

**RESPONSE TO THE PERIODIC REPORT OF THE UNITED
STATES OF AMERICA TO THE UNITED NATIONS
COMMITTEE ON THE ELIMINATION OF RACIAL
DISCRIMINATION**

July 3, 2014

SUBMITTED BY: SouthWest Organizing Project (SWOP) with the assistance of the New Mexico Environmental Law Center.

CONTACTS: Juan Reynosa, Southwest Organizing Project, Juan@swop.net
Eric Jantz, Staff Attorney, New Mexico Environmental Law Center,
ejantz@nmelc.org

SUPPORTING INDIVIDUALS AND ORGANIZATIONS: Ms. Esther Abeyta, San Jose neighborhood, Albuquerque, New Mexico; Mr. Steve Abeyta, San Jose neighborhood, Albuquerque, New Mexico; Bernalillo County Place Matters; OLÉ (Organizing in the Land of Enchantment); Dr. Marla Painter, Mountain View neighborhood, Albuquerque, New Mexico; Mountain View Community Action.

I. Introduction

1. Albuquerque, and the county in which it is located, Bernalillo County, are the population and industrial centers of New Mexico.

2. Because of its population density and concentration of industrial operations, the Albuquerque/Bernalillo County area faces environmental and public health issues that are unique in an otherwise predominantly rural state.

3. In particular, urban air pollution presents significant public health and environmental challenges to minority neighborhoods in Albuquerque and Bernalillo County.

4. These problems are aggravated by the unequal implementation and enforcement of air pollution laws by local regulatory agencies, under the supervision of the United States Environmental Protection Agency (“EPA”).

5. Further, minority neighborhoods that are unequally burdened by air pollution in Albuquerque and Bernalillo County do not have adequate means to seek redress for their unequal treatment under the current interpretation of federal environmental laws.

6. The unequal enforcement and implementation of environmental laws is aggravated by unequal application of local zoning laws, which effectively segregate low-income and minority populations into high pollution, high health risk neighborhoods.

II. Issue Summary

7. The United States has not realized the CERD’s mandates in Articles 1, 2, 5 and 6 with respect to implementing and enforcing the federal Air Pollution Prevention and Control Act, 42 U.S.C., §§ 7401 *et. seq.* (the “Clean Air Act”) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et. seq.* (“Title VI”).

8. Albuquerque and Bernalillo County local governments have not realized the CERD’s mandates in Articles 1, 2, and 5 with respect to implementing and enforcing the Clean Air Act and the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1, *et. seq.*

9. In Albuquerque, minority and low income communities suffer disproportionate health impacts from pollution, including air pollution that results in higher health risks and lower life expectancy due to unequal enforcement and implementation of federal, state, and local air pollution laws.¹

¹ Joint Center for Political and Economic Studies, *Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All* (Sept. 2012) at pp. 17-19; <http://www.bcplacematters.com/wp-content/uploads/2010/11/Place-Matters-for-Health-in-Bernalillo-County.pdf>.

10. In the San Jose² neighborhood, for example, recent community efforts³ have demonstrated that air concentrations of the volatile organic compound (“VOC”) chlorobenze are 10 times higher than concentrations typically found in urban ambient air and above EPA’s reference concentrations.⁴

11. Concentrations of fine particulate matter in the San Jose neighborhood are also above EPA’s annual health based standard.⁵ Exposure to elevated levels of fine particulate matter is linked to premature mortality.⁶

12. Similarly, in the Mountain View neighborhood⁷, a study found that there were more cases of lung, bladder, and brain cancer and leukemia than statistically expected.⁸

13. Further, air concentrations of the volatile organic compounds benzene, chloroform, carbon tetrachloride, and tetrachloroethylene in Mountain View were all above EPA screening levels.⁹

14. These VOCs found in high concentrations in Mountain View contribute to the kinds of cancers found in elevated numbers in the Mountain View neighborhood.¹⁰

15. Disproportionate impacts of air pollution are similar in other predominantly minority neighborhoods in Albuquerque and Bernalillo County.¹¹

² San Jose is 93% Latino. Bernalillo Place Matters, *Health Impact Assessment for NMRT’s Request for a Special Use Permit* at p.6 (March 22, 2011). Albuquerque’s population as a whole is 46.5 % Latino. <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. Bernalillo County’s population as a whole is 48.4% Latino. <http://quickfacts.census.gov/qfd/states/35/35001.html>.

