys about the pending lawsuit and how the county should respond to an interrogatory relating to an IPRA request from the plaintiff. *Id*. at ¶ 13. Though the Court determined two of the three emails were made for the purpose of facilitating litigation, such that they should be exempt from disclosure under IPRA, the description of such communications by the *Tawater* Court clearly demonstrates not only that such a description of an attorney-client privileged communication is allowed under IPRA, but <u>necessary</u> to any determination of whether an exemption on the basis of attorney-client privilege allowing the refusal to release such communications is appropriate.

In this instance, however, the City has failed to provide <u>any</u> description justifying why the 13 sought-after communications have been withheld pursuant to the attorney-client privilege exception to IPRA, and instead, merely lists the names of those communicating, some of who are attorneys, and broadly, baselessly asserting that the attorney-client privilege exception applies to each communication in the absence of any reasoning.

Furthermore, the intent of the New Mexico State Legislature, in enacting IPRA, was to ensure that all persons are entitled to the greatest possible information regarding the affairs of government, such that any denial of the release of records should provide enough information to allow the requestor to obtain the greatest possible information. *See Am. C.L. Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38, 392 P.3d 181, 190; *See also* NMSA 1978 § 14–2–5. Thus, in order to justify invoking the attorney-client privilege exception under NMSA 1978 § 14-2-11(B), the City of Albuquerque must describe the content of each withheld email,

consistent with *Tawater*, as well as identify the specific sender and recipient of each email, and the dates on which the email was sent.

Please provide the information sought above no later than April 25, 2024. Because the City's responses to our requests for information clearly do not comply with IPRA, we anticipate the City will promptly correct its mistake by the aforementioned date and I am certain we can resolve this matter without further legal action.

Thank you for your prompt attention to this matter.

/s/ Maslyn Locke
Maslyn Locke
Senior Staff Attorney

New Mexico Environmental Law Center
722 Isleta Blvd. SW
Albuquerque, NM
87105
C: (505) 231-7130
mlocke@nmelc.org

Attachment 1

New Mexico Environmental Law Center

January 29, 2024

Nyvia Barraza
Council Operations Coordinator
400 Marquette Ave NW
Albuquerque, NM 87102

Re: Closure of IPRA Request #23-11777

Good afternoon-

Thank you for your correspondence on Friday, January 12, 2023, at approximately 4:54 pm, informing me that your office determined that it was necessary to withhold the production of certain emails responsive to my IPRA request because the emails are exempt from disclosure pursuant to attorney-client privilege, NMSA 1978, § 14-2-1(F) (attorney-client privilege) and NMSA 1978, § 14-2-1(L) (as otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege).

While the substance of the withheld emails may very well be exempt from disclosure due to attorney-client privilege, facts, such as the names of the attorney and or the e-mail addresses of the sender and recipient, are not subject to this exemption. As such, I write to respectfully request the City release all emails responsive to request #23-11777 with the confidential, exempt information subject to attorney-client privilege redacted from each communication, rather than withhold the communications and documents in their entirety.

Facts, such as the name of the attorney and the name of the recipient of a confidential communication, are not privileged simply because they are communicated to a lawyer by a client. *S.F. Pac. Gold Corp. v. United Nuclear Corporation,* 2007-NMCA-133, ¶ 13, 143 N.M. 215. Thus, while attorney-client privilege protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

A fact is one thing; a communication *concerning* that fact is an entirely different thing – such that the attorney-client privilege does not extend to a refusal to disclose any relevant fact within the client's knowledge merely because they incorporated a statement of such fact into their communication to their attorney. *Id*. The fact of one person communicating to another is simply that – a fact, subject to disclosure consistent with the Inspection of Public Records Act, NMSA 1978, Chapter 14, Article 2. As such, while the substance of the responsive communications

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withheld by your office may be subject to attorney client privilege, the names of the individuals communicating are subject to release.

For the reasons stated above, I respectfully request your office release the emails identified as responsive to IPRA request #23-11777, redacted as necessary, no later than February 10, 2024.

