



August 12, 2024

Via email to: ighotline@hq.doe.gov

Honorable Teri L. Donaldson, Inspector General of Department of Energy

Re: Complaint to U.S. Department of Energy regarding waste and abuse by NNSA in violation of Executive Orders Nos. 12898 and 14096, DOE Congressional Budget Justifications FY 2022 and FY 2024, DOE Agency Fiscal Report FY 2023, 50 USC 2401 Section 3211(c), NNSA SD 226-1C Governance and Management Framework, and DOE Policies 144 and 144.1

Dear Ms. Donaldson:

The New Mexico Environmental Law Center (“NMELC”), on behalf of the Mountain View Neighborhood Association, Mountain View Community Action and Friends of Valle de Oro, (collectively, the “Mountain View Coalition”), submits the following complaint regarding the actions of the National Nuclear Security Administration (“NNSA”) which operates under the supervision of the U.S. Department of Energy. Mountain View residents live in a historically residential and agricultural community in the South Valley of Albuquerque, NM, of approximately 6,000 residents, predominantly low income and people of color.¹ Mountain View has become the dumping ground for heavy industry that no other Albuquerque neighborhood wants.² To advocate for the Mountain View neighborhoods, community groups consisting of the

¹ *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.htm

² See Joint Center for Political and Economic Studies, *Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All* (Sept. 2012) at 16-19, <https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf>; 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 low-income communities of color); see also Gabriel Pacyniak et. al., *Climate, Health, and Equity Implications of Large Facility Pollution Sources in New Mexico*, University of New Mexico & PSE Health Energy, at 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 (noting the location of most Albuquerque pollution sources are within low-income communities); see also 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,

Mountain View Neighborhood Association, the Mountain View Community Action group and the Friends of Valle de Oro formed the Mountain View Coalition to address the decades of environmental harms disproportionately impacting the area.

To do so, the Mountain View Coalition petitioned the Albuquerque-Bernalillo County Air Quality Control Board (“AQCB” or “Air Board”) in November 2022 to adopt a proposed regulation, the Health, Environment and Equity Impact rule (“HEEI Rule”) to address the adverse cumulative impacts of pollution on the City of Albuquerque and Bernalillo County’s most overburdened communities. The proposed rule would have required the City of Albuquerque to consider the social determinants of health and quality of life impacts when issuing air pollution permits in already overburdened communities. In response to the Mountain View Coalition’s proposed HEEI Rule, NNSA chose not to engage in community discussions regarding the rule before its submission and then vigorously opposed even holding a hearing on the legally proposed rule. All of NNSA’s actions regarding the HEEI Rule directly contradicted Executive Orders Nos. 12928 and 14096, and the following DOE and NNSA directives and guidelines: DOE Congressional Budget Justifications FY 2022 and FY 2024, DOE Agency Fiscal Report FY 2023, 50 USC 2401 Section 3211(c), NNSA SD 226-1C Governance and Management Framework, and DOE Policies 144 and 144.1. In so doing, the NNSA, by its own admission expended hundreds of thousands of dollars, and hours, thereby wasting an enormous amount of federal money, contrary to NNSA’s core mission and in violation of executive and agency mandates to respect, support and uplift environmental justice needs and goals, specifically in overburdened communities where NNSA’s sites are located. The City of

specifically noting that even two major federally-designated Superfund sites exist within a 2.5 square-mile neighborhood).

Albuquerque is the site of a major NNSA administrative complex, including the Sandia National Laboratories (“SNL”).

FACTUAL BACKGROUND

The Clean Air Act (“CAA”) delegated authority to the State of New Mexico to implement the CAA in New Mexico. Subsequently the State of New Mexico delegated, via the New Mexico Air Quality Control Act, authority to implement the CAA to the Albuquerque-Bernalillo County Air Quality Control Board. Among other things, this authority includes the AQCB’s authority to hear and decide rulemaking petitions to address air quality regulation in Albuquerque and Bernalillo County.

The New Mexico Air Quality Control Act charges the AQCB with the duty and authority to consider, adopt, and promulgate regulations to prevent and abate air pollution, which includes emissions that interfere with public welfare. NMSA 1978, §§ 74-2-5(B); 74-2-2(B). The AQCB serves as a joint local authority acting on behalf of both the City of Albuquerque and Bernalillo County. Bernalillo County Code, Art. II, §§ 30-31 to -47 (2020); Albuquerque, N.M., Rev. Ordinances §§ 9-5-1-1 to -99 (1996). The powers and authority of the AQCB for local rulemaking are well established under the New Mexico Air Quality Control Act. NMSA 1978 Sec. 74-2-5(B); 74-2-2(B).

The Mountain View Coalition, represented by NMELC, petitioned the AQCB to adopt a proposed regulation, the HEEI Rule, on November 21, 2022, pursuant to 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”).³ The proposed HEEI Rule sought to address the adverse

³ AQCB Docket no. 103 filed July 26, 2023
<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=103.+Petitioners%27+Notice+of+Filing+Amended+Exhibit+A+to+Petition.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

cumulative impacts of pollution on the City of Albuquerque and Bernalillo County's most overburdened communities: typically, communities of color and low-income communities. The proposed rule would have required the City's Environmental Health Department (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, in some instances, to deny air pollution permits to sources seeking to locate in already overburdened communities under certain circumstances.

The proposed HEEI Rule sought to require the EHD, the permitting authority for the City of Albuquerque and Bernalillo County, to review the health impacts of a proposed facility seeking an air quality permit in the Albuquerque/Bernalillo County area. One of the aspects of the proposed HEEI Rule required the permit applicant and the EHD to consider the social determinants of health for communities already overburdened by polluting sources, such as the residents of the Mountain View community, which is already impacted by a significant concentration of heavy industry, impacting public health and the environment and causing increased risk of disease and lower life expectancy in Mountain View and surrounding neighborhoods.⁴ The proposed HEEI Rule further required the EHD to ensure the health and environmental impacts of combined air emissions sources were considered and addressed by the EHD permitting process so no neighborhoods or population group in Albuquerque or Bernalillo County continues to bear the disproportionate health impacts of air pollution.