³ Significantly, air quality data in Albuquerque’s minority neighborhoods is the result of community initiated studies. Neither Albuquerque local government nor the U.S. EPA has endeavored to gather actual air quality or health data in these neighborhoods.

⁴ San Jose Air Quality Report [Draft] at pp. 4-5 (March 12, 2014).

⁵ *Id.*, p. 6.

⁶ *Id.*

⁷ Mountain View is approximately 80% Latino, compared with 46.5% for Albuquerque and 48.4% for Bernalillo County. <http://www.city-data.com/neighborhood/Mountain-View-Albuquerque-NM.html>.

⁸ <http://www.svpartners.org/VOC%20presentation%2009-17-09.pdf>, p. 28.

⁹ *Id.*, p. 23.

¹⁰ *Id.*, p. 28.

¹¹ Joint Center for Political and Economic Studies, *Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All* (Sept. 2012) at p. 17-19; <http://www.bcplacematters.com/wp-content/uploads/2010/11/Place-Matters-for-Health-in-Bernalillo-County.pdf>.

16. Additionally, air quality data used by local regulatory agencies under the oversight of the EPA significantly underestimate the severity of impacts on minority neighborhoods, because air monitoring stations are located substantial distances from air pollution sources concentrated in minority neighborhoods.¹²

17. Moreover, local regulatory agencies have no legal requirement to disclose and evaluate the cumulative environmental and health impacts of an operation seeking a permit under federal, state and local air pollution laws.

18. SWOP petitioned their local government to enact a local regulation requiring disclosure and analysis of cumulative air impacts,¹³ but the local regulatory authority refused to even grant a hearing on their petition.

19. Finally, minority and low-income communities are denied equal access to tribunals to challenge discriminatory enforcement of environmental laws that result in disparate adverse environmental and health impacts.¹⁴

20. Minority communities must instead rely upon the United States government - in the case of minority communities in Albuquerque, the EPA - to vindicate their civil rights. However, the EPA routinely does not act on community complaints in a timely manner and rejects the majority.¹⁵

21. Moreover, the New Mexico Air Quality Control Act does not have any provisions for citizen enforcement, so affected communities must rely on local authorities' discretion to enforce air pollution laws. Unfortunately, local government enforcement often ignores minority communities and is generally ineffective.

III. Legal Framework

22. Article 1(1) of the CERD defines "racial discrimination" as any "distinction, exclusion, restriction or preference" based on race color, descent or ethnic origin that has the "purpose or effect" of restricting equal recognition or enjoyment of human rights or fundamental freedoms such as exercise of political or social rights.

23. Article 2(1) of the CERD requires parties to the Convention to undertake policies and legislation, on both national and local governmental levels, to eliminate racial discrimination. Further, Article 2(1)(a) prohibits parties to the Convention in engaging in any acts or practices that result in racial discrimination.

¹² <http://www.svpartners.org/VOC%20presentation%2009-17-09.pdf>, p. 4.

¹³ <http://www.cabq.gov/airquality/air-quality-control-board/documents/2014-1%20Rulemaking%20SWOP%20Petition%20to%20Create%200.11.72%20NMAC.pdf>

¹⁴ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

¹⁵ http://www.epa.gov/civilrights/TitleVICases/2014-02-26_Title_VI_Case_History.pdf.

24. Article 5(e)(vi) guarantees the right to public health.

25. Article 6 requires that parties to the Convention ensure that everyone within its jurisdiction has equal access to tribunals, without regard to race or ethnicity, to protect their rights as guaranteed by the Convention and seek adequate remedies for any violation thereof.