Best,

Maslyn Locke
Senior Staff Attorney
New Mexico Environmental Law Center

Attachment 2

New Mexico Environmental Law Center

February 22, 2024

Nyvia Barraza
Council Operations Coordinator
400 Marquette Ave NW
Albuquerque, NM 87102

Re: Additional Response to IPRA Request #23-11777

Good afternoon-

Thank you for your additional correspondence on February 9, 2024, responding to my request to release withheld emails responsive to IPRA Request #23-11777, with privileged information withheld. Specifically, I requested the release of facts, including the names of the attorney and or the e-mail addresses of the sender and recipient, that are not subject to the attorney-client privilege exemption under New Mexico's Inspection of Public Records Act. Instead of releasing redacted emails, I was provided the following response:

"Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney's Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors."

I appreciate the release of the names of those who either sent or received the withheld emails, and would again request that the City provide additional facts found in the withheld emails, such as the dates of each correspondence, the sender and the recipient of each individual email and the subject line of each withheld email, because, as I explained in the letter dated January 29, 2024, facts, such as the name of the attorney and the name of the recipient of a confidential communication, and the date upon which the communication occurred, are not privileged simply because they are communicated to a lawyer by a client. *S.F. Pac. Gold Corp. v. United Nuclear Corporation,* 2007-NMCA-133, ¶ 13, 143 N.M. 215. Thus, while attorney-client privilege protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Nor does this privilege extend to prevent the dates of such communication from disclosure or the subject line of the email communication.

Again, I note that fact is one thing; a communication *concerning* that fact is an entirely different thing – such that the attorney-client privilege does not extend to a refusal to disclose any relevant

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fact within the client's knowledge merely because they incorporated a statement of such fact into their communication to their attorney. *Id*. The fact of one person communicating to another is simply that – a fact, subject to disclosure consistent with the Inspection of Public Records Act, NMSA 1978, Chapter 14, Article 2. As such, while the substance of the responsive communications withheld by your office may be subject to attorney client privilege, the subject line of the email communication and the date the communication took place, similar to the names of the individuals communicating, is not subject to attorney client privilege and cannot be withheld under IPRA.

If you could please provide the dates during which each withheld email communication occurred, as well as the subject line of each withheld email and identify the specific sender and recipient, no later than March 1, 2024, I would appreciate it.

Best,

Maslyn Locke
Senior Staff Attorney
New Mexico Environmental Law Center

Gmail

Maslyn Locke <mlocke@nmelc.org>

[External Message Added] City of Albuquerque public records request #23-11777

City of Albuquerque Public Records <cityclerk@cabq.gov> Fri, Feb 9, 2024 at 1:08 PM
Reply-To: cabq_23-11777-requester-notes@inbound.nextrequest.com
To: mlocke@nmelc.org

-- Attach a non-image file and/or reply ABOVE THIS LINE with a message, and it will be sent to staff on this request. --

City of Albuquerque Public Records

A message was sent to you regarding record request #23-11777:

Dear Ms. Locke:

On December 5, 2023, Council Services received your public records request identified as 23-11777. On January 12, 2024, my office completed your public records request specific to City Council records. My office withheld production of certain emails because those emails are exempt from production pursuant to attorney-client privilege (NMSA 1978, § 14-2-1(F)) and as

otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege (NMSA 1978, § 14-2-1(L)).

On January 29, 2024, you provided a letter requesting “the City release all emails responsive to request #23-11777 with the confidential, exempt information subject to attorney-client privilege redacted from each communication, rather than withhold the communications and documents in their entirety.”

Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney’s Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors.

Sincerely,
Nyvia Barraza
Council Operations Coordinator

View Request 23-11777

https://nextrequest.cabq.gov/requests/23-11777

NextRequest
POWERED BY CIVICPLUS

Questions about your request? Reply to this email or sign in to contact staff at City of Albuquerque.
Technical support: See our help page

EXHIBIT 6

Maslyn Locke

From: Sona, Kelsea
Sent: Monday, October 23, 2023 10:09 AM
To: Albrecht, Christopher P.; Martinez, Angel
Cc: Mulvihill, Nathan
Subject: RE: Air Quality Board Bilsl
Attachments: Board of County Commissioners - Administrative Meeting - Oct 24, 2023 5_00 PM.pdf; Admin Resolution- Tuesday, October 24, 2023.pdf

Good morning,

Please see the Bernalillo County Commission Administrative Meeting agenda item 3(A) and supporting documents regarding the City Council Resolution for a Moratorium.