The Mountain View community has borne a disproportionate share of toxic and hazardous contamination and pollution for decades due to the intentional placement of several major

⁴ 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) [hereinafter CDC EJI]; see also Albuquerque EJScreen, *supra* note 8; see also Fischer, *supra* note 2.

polluting sources in and around the community.⁵ Several oil and petroleum terminals, scrap yards, chemical storage facilities, the municipal sewage plant, as well as two Superfund sites, are located within the Mountain View Community and larger South Valley area. The community is also located downwind from the Kirtland Air Force Base, Sandia National Labs, and the Albuquerque International Sunport airport.⁶ The placement of these various pollution sources in and around the community has resulted in extreme health disparities in Mountain View, including high levels of asthma, cancer, heart disease, and other health issues among residents – with the Centers for Disease Control and Prevention (“CDC”) ranking the community region in the top percentiles nationwide in its Environmental Justice Index, Social Vulnerability, and Environmental Burden ranks.⁷ As a result, on average, Mountain View residents have a 10- to 24-year shorter life expectancy than more affluent, predominantly white communities in Albuquerque.⁸

The NNSA, an agency of the Department of Energy (“DOE”), formally intervened in this local air quality rulemaking before the AQCB on May 18, 2023,⁹ in opposition to the proposed HEEI Rule despite the NNSA, as a federal sub-agency of the DOE, having an obligation to uphold civil rights and environmental justice and to work cooperatively with local communities and tribes in carrying out its mission goals. Under 50 USC 2401, the enabling statute of the NNSA, at Section 3211(c), the NNSA is to carry out its “operation and activity consistent with the following principles:

⁵ *Mountain View is City’s Industrial Sacrificial Zone*, *supra* note 6.

⁶ *See* Fischer, *supra* note 2.

⁷ *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) [hereinafter CDC EJI]; *see also* Albuquerque EJScreen, *supra* note 8; *see also* Fischer, *supra* note 2.

⁸ *Mountain View is City’s Industrial Sacrificial Zone*, *supra* note 6.

⁹ AQCB 2022-3 Docket No.53 filed May 18, 2023. Link:

<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?rlkey=mk8ox5s9vihwhzt668d7s8xy0&e=2&st=99ig9kgf&dl=0>

1. Protecting the environment; and
2. Safeguarding the safety and health of the public and of the workforce”¹⁰

Additionally NNSA is subject to Executive Orders 12898 and 14096 which mandate all federal agencies to review, endorse and implement environmental justice in the execution of their duties. Furthermore, NNSA has specific guidance about consultation with local communities and tribes in executing its duties under DOE Policy 144.1. *Department of Energy American Indian Tribal Government Interactions and Policy*.

However, in 2021, the year prior to the Mountain View Coalition filing the petition for rulemaking, EHD and the Mountain View Coalition held several meetings to discuss the promulgation of such a rule and NNSA attended none of these meetings although the meetings were publicly noticed. Then, throughout the following year, both the Air Board and the Mountain View Coalition repeatedly encouraged other parties, including NNSA and several industrial interests, to informally discuss potential changes to the proposed HEEI Rule with the Coalition, which included *four* daylong pre-hearing meetings held on July 31, August 11, August 22, and August 29, 2023. NNSA did attend these meetings, but offered little substantive feedback on the proposed Rule, and flatly refused to work with the Mountain View Coalition toward a rule the Coalition would deem satisfactory – instead only proposing that any federal facility be exempt from any version of the Rule and baselessly claiming that federal facilities are exempt from local air quality regulation (a demonstrably false statement). See 42 USC 7401 Sec. 118.¹¹

¹⁰ 50 USC 2401 Section 3211(c)

¹¹ 42 USC 7401 Section 118 requires federal facilities to comply with federal, state, interstate and local requirements to control and abate air pollution.

Upon entering her appearance in the proceeding on May 18, 2023, counsel for NNSA, Dori E. Richards, simultaneously moved for the NNSA to join in the following frivolous motions and objections filed previously by other parties in their attempts to halt the rulemaking process:

- a. Programs' Objections Regarding Agenda Items on 6/14/23 Meeting Agenda for the AQCB;
- b. Motion to Disqualify Board Member Kitty Richards;
- c. Continuing Objection to Board Member Kitty Richards;
- d. Objections to Board's Proposed Order Delegating Limited Authority the Hearing Officer; and
- e. Renewed Objections to Order Delegating Limited Authority to the Hearing Officer.¹²

A month later, on June 13, 2023, NNSA filed a joinder to a previously filed Motion to Stay the AQCB rulemaking hearing.¹³ Next, on November 9 and 10, 2023, the NNSA filed, along with the NTESS, four complex motions in the two day period objecting to the rulemaking in its ongoing and directed attempt to stop the rulemaking from proceeding.¹⁴ Thereafter, the NNSA fully participated in the six day rulemaking hearing held December 4 - 11, 2023,

¹² AQCB 2022-3 Docket no. 75 filed June 14, 2023

<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=75.+NNSA+Notice+of+Joinder+in+Multiple+Filings.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

¹³ AQCB 2022-3 Docket no. 74 filed June 13, 2023

<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=74.+NNSA+Notice+of+Joinder+in+Motion+to+Stay.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

¹⁴ AQCB 2022-3 Docket nos. 155,157,160, and 161 filed on November 9 and 10, 2023. Links follow:

155:<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=155.+NTESS-Opposed+Motion+%26+Memo-+State+Rule+Violations+%26+Due+Process+Deficiencies.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

157:<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=157.+NTESS+and+NNSA%27s+Opposed+Motion+and+Memo-Jurisdiction.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

160:<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=160.+NTESS+%26+NNSA+Opposed+Motion+%26+Memo-Preempted+Fed+Law+%26+No+Waiver+of+Sovereign+Immunity.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

161:<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=161.+NTESS+%26+NNSA+Opposed+Motion+%26+Memo+Opposing+Board+Issuing+Rule-Tribal+Consultation.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

cross-examining Petitioner's expert witnesses and presenting witnesses in opposition to the proposed rule. Finally, NNSA joined in support of two notices given by industrial parties claiming the AQCB violated the Open Meetings Act; again, at the 11th hour, trying to stop the rulemaking proceeding.¹⁵

I. NNSA ABUSED ITS AUTHORITY BY VIOLATING BOTH DOE AND NNSA POLICIES AND DIRECTIVES IN ORDER TO HINDER AND OBSTRUCT LOCAL RULEMAKING

As said, the NNSA is a semi-autonomous agency within the DOE of approximately 60,000 employees (approximately 1,800 employees and 55,000 contractors) which is responsible for enhancing national security through military applications of nuclear science. The mission of the NNSA is to develop weapons, to both prepare and protect the United States from nuclear war, to respond to nuclear emergencies worldwide and to maintain the US Navy by providing its needed nuclear fuel. The NNSA chose to apply its resources to vigorously oppose the AQCB local rulemaking, fighting against improving local air quality and the health of overburdened communities in Albuquerque and Bernalillo County. Historically, it is unheard of for the NNSA to become so heavily involved in local rulemaking. After exhaustive research, NMELC could not identify another instance when the NNSA became involved in local rulemaking on air quality permitting or any other topic of local rulemaking.