IV. CERD Committee Concluding Observations

26. The Committee made the following relevant recommendations in its 2008 Concluding Observations:

27. Paragraph 10: the Committee cited an ongoing concern about the United States' continued failure to meaningfully address *de facto* racial discrimination in Federal and state laws and policy and recommended that the U.S. review the definition of "racial discrimination" in Federal and state legislation and court practice so as to ensure that it encompasses racial discrimination in effect in addition to discrimination in purpose;

28. Paragraph 17: the Committee recommended that the U.S. intensify its efforts aimed at reducing residential racial segregation as well as the negative consequences racial housing and residential segregation has for the affected individuals;

29. Paragraph 32: the Committee recommended that the U.S. continue efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities.

V. CERD Committee General Recommendations

30. The Committee's General Recommendations relevant to the United States' 2013 Periodic Report is General Recommendation XX.¹⁶ General Recommendation XX recognizes that the rights guaranteed in Article 5 of the CERD may be restricted or implemented in different ways; however, in no way may the restrictions or alternative implementations be discriminatory in purpose or effect.

VI. U.S. Government Report

31. The United States addresses equal access to justice issues in paragraphs 59-86 of its Periodic Report. However, the United States does not address minority communities' inability to enforce civil rights guarantees based on disparate effects or impacts. The United States likewise does not address minority communities' inability to vindicate civil rights guarantees in the context of enforcing environmental health laws.

¹⁶A/51/18 (Supp.) Annex VIII, paras. A.1-5 (Jan. 1, 1996); http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f51%2f18%28SUPP%29&Lang=en

32. In paragraph 136, the United States notes that in 2011 the Centers for Disease Control and Prevention (“CDC”) released a report (subsequently supplemented in 2013) evaluating health disparities and inequalities. However, neither the 2011 CDC report nor the 2013 supplement address at any length the link between industrial environmental pollution and health disparities.

33. Paragraph 137 notes the steps the United States has taken to increase access to health care as a way of addressing health disparities. However, the report does not mention any steps taken to address the more fundamental problem of racial minorities and low-income families being segregated into communities that have the highest concentrations of industrial pollutants, which in turn lead to worse health outcomes.

34. The United States addresses discrimination with respect to the right to health guaranteed by Article 5, as it pertains to environmental justice, in paragraph 144. The Report does not indicate that the efforts it mentions have resulted in any minority community being relieved of disparate environmental impacts in Federal or state permitting, enforcement or rulemaking.

35. The Report cites Plan EJ 2014 as a positive step toward addressing environmental racism. However, Plan EJ 2014 is a “roadmap” for re-integrating environmental justice into national environmental programs and has not resulted in any affirmative progress in communities. Indeed, Plan EJ 2014 notwithstanding, the EPA continues to marginalize communities of color in rulemaking and permitting, to say nothing of other Federal administrative agencies and state and local governments.

VII. Recommended Questions

36. Where state and local governments have been delegated authority to implement and enforce federal environmental laws, what steps is the United States taking to ensure that state and local governments are implementing and enforcing those laws such that racial and ethnic minorities are not suffering disparate environmental and public health impacts from pollution?

37. What steps will the United States EPA take to ensure that the CERD’s mandate to protect health is enacted through local government efforts implementing the Clean Air Act?

38. Absent Congressional amendments to Title VI to provide for a private right of action against governments for actions that have a discriminatory effect, what steps will the U.S. take to ensure prompt, fair, and meaningful resolution of complaints filed with the EPA for violations of Title VI?

VIII. Suggested Concluding Recommendations

39. The United States should require, consistent with the CERD’s right to health, Article 5(d)(iv), comprehensive studies analyzing and evaluating the public health consequences from disproportionate impacts of air pollution on minority communities.

40. The United States should ensure, consistent with its obligations under the CERD, that state and local governments are implementing and enforcing federal environmental law, including and especially, the Clean Air Act, consistent with the provisions of the CERD.

41. The United States should ensure, consistent with Article 5(a) that communities have equal access to justice to address disparate environmental impacts.

42. The United States should ensure, consistent with Article 5, that state and local governments implementing and enforcing federal environmental laws take into consideration the cumulative impacts of pollution from industrial and other operations on minority communities.