KELSEA E. SONA
Assistant City Attorney | Air Quality
Lauren Keefe | City Attorney
One Civic Plaza NW | PO Box 2248 | Albuquerque, New Mexico 87103
d 505.768.4533
o 505.768.4500
e ksona@cabq.gov

From: Albrecht, Christopher P. <CAlbrecht@cabq.gov>
Sent: Friday, October 13, 2023 10:03 AM
To: Martinez, Angel <angelmartinez@cabq.gov>
Cc: Sona, Kelsea <ksona@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>
Subject: FW: Air Quality Board Bilsl
Importance: High

Angel,

I am forwarding you, Kelsea, and Nathan this email that I received from Councilor Lewis last night. It is relative to the meeting and discussion we all had last Tuesday regarding the air board. Very interesting.

I will start reviewing the attached documents. Please let us all know what the next steps are regarding this as the Councilor states he wants to introduce today at noon.

Chris

CHRIS ALBRECHT
Deputy Director |air quality programs | environmental health department
m 505.350.0090
o 505.768-1965

From: Lewis, Dan P. <danlewis@cabq.gov>
Sent: Thursday, October 12, 2023 4:45 PM
To: Albrecht, Christopher P. <CAlbrecht@cabq.gov>
Subject: Air Quality Board Bilsl

Chris,

These are drafts of an ordinance and a resolution regarding the current air quality board.

The resolution puts a moratorium on their ability to decide on rules related to "environmental injustice" which is the current rule that effects so many groups and businesses right now. There are over 25 business groups including Kirtland Air Force Base, and Los Alamos Labs and others that are interested parties fighting against this rule. If implemented it will kill business in this city.

The ordinance is a change to the make up of the board and - it reorganizes the board and adds some much needed accountability.

Please take some time to check it out and let me know what you think.

My plan is to finalize these bills and introduce them on Friday at Noon.

Thanks!

Dan

Maslyn Locke

From: Albrecht, Christopher P.
Sent: Thursday, November 16, 2023 8:52 AM
To: Gallegos, Maria C.; Sona, Kelsea; Mulvihill, Nathan; Smith, Morgan A.
Subject: RE: team regroup

All,

I just spoke with Mr. Whelan regarding Maxeon who is the solar company manufacturing company proposing to locate to Mesa del Sol. We (the permitting team) met with Maxeon yesterday morning for a pre-application meeting. Maxeon is concerned about the HEEI rule and has been keeping an active ear in the HEEI development and Councilor Lewis moratorium and resolution to the air pollution ordinance, and the Mayor's decision to veto or not veto. We have been encouraging Maxeon to submit an application sooner than later and they are planning to submit an application by November 30th.

I updated Mr. Whelan with respect to Maxeon's concern and he will be discussing this with the administration this morning. Maxeon will be meeting with the administration today and this topic will most definitely be discussed.

Chris

CHRIS ALBRECHT
Deputy Director |air quality programs | environmental health department
m 505.350.0090
o 505.768-1965

From: Gallegos, Maria C. <mgallegos@cabq.gov>
Sent: Thursday, November 16, 2023 8:02 AM
To: Albrecht, Christopher P. <CAlbrecht@cabq.gov>; Sona, Kelsea <ksona@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>; Smith, Morgan A. <morgansmith@cabq.gov>
Cc: Gallegos, Maria C. <mgallegos@cabq.gov>
Subject: team regroup

Hi Everyone,
I know y'all are holding it down at CC2 (great job by the way) but I would like to schedule a half hour to hour long regroup- maybe sometime on Friday when you have had a moment to rest?
Because we have a deadline tomorrow, 11/17 and with Dir. Martinez out of office Thursday 11/16 & Friday 11/17 I have asked Mr. Whelan for updates from the administration related to the HEEI.

