

NEW MEXICO ENVIRONMENT DEPARTMENT



Office of the Secretary

POLICY AND PROCEDURE 07-09

- SUBJECT:** Non-Employee Discrimination Complaint.
- PURPOSE:** To provide guidance and clarification to non-employees (“complainant(s)”) who have a good faith belief that they have been unlawfully discriminated against by the New Mexico Environment Department (“NMED” or the “Department”) on the basis of race, color, national origin, disability, age or sex regarding decisions made by an NMED program as prescribed by 40 C.F.R. Parts 5 and 7, and including: 1) Title VI of the Civil Rights Act of 1964, as amended; 2) section 504 of the Rehabilitation Act of 1973, as amended; 3) the Age Discrimination Act of 1975, as amended; and 4) section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 (Hereinafter referred to collectively as the “Acts”).
- POLICY:** This policy contains step-by-step procedures for non-employees who have a good faith belief that they have been unlawfully discriminated against by NMED on the basis of race, color, national origin, disability, age or sex to submit detailed and timely complaints to NMED’s Non-discrimination Coordinator (or “Coordinator”). This policy also describes the process that will be used to investigate and resolve such complaints. These procedures shall neither prevent, unduly hinder nor disrupt NMED from carrying out its administrative or regulatory duties including, but not limited to, permitting, rulemaking or enforcement operations. This policy also does not apply to departmental hiring decisions or actions. This policy does not replace or function in lieu of statutory rights of appeal provided for in NMED’s controlling statutes.
- REVISIONS:** This policy supersedes any previous versions of NMED Policy 07-09.
- APPLICABILITY:** This policy applies to non-employees affected by decisions made by NMED programs. NMED employees shall follow NMED Policy 01-04, Non-Discrimination and NMED Policy 02-70, Conflict Resolution and Grievances regarding internal NMED complaints alleging unlawful discrimination on the basis of race, ethnicity, national origin, disability, age, or gender.

REFERENCES: 40 C.F.R. Parts 5 and 7; Title VI of the Civil Rights Act of 1964, as amended; Title IX of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500; NMED policy 01-04, Non-Discrimination; and NMED policy 01-70, Conflict Resolution and Grievances.

PROCEDURES:

- 1.0 Scope
- 2.0 Role of the Non-discrimination coordinator
- 3.0 Submission of Complaint
- 4.0 Investigation
- 5.0 Preponderance of the Evidence
- 6.0 Disposition of Complaints
- 7.0 Alternative to Submission of Complaint
- 8.0 Retaliation

APPROVAL: *Butch Tongate* DATE: 8/18/17
Butch Tongate
Cabinet Secretary

Non-employee Discrimination Complaint

1.0 SCOPE

1.1 Pursuant to 40 C.F.R Parts 5 and 7, and the Acts, NMED prohibits unlawful discriminatory practices in its departmental proceedings. NMED does not condone, tolerate, practice, or engage in unlawful discrimination against any external individual, party or parties. NMED employees shall not retaliate, intimidate, threaten, coerce, or discriminate against an individual or group for the purpose of interfering with any right or privilege granted by the Acts, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation under this policy or has opposed any practice made unlawful by the Acts.

1.2 NMED shall execute a prompt and impartial investigation of any discrimination complaint submitted by a non-employee, if the complaint meets the requirements specified herein.

2.0 ROLE OF THE NON-DISCRIMINATION COORDINATOR

2.1 NMED's Non-Discrimination Coordinator is responsible for making information available to non-employees regarding rights to services, aides, benefits, and participation without regard to race, national origin, ethnicity, gender, disability, age or prior opposition to discrimination. NMED's Non-Discrimination Coordinator will periodically evaluate the effectiveness of NMED's efforts to offer such services, aids, benefits and participation opportunities when feasible.

2.2 NMED's Non-Discrimination Coordinator shall coordinate or facilitate training efforts for NMED staff regarding the Department's obligations to comply with non-discrimination statutes, and policies and procedure.

2.3 NMED's Non-Discrimination Coordinator shall track all complaints filed against NMED under this policy or with the U.S. Environmental Protection Agency ("U.S. EPA") and shall review all complaints on a semi-annual basis to identify and address any patterns or systemic problems. NMED's Non-Discrimination Coordinator shall also ensure that complainants are updated on the progress of their discrimination complaints filed with NMED, if requested. NMED's Non-Discrimination Coordinator shall promptly inform the complainant as to any determinations made.

2.4 NMED's Non-Discrimination Coordinator is responsible for providing notice of this policy and carrying out the process, as prescribed by this policy, of the investigation of non-employee complaints. NMED's Non-Discrimination Coordinator may delegate an investigation to another investigator or designee, if necessary, on a case-by-case basis.

3.0 SUBMISSION OF COMPLAINT

3.1 Filing Complaints of Alleged Discrimination.

A. The complainant(s), using NMED's non-employee discrimination complaint form ("complaint form" or "complaint"), may submit written discrimination complaints to

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NMED's Non-Discrimination Coordinator at: Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Drive, P.O. Box 5469, Santa Fe, New Mexico 87502-5469 or via electronic mail to nd.coordinator@state.nm.us.

B. In instances where a complainant is unable to submit a written complaint, either by U.S. Postal Service or electronic mail, or requires assistance filing a complaint due to limited English proficiency or disability, but requests that NMED investigate allegedly unlawful discrimination, the complainant may submit a verbal complaint to NMED's Non-discrimination coordinator by calling NMED's main office phone number: 505-827-2855. An NMED employee may assist the complainant to convert the verbal complaint to written form using the complaint form. Once completed, the complainant or that person's representative must sign the complaint form or authorize the form via electronic mail.