The intentional disruption and opposition mounted by the NNSA to the HEEI rulemaking was extensive, time consuming and expensive, both for the NNSA and for the already overburdened community. NNSA's intentional interference included filing motions that were unwarranted, premature and frivolous (discussed below), in addition to joining motions to

¹⁵ AQCB 2022-3 Docket no.230 filed December 8, 2023
<https://www.dropbox.com/scl/fo/ftzpfvwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?dl=0&e=1&preview=230.+NTESS%27+%26+NNSA%27s+Notice+of+Joinder+in+Two+Written+Notices+to+AQCB+of+Open+Meetings+Act+Violations.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

disqualify board members, a motion to stay the proceeding and the hiring and extensive presentation of expert witnesses with counter positions to the proposed rule. In no observable way did the NNSA intervention into the HEEI rulemaking fit within its core mission goals of nuclear weapon preparedness and nuclear threat mitigation.

The substantial involvement of the NNSA in the HEEI rulemaking contravened its core mission goals and three major areas of DOE policy and guidance for the federal agency. The NNSA involvement in the HEEI rulemaking was directly contrary to and in violation of:

- 1.) NNSA's core mission goals are to develop, stockpile and manage US nuclear weapons, to make nuclear fuel for the U.S. Navy, to promote international nuclear safety and to reduce global danger from weapons of mass destruction.
- 2.) Executive Orders 12898 and 14096 which apply to and govern all federal agencies and whose principles are confirmed in the statements and policies of the DOE.
- 3.) Commitments to environmental justice and fiscal responsibility in the FY2022 and FY2024 DOE Congressional Budget Justifications to secure federal funding for the NNSA from Congress;
- 4.) Policies on community engagement and tribal consultation embodied in the NNSA Governance and Management Framework, and DOE Policy 144.1 *Department of Energy American Indian Tribal Government Interactions and Policy*, approved on January 16, 2009.

A. NNSA'S SUBSTANTIAL AND SIGNIFICANT INVOLVEMENT IN HEEI AIR QUALITY RULEMAKING AT THE LOCAL LEVEL GROSSLY DEVIATED FROM ITS CORE MISSION AND GUIDANCE

The core mission of the NNSA as stated repeatedly in its enabling statute 50 USC 2401, the NNSA Governance and Management Framework and the news feed of the NNSA are:

1. “To enhance U.S. national security through the military application of nuclear energy.”
2. “To maintain and enhance the safety, reliability and performance of the U.S. nuclear weapons stockpile, including the ability to design, produce, and test, in order to meet national security requirements. “ (Commonly referred to as “weapons activities”)
3. “To provide the U.S. Navy with safe, militarily effective nuclear propulsion plants and to ensure the safe and reliable operation of those plants.” (Commonly referred to as “naval reactors” activities)
4. “ To promote international nuclear safety and nonproliferation.“ (Commonly referred to as “emergency management” and “nonproliferation activities)
5. “To reduce global danger from weapons of mass destruction”. (Commonly referred to as “weapons of mass destruction activities)
6. “To support U.S. leadership in science and technology”.¹⁶

Again, the primary mission of NNSA is to develop, maintain and stockpile weapons, to search for and reduce nuclear threats, to keep the US Navy supplied with fuel and to respond to nuclear and radiological emergencies. None of these core mission goals necessitated or even supported NNSA involvement in local air quality rulemaking. In opposing the HEEI rule the NNSA offered no evidence or argument the HEEI rule would impact its core mission goals - only bald, repeated assertions that it would. No evidence of interference was presented and therefore there is no reason to believe the HEEI rule and its implementation would in any way affect nuclear weapon stockpiling or detection, impact nuclear threat surveillance, prohibit responding to a nuclear or radiological emergency or impact the production and supply of nuclear fuel for the U.S. Navy.

¹⁶ 50 USC 2401 Section 3211 Establishment and Mission.

Further, the enabling statute of the NNSA, 50 USC 2401, under Section 3211 (c), requires the NNSA to protect the environment and “safeguard” the health and safety of people while executing its mission goals as stated above. None of the actions NNSA took in regard to the HEEI rulemaking fell in line with its mission goals and were directly contrary to the dictates of the NNSA enabling statute.

B. NNSA VIOLATED THE FEDERAL MANDATE TO SUPPORT ENVIRONMENTAL JUSTICE THROUGH EXECUTIVE ORDERS

President Biden’s Executive Order 14096 *Revitalizing Our Nation’s Commitment to Environmental Justice For All* issued on April 21, 2023, built on President Clinton’s 1994 Environmental Justice Executive Order 12898: *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. Both Executive Orders, and other Executive Orders addressing racial equity and federal action, underscore and mandate that federal agencies expressly deepen their commitment to environmental justice. EO 12898, issued in 1994, mandates environmental justice be incorporated into the missions of *all* executive branch agencies: “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income communities.” Federal Register, Vol. 59, No. 32, 7629.

On April 21, 2023, in issuing EO 14096, President Biden strengthened and extended EO 12898 stating “the Federal Government must build upon and strengthen its commitment to deliver environmental justice to all communities across America . . . which includes Federal engagement with communities with environmental concerns and that uses the tools available to the Federal Government, including enforcement of civil rights and environmental laws.” Federal Register, Vol. 88, No. 80, 25252.

The Department of Energy is an executive branch agency. The Clean Air Act is a bedrock environmental law.¹⁷ Therefore, both these executive orders direct the NNSA to engage cooperatively with disproportionately impacted communities to uplift and address their environmental justice concerns using existing environmental laws to create safety and resiliency for those communities. The Mountain View Coalition squarely falls within the category of communities the executive branch agencies are directed to advance through federal action on environmental justice. Instead of following executive orders 12098 and 14096, the NNSA directly opposed and used its power and funding to marginalize the environmental concerns of an overburdened community, working diligently to undermine the Mountain View Coalition's petition requesting AQCB to address decades of environmental injustice and harm.

EO 14096 states, "Communities with environmental justice concerns experience disproportionate and adverse human health or environmental burdens. These burdens arise from a number of causes, including inequitable access to clean water, clean air, natural places, and resources for other basic human health and environmental needs; the concentration of pollution, hazardous waste, and toxic exposures . . . " Federal Register/Vol. 88, No. 80, 25252. Testimony at the rulemaking confirmed Mountain View as an already overburdened community due to the concentration of pollution and toxic exposures to pollutants. But NNSA chose to fight even the right of the Mountain View Coalition to have their specific overburdened circumstances considered as part of the permitting equation in direct contravention of the mandate of EO 14096 that the Federal Government act in partnership with "State, Tribal, territorial, and local governments as well as community organizations, business and members of the public, . . . to

¹⁷ The Clean Air Act 101, Natural Resources Defense Council, October 21, 2024 Link:

<https://www.nrdc.org/stories/clean-air-act-101#whatis>

<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwOybEfxPMg5duhgY?rlkey=mk8ox5s9vihwhzt668d7s8xy0&e=2&st=99ig9kgf&dl=0>

advance environmental justice and help create a more just and sustainable future for all.”

Federal Register/Vol. 88, No. 80, 25253.