Gracias,
-maria ☺

Sinceramente,

María Gallegos
public health compliance manager | environmental health

m: 505-376-7828
o: 505-768-2629
cabq.gov/environmentalhealth/

The mission of the Environmental Health Department is to responsively and professionally serve the people of Albuquerque by promoting and protecting public health, by preventing disease, and by preserving the integrity and quality of our environment through sustainable management and responsible stewardship.

The City of Albuquerque is located on the traditional, unceded territory of the Tiwa People

EXHIBIT 7

Gurule, Yvette M.

[redacted]

Get Outlook for iOS

From: sanchezsettled@gmail.com <sanchezsettled@gmail.com>
Sent: Tuesday, November 14, 2023 4:12:28 PM
To: SdeArmijo, Anita <asdearmijo@cabq.gov>; Antoinette Sedillo Lopez <asedillolopez@gmail.com>; stuart.butzier@modrall.com <stuart.butzier@modrall.com>; Stan N. Harris <sharris@modrall.com>; benjamin.rossi@modrall.com <benjamin.rossi@modrall.com>; katalina.hadfield@modrall.com <katalina.hadfield@modrall.com>; knparkh@sandia.gov <knparkh@sandia.gov>; Richards, Dori <dori.richards@nnsa.doe.gov>; Eric Jantz <ejantz@nmelc.org>; Maslyn Locke <mlocke@nmelc.org>; Keefe, Lauren <lkeefe@cabq.gov>; Sona, Kelsea <ksona@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>; pdomenici@domenicilaw.com <pdomenici@domenicilaw.com>; lhollingsworth@domenicilaw.com <lhollingsworth@domenicilaw.com>; lrose@montand.com <lrose@montand.com>; kbrooks@montand.com <kbrooks@montand.com>; Moellenberg, Dalva L. <DLM@gknet.com>; Richards, Dori <dori.richards@nnsa.doe.gov>; lpmartinez@salud.unm.edu <lpmartinez@salud.unm.edu>; Michael B Calderon <MBCalderon@salud.unm.edu>; snavarrette@salud.unm.edu <snavarrette@salud.unm.edu>; reaughfield@law.unm.edu <reaughfield@law.unm.edu>; Annalisa Miller <annalisamiller@law.unm.edu>; Gabriel Pacyniak <pacyniak@law.unm.edu>; florecermucho1953@gmail.com <florecermucho1953@gmail.com>; WILLARD, DANIEL C CIV USAF AFGSC 377 ABW/JA <daniel.willard@us.af.mil>; Manuel Criollo <manuelcriollo@unm.edu>; Elaine Cimino <ecimino10@gmail.com>; Cutler, Lindsay <Lindsay.Cutler@isletapueblo.com>; vanessa.hidalgo@isletapueblo.com <vanessa.hidalgo@isletapueblo.com>
Subject: Albuquerque/Bernalillo County Petition Number 2022-03

[EXTERNAL] Forward to phishing@cabq.gov and delete if an email causes any concern.

Everyone,

I am the Hearing Officer appointed by the Air Quality Control Board, on AQCB Petition Number 2022-3.
Because my Contract was formalized about 2 weeks ago on October 27th, and because of time constraints and calendar conflicts, there will not be an opportunity to set a pre hearing conference.

We are scheduled to have a Scheduling Meeting on November 20th, and we can use that time to address scheduling as well as any further matters concerning the rulemaking hearing scheduled to commence on December 4th. First and foremost, I need to emphasize this hearing is scheduled to be concluded in 5 days. The challenge I have as the Hearing Officer is to limit duplication and repetitive testimony, while allowing a reasonable opportunity for everyone to present their positions.

It is my understanding, that the City Counsel Ordinance and the City Counsel Resolution passed last week, but have not gone into effect. It is my position that it would be prudent to continue to prepare for the upcoming rulemaking hearing. In light of this, I am sending this email to everyone to give a little advance notice concerning our Zoom Scheduling meeting that we have scheduled for next Monday, November 20th, starting at 10:00 am.