C. Complaints must be submitted to NMED's Non-Discrimination Coordinator within ninety (90) calendar days of when the alleged unlawful discriminatory act occurred. NMED may waive the 90-day deadline to submit a complaint. However, NMED will only consider waiving the deadline if the complainant demonstrates that the failure to submit a timely complaint was due to "good cause." Good cause for the purposes of this policy includes any circumstance(s) which would explain and reasonably justify why the complainant could not have submitted a complaint by the deadline. If a complainant requests a waiver of the deadline, the complainant or that person's representative shall submit a complete and written explanation to the coordinator explaining why the complainant failed to file the complaint within ninety (90) days of the allegedly unlawful discrimination.

D. Anonymous complaints shall not be accepted or investigated.

3.2 Complaint Format.

A. All complaints shall be documented on the complaint form and signed or authorized via electronic mail by the complainant or that person's representative before NMED proceeds with its review. Complaints shall include:

- 1) the date the complaint was submitted to the coordinator;
- 2) the complainant's contact information including first and last name, address, city, state, zip code, phone number and email address (as appropriate);
- 3) whether the complainant has a representative and if so, the representative's contact information including first and last name, address, city, state, zip code, phone number and email address (as appropriate);
- 4) identity of the protected classification upon which the alleged violation is based (i.e., Race, Ethnicity, National Origin, Disability, Age or Gender);
- 5) a specific and detailed description of the decision(s) or action(s) (including the date or date range) which is alleged to have constituted unlawful discrimination in violation of 40 C.F.R. Parts 5 and 7;
- 6) a specific description of any adverse impact alleged to have occurred or which will occur; and
- 7) identity of parties alleged to be subjected to, or potentially impacted by

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the alleged discrimination.

B. NMED shall acknowledge within five (5) working days its receipt of the complaint in writing to the complainant.

3.3 Preliminary Determination of Jurisdiction, Authority, and Merit.

A. The Non-Discrimination Coordinator shall consult with NMED's Office of General Counsel ("OGC") to determine whether NMED has jurisdiction or authority to pursue the matter and whether an investigation is warranted. NMED will notify the complainant in writing its determination as to whether NMED has jurisdiction or authority to investigate the complaint and whether NMED finds merit to the allegations to investigate the complaint within fifteen (15) working days from when the coordinator received the signed complaint. A complaint will warrant investigation unless:

- 1) it is regarding a hiring decision or action;
- 2) it attempts to replace or function in lieu of statutory rights of appeal provided for in NMED's controlling statutes;
- 3) it appears frivolous or trivial;
- 4) within fifteen (15) working days after the receipt of the complaint, NMED voluntarily concedes non-compliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant;
- 5) within fifteen (15) working days after the receipt of the complaint, the complainant withdraws the complaint; or
- 6) the complaint is not timely submitted and there is no "good cause" to waive the 90-day requirement.

4.0 INVESTIGATION

4.1 **Accepting and Investigating a Valid Complaint.** If NMED's Non-Discrimination Coordinator accepts the complaint, the Coordinator or a designee will investigate the allegation(s). The Coordinator or designee will investigate, using, as may be appropriate, interviews, statements, or other gathered evidence.

4.2 **Request for Additional Information.** NMED's Non-Discrimination Coordinator or designee may request from the complainant additional information, evidence, or documentation. The complainant must submit the information requested within thirty (30) working days. If the complainant fails to submit additional information as requested, the Coordinator may consider whether there is sufficient evidence to continue, or whether good cause for a determination of no investigative merit exists.

4.3 **Request for Information Involving Third Party Entities.** In the case of a complaint which involves or which implicates a third party(s), e.g. a sub-recipient, permit applicant or permittee, NMED will notify the third party(s) of the complaint as soon as possible after receipt of the complaint. NMED's Non-Discrimination Coordinator may request that the third party(s) provide information to NMED to investigate the complaint. NMED may use that information as needed to resolve the complaint.

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4.4 **Investigative Fact Finding Report.** After examining all information pursuant to 40 C.F.R. Parts 5 and 7, the coordinator will consult with OGC and draft and submit an investigative fact finding report, to include a summary of findings and recommendations, and present it to NMED's Office of the Secretary ("OOTS").

5.0 PREPONDERANCE OF THE EVIDENCE

"Preponderance of the Evidence" is the standard by which non-employee complaints must be proved. This standard requires that, for a finding of discrimination, the evidence and testimony must show that it is more likely than not (that is, more than 50% likely) that NMED caused harm due to a discriminatory action.

6.0 DISPOSITION OF COMPLAINTS

Within 180-days of accepting the complaint, unless it is determined that based upon the complexity of the complaint that additional time is needed, NMED's OOTS will issue a written decision, which shall be provided in writing to the complainant, approving or disapproving, in whole or in part, the recommendations within the investigative fact finding report. If it is determined that additional time is needed for the issuance of the written decision, the specified number of days in which the complaint evaluation will be extended will be provided in writing to the complainant. NMED shall implement any recommendations approved by the OOTS.

7.0 ALTERNATIVE TO SUBMISSION OF COMPLAINT WITH NMED

In lieu of filing a complaint with NMED, complaints may be filed in accordance with 40 C.F.R. Parts 5 and 7 with the U.S. EPA addressed to External Civil Rights Complaint Office, U.S. Environmental Protection Agency, Mail Code 2310A, 1200 Pennsylvania Ave. NW, Washington D.C. 20460, or via electronic mail to Title_VI_Complaints@epa.gov.

8.0 RETALIATION

NMED employees shall not retaliate, intimidate, threaten, coerce, or discriminate against an individual or group for the purpose of interfering with any right or privilege granted by the Acts, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation under this policy or has opposed any practice made unlawful by the Acts, nor will NMED tolerate such actions. Retaliation is a serious violation of this policy and must be reported to the Non-Discrimination Coordinator immediately.