Under Section 3 of EO 14096, *Government-Wide Approach to Environmental Justice*, “each agency *should make achieving environmental justice part of its mission.*” (Emphasis added). Thus, each agency is tasked with many obligations under Section 3 of EO 14096, which includes the following requirement:

(iv) “identify, analyze, and address barriers related to Federal activities that impair the ability of communities with environmental justice concerns to receive equitable access to human health or environmental benefits, including benefits related to natural disaster recovery and climate mitigation, adaptation and resilience.” By its participation in the rulemaking, NNSA chose to *be* the barrier through its Federal activity instead of implementing the mandate of EO 14096 to address barriers to “equitable access to human health benefits as required.” In EO 14096 “Federal activity” is defined as any “agency rulemaking, guidance, policy, program, practice or *action*” that affects or has the potential to affect human health, and the environment including an agency action related to climate change.” Federal Register/Vol. 88, No. 80, 25254 (emphasis added). The deliberate *action* of the NNSA to jump fully into thwarting a local rulemaking addressing the health impacts of discriminatory air quality permitting directly contradicted the mandate of its agency under EO 14096.

Further, under EO 14096, each Federal agency must consider minimizing or mitigating “disproportionate and adverse human health and environmental effects.” As such, under the provisions of EO 14096, NNSA, as a federal agency, was directed to be on the side of the Mountain View community - and *to use available legal authorities to support and assist communities experiencing human health effects.* EO 14096 Section 3 (vi) reads:

(vi) “evaluate relevant legal authorities and, where available and appropriate, consider adopting or requiring measures to avoid, minimize or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable, and to address any contribution [of] such Federal activities to adverse effects - *including cumulative impacts of environmental and other burdens - already experienced by such communities.*” (emphasis added). Federal Register/Vol. 88, No. 80, 25254.

While the primary activity of EO 14096 Sec. 3(vi) requires a Federal agency to adopt its own environmental justice measures within its agency mission and actions, the mandate is nonetheless to address, and use legal authorities to do so, the undue burdens and impacts “already experienced by such communities [with environmental justice concerns].” Ultimately, Under EO14096, if a Federal agency chooses to get involved in local rulemaking, it is required to work towards measures that mitigate disproportionate health impacts under this EO, not fight to avoid mitigation entirely, as NNSA did here.

C. NNSA INVOLVEMENT IN THE HEEI AIR QUALITY RULEMAKING CONTRADICTED NNSA’S AND DOE’S STATED COMMITMENT TO ENVIRONMENTAL JUSTICE AND COMMUNITY ENGAGEMENT

Annually, the DOE submits a Congressional Budget Justification to Congress in order to receive funding for its agency, which includes the NNSA budget and requests for funding its mission. The DOE budget overview statements in the FY2022 - FY2024 Congressional Budget Justifications set out a federal agency commitment, which included the NNSA, to “support communities of color living with the toxic legacy of air pollution , , , and [who] are first and worst impacted by the climate emergency”.¹⁸ Continuing on in FY2024, the DOE Budget Justification Overview commits the DOE to “advancing environmental justice, [and]reducing

¹⁸ FY2022 Department of Energy Congressional Budget Justification, Budget in Brief, p. 2

health and environmental hazards for at-risk communities.”¹⁹ These statements are both a commitment to and guidance for DOE and all its sub-agencies to actively engage with and support at-risk and overburdened communities in order to specifically address the “toxic legacy of air pollution.” These explicit commitments of DOE to environmental justice are further supported in the policy guidance under DOE regulations and NNSA directives.

DOE’s Business Operating Procedure Policy 144 further addresses Intergovernmental Affairs and the required conduct of NNSA employees in interacting with government agencies and stakeholders. The Intergovernmental Affairs Procedure’s Purpose section reads: “To ensure that NNSA operates in a manner that is open, proactive, responsive and well coordinated in managing relationships with state, *local*, tribal government officials and *stakeholders*.”²⁰ (Emphasis added). NNSA violated the tenets of this procedure by refusing to even discuss the content of the proposed HEEI rule with EHD and the Mountain View Coalition before the HEEI rulemaking began - its actions were neither open, proactive or responsive in managing the relationships between NNSA and the stakeholders in a community near one of NNSA’s primary sites.

Instead, NNSA was openly hostile to the AQCB, a quasi-legislative local body which had been given the authority to engage in rulemaking on local air quality issues. NNSA used every possible tactic to try and stop the HEEI rulemaking and to keep Mountain View Coalition’s petition to address air pollution impacts from being heard by:

1. Deliberately not engaging in good faith in pre-hearing negotiations about the rule;
2. Filing motions to stay, motions disputing the authority of the AQCB, and motions to disqualify board members;

¹⁹ *Id.* at p. 2

²⁰ DOE Business Operating Procedure 144, “Intergovernmental Affairs,” approved 5/20/14

3. Arguing in full opposition to the rule throughout the HEEI rulemaking hearing; and
4. Supporting the illegal attempt by the City of Albuquerque to disband the AQCB.

NNSA's actions as a federal agency before and during the HEEI rulemaking were unwarranted and contrary to its own commitments to environmental justice and its operating procedures for engagement with local communities.

D. NNSA ACTED IN DIRECT CONTRAVENTION OF ITS OWN POLICIES OF COMMUNITY ENGAGEMENT AND TRIBAL CONSULTATION

NNSA adopted a *Governance and Management Framework* in 2019 which included, among its many provisions, guidance for the conduct of the NNSA regarding “external relationships.” The NNSA Governance and Management Framework provides the following guidance for the NNSA: “We cannot be successful without building and sustaining strong relationships across the Federal Government to include DOD, the Department of State and Congress; oversight agents; *the communities where our sites are located*; and other non-federal external partners.”²¹ (Emphasis added.) In the instant case, the local rulemaking affected a community where the NNSA has a major site, the Albuquerque Complex, which has a recently completed 33,000 square foot LEED certified facility to house its employees. The proposed HEEI Rule would have required EHD to review air quality permitting decisions in such a way that would protect already overburdened communities by necessitating a review of the existing air pollution health burden in the local community where this beautiful complex is located.