In an effort to get this rulemaking hearing concluded by December 8th, I am going to suggest the following:

1. Petitioner will present their case first with their presentation of witnesses. Petitioners (as well as any parties presenting witnesses), will have an opportunity to give a brief Opening Statement concerning their presentation of witnesses. Petitioners and all parties supporting the Petition, will have up to one and a half days to complete their presentation. It is my suggestion that Petitioners collaborate with supporting parties to organize their witnesses and time allotted.
2. In an effort to get the case completed timely, cross examination of witnesses will be permitted by one or two representatives of the opposing party. Cross examination will be limited to 90 minutes. The Board will thereafter have the opportunity to ask follow up questions.
3. The City of Albuquerque can choose to follow the Petitioners or elect to follow the Parties in opposition of the Petition. The City will be allowed a half day for their presentation.
4. Parties in opposition to the Petition will be allowed one and a half days for their presentation. It would be helpful if these parties could collaborate and organize their witnesses and time. Again, cross examination of each witness will be limited to 90 minutes, by one or two representatives of the opposing side.
5. Any neutral parties remaining will have their opportunity to present witnesses in the same manner as above.
6. Petitioners will have the opportunity to present one rebuttal witness, and have no more than one hour for this presentation. Opposing party will be allowed 30 minutes for cross examination.
7. Pro Se parties and any party without witnesses will have the opportunity to present a closing statement. Dependent on time constraints, Closing Statements may be limited drastically. I am inclined to limit Closing Arguments to 60 minutes for each side. Each side can agree on one or more presenting their closing argument, but cumulatively not exceeding the time limit.

There are further matters that we can discuss at our November 20th scheduling meeting.

(P.S. Please let me know if I omitted anyone.)

William A. Sanchez, Esq.
Sanchez Settlement and Legal Services, LLC

Mailing Address:
P.O. Box 11841
Albuquerque, NM 87192-1841
(505) 720-1904

Gurule, Yvette M.

[redacted]

From: Moya, Julian N <julianmoya@cabq.gov>
Sent: Wednesday, November 22, 2023 10:25 AM
To: Moya, Julian N <julianmoya@cabq.gov>
Subject: Press Release - Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs

November 22, 2023

FOR IMMEDIATE RELEASE
Contact Information: Julian Moya, 505-768-2511, julianmoya@cabq.gov

Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs

Mayor Vetoes Legislation that puts checks and balances on rogue Air Quality Control Board.

Albuquerque, NM – Moments ago, the Albuquerque City Council received Mayor Tim Keller's veto for Bill O-23-88, which aimed to repeal and replace the Air Quality Control Board, and R-23-176, which imposed a specific moratorium on the Board, preventing it from passing a Health, Environment and Equity Impacts rule without scientific evidence because it is outside of their jurisdiction based on case law.

"By vetoing these bills, the Mayor has put the City of Albuquerque and State of New Mexico at risk of losing thousands of jobs" said City Councilor Dan Lewis. *"It's unfortunate that the Mayor has sided with environmental extremists such as Marla Painter who claims to solely represent the South Valley, and her domestic terrorist husband Mark Rudd of the notorious Weather Underground, and against crucial economic development and thousands of family owned businesses in our City who have expressed grave concern over this proposed rule."*

The Air Quality Control Board has every intention of passing regulations making it extremely difficult, if not entirely impossible for companies to obtain air permits in the City of Albuquerque. The Mayor's veto message demonstrates that he has serious concerns with the proposed rule, yet he chose to veto the two pieces of Council legislation that would prevent the board from implementing this extreme proposal.

The Albuquerque Journal wrote, "the so-called Health, Environment and Equity Impacts rule is perhaps the most restrictive regulatory rule in New Mexico history. And environmentalists love it because it would apply to a vast array of businesses that require air quality permits — from dry cleaners, auto body shops and concrete plants to schools, hospitals and university facilities."

The University of New Mexico said, "UNM believes that the proposed regulations will negatively impact UNM operations on main campus and the Health Sciences Center, UNM Hospital, and UNM's anticipated development of the South Campus TIDD and UNM Health infrastructure."

Even the City's Environmental Health Department has grave concerns with the regulations and stated, "the Proposed Rule seemingly applies to any entity that requires an air permit, including small businesses, schools, hotels, office buildings, gas stations, and larger entities."

The undemocratic decisions and behind-the-scenes deals of the extremists on the Air Board are poised to inflict severe damage on our major employers, putting at risk our capacity to attract businesses essential for job growth. The Air Quality Control Board is scheduled to hear the proposed rule on December 4th-8th. The City Council has an opportunity to override the Mayor's veto with 6 votes at the December 4th regular City Council meeting.