The Mountain View Coalition sought support from many parts of the community, including the NNSA, which was and is mandated to build and sustain strong relationships *particularly* in communities where NNSA sites are located, according to its Governance

²¹ NNSA Supplemental Directive 226-1C Government and Management Framework approved on 10-01-19 with an expiration date of 10-01-22. Follow up research on the DOE Office of Primary Interest (OPI) site was not conclusive if SD 226-1C had been extended. It did not appear to be archived by OPI or rescinded. Link: https://www.directives.doe.gov/browse-archived-directives?page_b77186a1_9333_4c79_96f3_36b6fa946099=2

Framework. Instead, using every available legal means in an attempt to stop the HEEI rulemaking and continually criticizing and disparaging the AQCB members, the NNSA did not build or sustain a strong relationship with a nearby and impacted community near a major NNSA site. NNSA could and should have opted to work with the Mountain View Coalition, to hear their extensive concerns, and to genuinely and actively work towards an HEEI rule that all parties could agree on.²²

As stated above, NNSA refused to meaningfully engage in discussion and negotiation regarding the proposed HEEI rule during the months of scheduled negotiation sessions in 2023 before the rulemaking hearing commenced. This was the first and the major opportunity to engage in a positive manner with both the EHD and the Mountain View Coalition in order to build strong relationships with community members who live downwind and close to a critical and extensive NNSA site. Instead of participating, NNSA repeatedly and incorrectly stated that all federal facilities are exempt from the Clean Air Act, a position not supported by statute or case law, embarking on an expensive oppositional stance to a local community and a local air board, the AQCB, in Albuquerque.

Finally, the DOE Congressional Budget Justification FY2024 touts that “the budget includes broad support for underserved communities, including \$70 million for community capacity initiatives in the Office of Environmental Management and *the NNSA*, to address areas of persistent poverty around the Department’s sites.”²³ (Emphasis added). Contrary to the community building initiative, NNSA took persistent and repeated action in the HEEI rulemaking to thwart community involvement and to discount the request of the impacted, low

²² Even if the parties had not been able to reach full agreement on an HEEI rule, the NNSA could have engaged to listen, show respect and actively engage in the pre-hearing negotiation process in order to build an ongoing cooperative relationship with the neighborhoods part of or represented by the Mountain View Coalition, in compliance with the NNSA Governance and Management Framework.

²³ DOE Congressional Budget Justification, FY2024, p.4

income neighborhoods around and near its Albuquerque Complex site, for a more just air quality permitting rule.

One of the many baseless motions NNSA filed in the rulemaking was opposition to the requirement in the proposed rule for tribal consultation, claiming the provision would impermissibly delegate the AQCB's authority to tribes and arguing the provision was unconstitutionally vague. The definition of tribal consultation in the proposed rule mirrored requirements for tribal consultation in both New Mexico State Law and the Albuquerque Municipal Ordinance Sec. 2-6-6-2.²⁴ The HEEI rule defined tribal consultation as meaning “to cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent.”²⁵ There was absolutely no legitimate basis for the NNSA to oppose such a provision for tribal consultation in the HEEI Rule; practice and case law support the necessity of inclusion of tribal consultation, as do NNSA's own policies.²⁶

The NNSA is required to engage in tribal consultation under DOE Policy 144.1 *Department of Energy American Indian Tribal Government Interactions and Policy* which requires tribal consultation before taking any action with potential impact upon tribal nations.²⁷ NNSA's specious argument that the proposed HEEI rule improperly delegated the AQCB's authority to tribal governments openly contradicted its own mandate that requires the NNSA to

²⁴ NMSA 1078 Sec. 11-18-2(A)(1) (requiring every state agency to develop policies that “promote effective communication and collaboration between the state agency and Indian nations, tribes or pueblos”) and Albuquerque Municipal Ordinance Sec. 2-6-6-2 (creating a process for government-to-government consultation with federally recognized tribes).

²⁵ Ex. 1 HEEI Rule V. 4, p.2.

²⁶ *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996); DOE policy 144.1 *Department of Energy American Indian Tribal Government Interactions and Policy*.

²⁷ DOE policy 144.1, approved January 16, 2009 *Department of Energy American Indian Tribal Government Interactions and Policy* defines “Consultation” as follows: “Prior to taking any action with potential impact upon American Indian or Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation and collaboration to determine the impact on traditional and cultural ways of life, natural resources, treaty and other federally reserved rights, involving appropriate tribal officials and representatives throughout the decision making process”

seek and engage in tribal consultation before taking any action which would potentially impact upon American Indian nations.

The blatant disregard of the federal mandate and NNSA policies supporting and requiring considerations of environmental justice, and tribal consultation constituted an abuse of its power since it was done for the specific purpose of impeding the consideration of the proposed rule drafted to address life and health impacting environmental justice concerns.

E. THE DOE EJ SCORECARD FAILS TO DOCUMENT OR ACCOUNT FOR THE REGRESSIVE ENVIRONMENTAL JUSTICE STANCE TAKEN BY THE NNSA DURING THE HEEI RULEMAKING

The DOE EJ Scorecard for Fiscal Year 2023 (October 2022 to September 2023) states DOE is “weaving energy and environmental justice into the fabric of its energy systems and operations via departmental offices, programs and policies”.²⁸ As set forth above, DOE has included environmental justice into some of its policies, so the aforementioned scorecard statement about policies is accurate. But “operations” are a different matter. The DOE EJ Scorecard fails to take into account the regressive action on environmental justice on the part of NNSA, as a sub-agency of DOE, in choosing to oppose and to actively create barriers to a rulemaking hearing to address the environmental justice concerns of a disadvantaged community.

The timeframe for the FY2023 EJ Scorecard dovetails with the time frame in which community meetings were occurring pre-filing of the HEEI Rule with the AQCB and beyond. Fiscal Year 2023 also coincides with the time period in which NNSA chose to engage in contentious litigation tactics, along with NTESS and several industry parties, attempting to stop the hearing on the requested rulemaking to address cumulative impacts on the communities forming the Mountain View Coalition.²⁹

²⁸ <https://ejscorecard.geoplatform.gov/en/scorecard/departments-of-energy/p.1>

²⁹ NNSA General Counsel entered her appearance in AQCB 2022-3 on May 18, 2023 (AQCB Docket no. 53) and filed NNSA’s joinder in Motions to Disqualify AQCB Kitty Richards on June 14, 2023 opposition to delegation of

Weirdly, NNSA chose not only to ignore EO 12898 and 14096 but to flagrantly act counter to DOE EJ policies which squarely direct NNSA to take special care to uplift the quality of life concerns in *communities where NNSA sites are located*.³⁰ The DOJ EJ Scorecard touts in the section on “Environment and Civil Rights Protection” that “Federal agencies are advancing environmental justice by carrying out their responsibilities under the law to identify and address disproportionate and adverse public health and environment, climate-related, and *cumulative impacts on communities with environmental justice concerns*.” (Emphasis added.)³¹ Not in this case. As said, the HEEI Rule petition was drafted to seek the protection of the Clean Air Act, a bedrock environmental law. Ironically, the DOE EJ Scorecard within the same section boasts, “Agencies are working to ensure that all communities experience the protection of our bedrock environmental laws.”³² The DOE EJ Scorecard does not reflect the facts of the NNSA anti-EJ stance in the HEEI rulemaking and its abuse of power and resources during the rulemaking process.

II. NNSA’S ACTIONS DURING THE RULEMAKING FLAGRANTLY WASTED FEDERAL RESOURCES

As stated, NNSA and NTESS, a subsidiary of Honeywell International and a contractor operating Sandia National Laboratory (SNL) under the purview of NNSA, jointly submitted four motions to the AQCB to halt the proceedings, on a variety of legal grounds detailed below, in a two day period - November 9 and 10, 2023.³³ The AQCB, at the outset of the hearing on

authority to a hearing officer.(AQCB Docket no. 75) NNSA’s Motion to Stay the Proceeding was filed on June 13, 2023 (AQCB Docket no. 74). Pre-hearing community meetings occurred on July 31, August 11, August 22, and August 29, 2023.

³⁰ DOE Congressional Budget Justification, FY2024, p.4;NNSA Supplemental Directive 226-1C Government and Management Framework approved on 10-01-19 with an expiration date of 10-01-22.

³¹ <https://ejscorecard.geoplatform.gov/en/scorecard/department-of-energy/> See section entitled, “Environment and Civil Rights Protection.

³² *Id.*

³³ The Board’s rulemaking procedures constitute a quasi-legislative process intended to give the Board access to broad evidence, public comment, policy considerations and legal analysis in helping the Board determine whether and how regulations would best prevent and abate air pollution.

December 4, 2023, denied one of the four motions and stated the other three motions were premature as no rule had yet been adopted.³⁴ The NNSA had earlier joined in other motions and objections prior to filing the November 9 and 10 motions which were also seeking to stop or delay the rulemaking hearing process. Then, the NNSA, through Ms. Richards, prepared for and participated in a six day hearing at a huge expense to the NNSA. Finally, the NNSA joined in supporting two “cease and desist” letters, based on the Albuquerque City Council’s illegal attempts to stop the rulemaking, addressed to the AQCB while the rulemaking hearing was still in progress.

It is largely, if not totally, unprecedented to have a federal agency become involved, much less so deeply involved, in local rulemaking such as the HEEI rulemaking. The proposed HEEI rule was substantially similar to a rule addressing cumulative air impacts promulgated in New Jersey in April 2023. Both rules required the permitting authority to provide special consideration of permit applications for sources seeking to locate in an overburdened community. *See*, N.J.A.C. 7:1C- 2.1. Both rules created a tiering system, dictating whether a facility may be exempt from the cumulative impacts analysis depending on the source’s contribution to environmental stressors. *See*, N.J.A.C. 7:1C-2.2-2.3. Finally, in the simplest terms, both rules required the permitting authority’s consideration of quality of life impacts and how the impacts would influence the final decision on a permit application. Notably, neither rule sought to exempt federal polluting facilities simply due to the fact that the facility was part of a federal operation, as the NNSA sought to do in this instance.

Dr. Nicky Sheats, Ph. D, MPP, Esq., founding member of the New Jersey Environmental Justice Alliance, and a member of EPA’s National Environmental Justice Advisory Council,

³⁴ AQCB 2022-3 Docket No. 227 filed December 7,2023
<https://www.dropbox.com/scl/fo/ftzpfvuwnpmwu7vg492o/AJVv1VSwoYbEfxPMg5duhgY?dl=0&e=1&preview=27.+Order+on+Motions+Addressed+at+Rulemaking+on+12-4-23.pdf&rlkey=mk8ox5s9vihwhzt668d7s8xy0>

served as an expert witness in the HEEI rulemaking and participated as a stakeholder in the New Jersey rulemaking process.³⁵ Dr. Sheats testified at the HEEI rulemaking hearing that *no* federal entities were opposed to, much less involved in, the New Jersey rulemaking, despite New Jersey also being home to federal facilities.³⁶ The apparent reasons for NNSA involvement in the HEEI rulemaking here, then, were seemingly only to discredit and harass the Mountain View Coalition for seeking to protect their community members from hazardous and discriminatorily distributed air pollution permits. The NNSA, instead of meaningfully engaging with an overburdened community, sought instead to maintain business as usual in its air pollution scheme, contrary to executive orders and its own policies and budget commitments. The NNSA used its federal resources to add to the burden for Mountain View rather than comply with its mandate to work to protect environmental justice communities.

The actions of NNSA to expend hundreds of hours and hundreds of thousands federal dollars (according to Ms. Richards)³⁷ for legal counsel and expert witnesses to fight a community-proposed local air quality regulation, as said, is unheard of.³⁸ The proposed HEEI Rule was drafted and designed to protect the health of an overburdened community that has consistently been ignored and discriminated against by the local permitting authority. Again, NNSA's deliberate actions were contrary to President Biden's EO 14096, which builds upon and strengthens the federal government's commitment to environmental justice. As stated above, EO 14096 requires the federal government agencies to engage with and promote opportunities for better lives and health for underserved and overburdened communities.

³⁵ Dr. Sheats also served on EPA's Clean Air Act Advisory Committee and currently serves on the White House Environmental Justice Advisory Council.

³⁶ AQCB 2022-3 Transcript of proceeding no. II, p. 464, lines 12-15.

³⁷ AQCB 2022-3 Transcript of proceeding no. VI, p. 2002, lines 15-21.

³⁸ *Id.* at lines 15-19.

During the HEEI rulemaking hearing, the Federal Government, through the Department of Energy and NNSA did the exact opposite of what is required under these executive orders. Contrary to the goals of EO 14096, NNSA made every attempt to block the opportunity for an overburdened community seeking the protections of the Clean Air Act to have a complete and full hearing on the HEEI Rule. In addition to refusing to participate in good faith during the meetings leading up to the rulemaking hearing, meeting every opportunity for constructive conversation with stonewalling, NNSA filed *four* frivolous motions with the AQCB in two days attempting to block the hearing on the rulemaking process on spurious claims about AQCB's authority and the content of the proposed regulation, as follows:

Motion #1 (Jurisdiction):

Asserting the proposed regulation raised a substantive due process issue when in fact controlling air pollution is a longstanding, legitimate government interest. The Air Quality Control Act ("ACQA") mandates the Board establish rules to "prevent and abate air pollution," and defines air pollution as turning on whether emissions may "injure human health" or "interfere with public welfare." Arguing that controlling air pollution is not within the purview of ACQA was meritless.³⁹

Motion #2 (Preemption):

Asserting federal preemption when the Clean Air Act clearly and specifically waives federal preemptive rights. Clean Air Act Section 118 is a "clear and unambiguous waiver" of preemption and sovereign immunity that expressly subject federal facilities to local air pollution regulation, as found by numerous courts. See *United States v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732 (C.D.Cal.1990); *N. Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 515 F. 3d 344 (4th Cir. 2008). This was a baseless motion due to the waiver of preemption set forth expressly in the statute.⁴⁰

Motion #3 (Tribal Consultation):

Asserting the tribal consultation provision allowed a tribe or tribes to "veto" the issuance of an air quality permit by the AQCB. NNSA and NTESS were referring to earlier versions of the proposed regulations and misrepresenting the definition of tribal consultation used in the proposed regulation. The 10th Circuit Court has recognized the cultural and historical interest of the pueblos in rulemaking. *City of Albuquerque v.*

³⁹ AQCB 2022-3 Docket no.155 filed on November 9, joined by NNSA on Docket no.158 filed same date

⁴⁰ AQCB 2022-3 Docket no.160 filed November 10, 2023.