###

Julian Moya
Deputy Director
Council Services Department
(505) 768-2511
julianmoya@cabq.gov
cabq.gov/council

Gurule, Yvette M.

[redacted]

Get Outlook for iOS

From: Nick Maxwell <inspector@sunshineaudit.com>
Sent: Monday, December 11, 2023 1:43:27 AM
To: kittyrichards1@gmail.com <kittyrichards1@gmail.com>; asedillolopez@gmail.com <asedillolopez@gmail.com>; inspector@sunshineaudit.com <inspector@sunshineaudit.com>; ContactUs@da2nd.state.nm.us <ContactUs@da2nd.state.nm.us>
Cc: SdeArmijo, Anita <asdearmijo@cabq.gov>; sanchezsettled@gmail.com <sanchezsettled@gmail.com>; Keefe, Lauren <lkeefe@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>; Sona, Kelsea <ksona@cabq.gov>; ejantz@nmelc.org <ejantz@nmelc.org>; mlocke@nmelc.org <mlocke@nmelc.org>; khovden@nmelc.org <khovden@nmelc.org>; pdomenici@domenicilaw.com <pdomenici@domenicilaw.com>; lhollingsworth@domenicilaw.com <lhollingsworth@domenicilaw.com>; sbutzier@modrall.com <sbutzier@modrall.com>; sharris@modrall.com <sharris@modrall.com>; benjamin.rossi@modrall.com <benjamin.rossi@modrall.com>; katalina.hadfield@modrall.com <katalina.hadfield@modrall.com>; knparkh@sandia.gov <knparkh@sandia.gov>; dlm@gknet.com <dlm@gknet.com>; ajt@gknet.com <ajt@gknet.com>; dori.richards@nnsa.doe.gov <dori.richards@nnsa.doe.gov>; lpmartinez@salud.unm.edu <lpmartinez@salud.unm.edu>; mbcalderon@salud.unm.edu <mbcalderon@salud.unm.edu>; snavarrette@salud.unm.edu <snavarrette@salud.unm.edu>; pacyniak@law.unm.edu <pacyniak@law.unm.edu>; rcaughfield@law.unm.edu <rcaughfield@law.unm.edu>; annalisamiller@law.unm.edu <annalisamiller@law.unm.edu>; daniel.willard@us.af.mil <daniel.willard@us.af.mil>; ecimino10@gmail.com <ecimino10@gmail.com>; lindsay.cutler@isletapueblo.com <lindsay.cutler@isletapueblo.com>; vanessa.hidalgo@isletapueblo.com <vanessa.hidalgo@isletapueblo.com>; ariel.noffke@us.af.mil <ariel.noffke@us.af.mil>
Subject: Urgent Follow-Up and Notice of Violation of the Open Meetings Act by the Air Quality Control Board

[EXTERNAL] Forward to phishing@cabq.gov and delete if an email causes any concern.
Subject: Urgent Follow-Up and Notice of Violation of the Open Meetings Act by the Air Quality Control Board

Dear Vice Chair Kitty Richards,

In light of the recent reorganization following the passage of an ordinance affecting the City's appointees to the Albuquerque-Bernalillo County Air Quality Control Board, I am writing to urgently follow up on my previous communication. Given that this reorganization has effectively vacated the positions of the City appointees, including the Office of Chair of the Board, and considering that it has been 5 days since the ordinance's publication on December 5, 2023, there appears to be no longer a lawful quorum of the Board. As one of the three county appointees, I wish to draw your attention to a significant violation of the Open Meetings Act (OMA) of New Mexico, NMSA 1978 § 10-15-1(F), which was served in a prior Notice on December 8, 2023 to your email and is also attached to this email.

Let me first state, there has been a notable absence of a new event listing on the Board's website regarding the extended continuance of the HEEI public hearing over the weekend to Monday. This lack of transparency and public participation is concerning and may inadvertently contravene the guidelines set forth in Section 1(A) of the Act. The failure to continue listing each day of the HEEI hearing, especially this crucial continuance to Monday, and after each prior day had its own individual listing, could be perceived as arbitrary or capricious, undermining the public's right to access information about the activities of the Board.