Browner, 97 F.3d 415, 418 (10th Cir. 1996) (recognizing the Tribe’s ceremonial use of the Rio Grande and surrounding lands and resources). The proposed regulation in front of the AQCB for rulemaking merely incorporated tribal consultation provisions used in federal and state law and does not provide a tribal “veto.” NNSA and NTESS were well aware that the language they cited as objectionable had been changed from earlier versions of the rule and that the HEEI rule in front of the AQCB for consideration was version no. 4 and not the earlier ones referenced in their motion. The content of this motion was based on incorrect facts and its goal was to harass the Coalition by making it respond to yet another meritless motion.⁴¹

Motion #4 (Due Process):

Asserting the inclusion in the proposed local rule the considerations of the “social determinants of health”, “odor generation” and “noise generation” were not objectively related to the abatement of air pollution when the plain language of the Clean Air Act states that emissions that may “injure human health” are covered by the CAA. The CAA covers the exact terms NNSA and NTESS were objecting which made this another frivolous motion to add to the list.⁴²

It was a waste of federal resources budgeted to the NNSA for its stated mission goals to further nuclear science in the weapons arena for the NNSA to become deeply involved in the HEEI rulemaking and to use contentious litigation tactics to harass both the Mountain View Coalition and the AQCB. The four meritless motions filed in two days were not only premature, but frivolous as defined by established case law. The factual contentions of the four motions were either baseless or the claims were based on undisputedly meritless legal theories in this context. *See, Livingston v. Adirondack Beverage Co.*, 141 F. 3d 434, 437 (2nd Cir. 1998). Significant federal resources allocated to the Office of the NNSA General Counsel funded these baseless motions. NNSA set out to create additional burdens for the Mountain View Coalition to overcome to have their petition heard by the AQCB at the expense of the health of an EPA-identified environmental justice community. In doing so, NNSA used its budgeted resources for goals both contrary to its mission goals and its own stated commitment to uplifting

⁴¹ AQCB 2023-3 Docket no. 161 filed on November 9, 2023.

⁴² AQCB 2022-3 Docket no. 157 filed on November 9, 2023.

overburdened communities, addressing environmental injustice and building relationships, especially in communities where NNSA sites are located, such as Albuquerque.

The use by the NNSA of “hundreds of thousands of dollars” of federal money to create as many roadblocks to an overburdened and disadvantaged community seeking to address environmental justice concerns was a significant and illegal use of federal money. Such use was contrary to the bold and specific commitments made to uplifting environmental justice declared in the US Department of Energy Agency Fiscal Report for FY 2023. Within the “Promote Equity and Energy Justice” section of its fiscal report DOE declares, “DOE is committed to the successful implementation of initiatives and the DOE federal workforce to ensure equity is enduringly embedded in the Department’s policies and activities.”⁴³ (Emphasis added). Within the report, different DOE sub-agencies and offices’ activities are highlighted in the “Promote Equity and Energy Justice” section for their work to embody these commitments. The NNSA section highlights the Long Term Stewardship (LTS) program designed to ensure legacy environmental clean up and states, “Absent a viable LTS program, communities surrounding NNSA LTS sites, including disadvantaged communities, would be exposed to legacy pollution.”⁴⁴ It is beyond ironic that NNSA is touted here in a fiscal report as doing good work to promote equity within the LTS stewardship program of which Sandia National Laboratories (SNL) is a “Considered Site” identified as being a site of multiple sources of legacy pollution.

Mountain View Coalition members are directly downwind of SNL and the Long Term Stewardship website notes for SNL that “NNSA is the site landlord and will be responsible for Long Term Stewardship.”⁴⁵ Contrary to the statement in the FY 2023 Agency Fiscal Report that NNSA is somehow protecting LTS sites from legacy pollution, in this instance, NNSA worked to

⁴³ US Department of Energy (DOE) Agency Fiscal Report FY 2023, p.34

⁴⁴ US Department of Energy (DOE) Agency Fiscal Report FY 2023, p.37

⁴⁵ Long Term Stewardship Resource Center link: <https://www.energy.gov/lm/long-term-stewardship-resource-center>

insure disadvantaged communities near a LTS site not only have legacy pollution but should potentially have other polluting sources added to their overburdened community. Using federal money in the amount of hundreds of thousands of dollars to *stop* environmental justice rulemaking is a waste of federal money and completely counter to NNSA's environmental justice commitment and policies. The FY 2023 report (which covers the time period of October 1, 2022 to September 30, 2023 - the same time period in which NNSA chose to become involved in strident opposition to the HEEI rule) does not mention the involvement of NNSA to act completely counter to "ensuring that equity is enduringly embedded in the Department's policies and activities."

The federal monies used to pay Ms. Richards and the experts hired and presented by the NNSA to oppose addressing the environmental justice concerns of the Mountain View Coalition constitute a gross waste of federal funds on actions performed by a federal agency contrary to the very goals and tenets of EO 14096 and the listed policies of the DOE and NNSA. Moreover, because the Congressional Budget Justification that DOE presented for NNSA to receive federal funding to further its core mission includes a commitment by the agency to environmental justice, NNSA's outright use of federal funds for a purpose so contrary to their budget needs and policy principles is nothing but an illegal waste of federal monies.

Finally, the massive expenditure of federal funds used to interfere in the HEEI rulemaking with the goal of shutting down the forum designed to hear the Petitioner's request to have cumulative impacts of air pollution on their community addressed was not only a waste but also an abuse of federal funds by NNSA. According to the Government Accountability Office statement of policy, GAO-24-106458, *Understanding Abuse of Federal Resources*, abuse occurs when there is "an excessive use of federal funds." In this instance, for NNSA to expend hundreds

of thousands of dollars and hundreds of hours of NNSA General Counsel's time to interfere with the community-led HEEI rulemaking was a clear abuse of federal money in light of the charge to federal agencies under EO 14096 and NNSA policies and directives. The fact that NNSA refused to negotiate with the Mountain View Coalition, both ignoring any opportunity to join the Mountain View Coalition and EHD at stakeholder meetings held in the year prior to the filing of the Petition, as well as refusing all additional opportunities for meaningful, good faith negotiation on the substance of the proposed rule, and the numerous baseless motions filed by NNSA to attempt to stop the proceeding were an abuse of power and constitute an abusive use of federal funds for an unmandated purpose. NNSA evaded every chance to avoid litigation, its most expensive option.