Furthermore, at approximately 9:00 P.M. on December 8, 2023, the Board published an amended agenda for a special meeting scheduled at 9:00 A.M. on December 11, 2023. This amended agenda, especially the inclusion of the item 'a) Request to ratify the Chair's decision to authorize the Board Attorney to pursue litigation to protect the Board's current rulemaking,' contravenes Section 1(F) of the Act. This section requires that the agenda be available and posted at least seventy-two hours prior to the meeting. The requirement was not met for all items added to the amended agenda that were not part of the initial agenda.

It is also pertinent to note that the Chair does not have the authority, as per various governing laws and regulations, to unilaterally authorize litigation on behalf of the Board. This action, therefore, represents a potentially serious misuse of city government resources, bordering on fraud, waste, or abuse.

Additionally, the Board's attorney's interactions with the media appear to contravene Section 1(K) of her contract with the Board, potentially amounting to professional misconduct. That contract has been attached for your review.

As a concerned citizen, I demand that the Board address these violations

immediately in line with NMSA 1978, Section 10-15-1. While the initial agenda was published within the timeframe mandated by the Act, the subsequent modification without full public notification is a clear violation of the Act. This violation casts doubt on the lawfulness of the Board's actions regarding those modified items, even in the event that a lawful quorum were to be established.

In the interest of maintaining public trust and adherence to established protocols, I urge the Board to update its website immediately with the relevant information regarding the hearing on Monday and to rectify the noted violations of the Open Meetings Act.

Thank you for your prompt attention to this matter. I look forward to a response and the timely resolution of these issues.

Warmest Regards,
-s- Nicholas R. Maxwell

On 2023-12-09 09:55, Nick Maxwell wrote:
> Greetings,
>
> Does the Board intend to post any kind of notice on its website to
> include meeting access for the continuance of the public hearing on
> Monday?
>
> Regrettably, the Board has failed to provide any public notice on
> their website that the hearing has not been adjourned and that the
> quorum will be continuing on Monday morning, supposedly after the
> improperly-noticed special meeting.
>
> I would argue the failure to post a hearing continuation notice on the
> website violates Section 1(A) of the Act.
>
> Regards,
> Mr. Nicholas R. Maxwell
>
> On December 8, 2023 11:25:12 PM MST, Nick Maxwell
> <inspector@sunshineaudit.com> wrote:
>
>> Warmest Greetings,
>>
>> Enclosed, please find a notice regarding the Albuquerque-Bernalillo
>> County Air Quality Control Board's breach of the Open Meetings Act.
>> This pertains to the amended agenda posted on their website this
>> evening, which was done after the expiration of the mandated 72-hour
>> deadline.
>>
>> Sincerely,
>> Mr. Nicholas R. Maxwell
>> P.O. Box 1064
>> Hobbs, New Mexico

>> Telephone: 575.441.3560
>> E-mail: inspector@sunshineaudit.com

percent of SO_2 emissions. In this region, in particular, a disproportionate share of health-damaging air pollutant emissions come from relatively small GHG emitters.

3.4.3 Albuquerque and Bernalillo and Sandoval Counties

Perhaps unsurprisingly, the 15 facilities located in Albuquerque and just outside in Rio Rancho and other parts of Sandoval County have more people living nearby than in any other part of the state (**Figure 14**). The Albuquerque facilities, in particular, tend to be located in more low-income areas than the rest of the state. The vast majority of SO_2 and NO_2 emissions (over 97 percent) come from the 10 facilities with GHG emissions of over 25,000MMT CO_2e. Bernalillo has some of the largest total emissions of HAPs and PM, emitted from facilities such as landfills, airports, and manufacturing.

Figure 14. Large Stationary Source Emitters in Albuquerque and Bernalillo and Sandoval Counties.

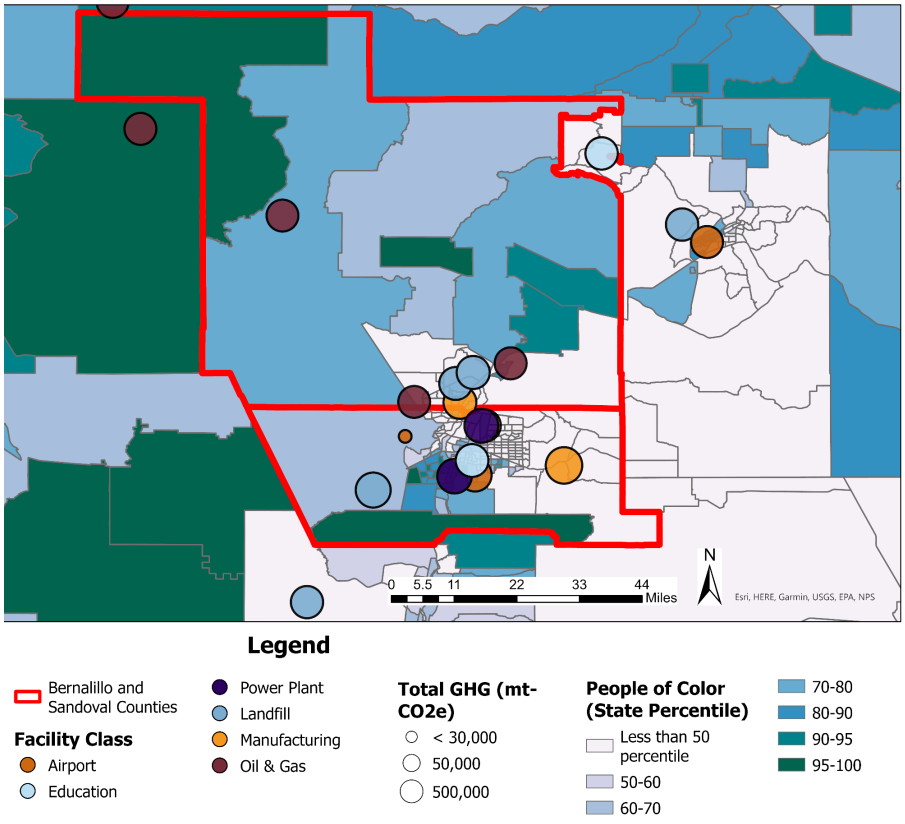

EXHIBIT 9

Gmail

Kacey Hovden <khovden@nmelc.org>

Take a look at this

1 message

Marla Painter <marladesk@gmail.com> Fri, May 31, 2024 at 1:21 PM
To: "Rogers, Paul J." <progers@cabq.gov>
Bcc: khovden@nmelc.org

Hi again, Mr. Rogers,

Thanks for the call. Better later than never. I have a bit more information to offer you.

Please inform your receptionists not to scream at people calling your office for help. That is not acceptable. Nor is screaming at me that it is not their problem but a County problem. Nor is it appropriate for your staff to tell me that EHD comes to work at regular business hours and therefore would not been aware of a hazardous fire starting in the middle of the night. Environmental hazards have no business hours.

Regarding your message that there were no unusual air quality readings on our local monitor during the fire and no hazardous smoke alerts necessary in our neighborhood as a result. Please take a look at this video. Smoke is coming right at us. You are telling me this smoke would not register on an air quality monitor less than a half mile from the fire? The smoke has covered the neighborhood. We all suffered from the smoke. Something needs to be fixed here. The City is not protecting us in your jurisdiction who live in the County. And the truth is being suppressed. If you believe this smoke coming right at us is not a problem, I would suggest better training in your field of environmental health. I assume you have been trained since you are the Director of Environmental Health.

At 10:08 AM this morning I received my daily air quality alert it is said that air quality is moderate. That was, of course, inaccurate for our neighborhood.

I also remind you that Mountain View is a vulnerable, fenceline community considered by the EPA to be suffering from environmental injustices. We are protected by the EPA's commitment to all people's access to equal civil rights under the law.

And

https://www.kob.com/new-mexico/fire-crews-battle-major-fire-near-2nd-and-rio-bravo/

Please explain the gross errors.

Thank you,
Marla Painter
Mountain View Community Action

"It is difficult to get a man to understand something when his salary depends upon his not understanding it." –Upton Sinclair