NNSA avoided or ignored every opportunity to engage substantively in negotiations about the proposed rule and instead proposed only one alternative that it would agree to: an exemption of all federal facilities from local air quality regulation. When such an exemption proved untenable, NNSA, through its attorney Ms. Richards chose to engage in litigation tactics that were, most simply, frivolous and a waste of federal resources - choosing its most expensive option.

The baseless motions described above (which were complemented by two additional motions filed by NTESS) likely took enormous amounts of time to research and draft. Moreover, and as an intended consequence, the filing of such motions placed an enormous burden on to the Mountain View Coalition, as it had to quickly respond to numerous, contemporaneous, frivolous motions, after already having to respond to the numerous motions NNSA joined prior to the November 2023 filings. Notably, the AQCB has an established process to hear legal arguments *at the close of the rulemaking hearing*. These frivolous motions filed before the hearing date

constituted an aggressive and targeted attempt to keep the Mountain View Coalition's request for the AQCB to consider the cumulative impacts of air pollutants on an already disproportionately harmed community from being heard.

Certainly the resources of NNSA as a semi-autonomous federal agency are massive compared to those available to the Mountain View Coalition, and these federal resources were used abusively to try and stop the Mountain View Coalition from *even being heard* on the proposed regulation to benefit their community. Federal government resources could have been and *should* have been used to support and to develop an air quality regulation to benefit the community, not used to try and stop the Mountain View Coalition from receiving a hearing to find a solution to decades of bearing the brunt of the city and county's air pollution burden.

Further, adding insult to injury, the NNSA's General Counsel Ms. Richards ridiculed and demeaned the efforts of the Mountain View Coalition in her closing argument to the AQCB. Ms. Richards read into the record the AQCB's suggested process for rulemaking⁴⁶ and implied that the Petitioners had not followed the process, stating "they did so at their own folly."⁴⁷ Ms. Richards further stated the parties could have all been at the hearing that day implementing a properly tailored rule if Mountain View Coalition had only followed the process – failing to note NNSA's extensive, wasteful and abusive participation in: 1) trying to stop the rulemaking process, 2) countering all the steps taken and evidence presented by Mountain View Coalition, a disproportionately impacted community, who worked diligently over years with limited resources to even petition the AQCB to consider a rule addressing the health impacts of air pollutants on their community, 3) misrepresenting the opportunity for stakeholder involvement

⁴⁶ The AQCB procedural steps listed by Ms. Richards' in her closing statement were: "obtaining access to technical and legal expertise, performing necessary technical and legal research, writing a draft of the proposed regulation, sending the draft [to stakeholders], and revising the draft based on stakeholder comment." All of these steps were meticulously followed by the Petitioners throughout the years of researching, drafting and submitting the HEEI Rule. The facts of Petitioners following these steps were known to the NNSA.

⁴⁷ AQCB Transcript Vol. VI, p. 2005, lines 7-9.

and the numerous opportunities for the NNSA (and other parties) to work with the Petitioners to craft an agreed on HEEI rule, and 4) demanding, with no grounds for doing so under the Clean Air Act, that the NNSA, DOE and Kirtland Air Force Base be exempted entirely from any air quality regulation the AQCB might ultimately adopt. Given the mandate of EO 10496 that Federal agencies are to analyze, consider and support the needs of impacted communities, this derision on behalf of the NNSA was another form of abuse.

The NNSA, through Ms. Richards in her closing argument, misrepresented the facts about the proposed rulemaking process, stating there was a “lack of stakeholder and community engagement” when the parties actually had met multiple times to discuss and amend the proposed rule – NNSA merely chose not to meaningfully participate. Ultimately, rather than support a cumulative air impacts rule that would aid in ensuring that environmental justice communities in Albuquerque and Bernalillo County are better protected, consistent with the Executive Orders and DOE and NNSA policies and guidance, NNSA used every opportunity and method to try and shoot it, and the Mountain View Coalition, down.

Given the many DOE and NNSA policy statements, directives, guidance and commitments to both engaging meaningfully and respectfully with overburdened communities, especially those close to an extensive NNSA administrative site, it is telling that the EPA OIG recently determined that EPA Region 7 did not effectively engage with community surrounding the Findette Corp. Superfund Site.⁴⁸ The EPA OIG found the EPA Region 7 did not effectively engage, provide tools to assist the community and the failure to use mediation services in a timely manner - which could have mitigated the contentious relationship among stakeholders - resulted in clean up delays and added to community distrust of EPA. Here Ms. Richards, as

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<https://www.epaoig.gov/reports/evaluation/epa-region-7-did-not-effectively-engage-community-surrounding-findette-corp>.

General Counsel for NNSA and NNSA management, could have likewise used engagement and community assistance tools before, during and after the HEEI rulemaking to assist Mountain View Coalition in being heard, supported and, where industry had concerns about implementation of the HEEI rule, NNSA could have led the way to use mediation or other methods of resolution and support. Those types of actions would have followed the mandate of EOs and the DOE agency directives to engage, support and assist overburdened communities in a true embodiment of equity - especially on NNSA's home turf given the size and importance of the NNSA Albuquerque complex.

The NNSA decision to disparage and oppose the HEEI rule and therefore the Mountain View Coalition constitutes abuse of its budgeted federal money, governing federal policy and a neighboring disadvantaged community, the Mountain View Coalition.

V. CONCLUSION

NNSA wasted hundreds of thousands of dollars to interfere with and oppose an impacted community's fight for environmental justice in the AQCB No. 2022-3, contrary to the mandate of Executive Orders Nos. 12898 and 14096, DOE Congressional Budget Justifications FY 2022 and FY 2024, DOE Agency Fiscal Report FY 2023, 50 USC 2401 Section 3211(c), NNSA SD 226-1C Governance and Management Framework, DOE Policy 144 Business Operating Procedure Policy 144, and DOE Policy 144.1 Department of Energy American Indian Tribal Government Interactions Policy. Further, NNSA abused its power and function by refusing to aid an impacted community and instead working in direct opposition to their request for the AQCB to address the cumulative health impacts of air pollutants on disproportionately affected low income and neighborhoods of color.

For the foregoing reasons, the following remedial actions are requested:

1. Perform an audit of the DOE NNSA Albuquerque Administrative Complex case acceptance policies and a determination of whether the Albuquerque Complex was following EO 14096 and other stated federal policies and guidelines regarding environmental justice which are applicable to the NNSA operations and management;
2. Impose sanctions if the Albuquerque Administrative Complex of the NNSA failed to follow any mandated policies. The staff responsible for the failure to follow federal mandates, policies and guidelines addressing environmental justice to be held accountable by suspension, demotion and/or reassignment, or other disciplinary action;
3. Requirement that the Albuquerque Administrative Complex create, with community input, an Environmental Justice policy, to be published to the public, which will apply to all NNSA actions taken within Bernalillo County, New Mexico.

Respectfully submitted,

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