VIA FACSIMILE TO (202) 501-1836, (202) 501-1450 AND CERTIFIED MAIL

March 22, 2005

Karen Higginbotham
EPA Office of Civil Rights
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Steve Johnson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Don't Waste Arizona, Inc. v Arizona Department of Environmental Quality*

Dear EPA Office of Civil Rights Director Higginbotham and Steve Johnson, EPA Administrator:

Don't Waste Arizona, Inc. is a non-profit environmental organization dedicated to the protection and preservation of the environment in Arizona. DWAZ is especially concerned about environmental justice, and emergency response and planning issues.

The Arizona Department of Environmental Quality (ADEQ) has violated Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") implementing regulation, 40 C.F.R. § 7.35, by discriminating on the basis of race in its administration of the settlement money from a federal CERCLA enforcement action against TRW Vehicle Safety Systems (TRW). The settlement included a $2.5 million Supplemental Environmental Project (SEP) dedicated to implementing an emergency telephone ring down and notification system in the event of a release of hazardous chemicals.

The discrimination is intentional and informed. The ADEQ's staff person in charge of the entire bidding and oversight process for this emergency telephone ring down and notification system, Greg Workman of ADEQ, was well-informed about the need for community outreach and education about evacuation and shelter-in-place procedures as they related to the emergency telephone ring down system, education about how the alert would be given, and other public education and awareness issues.

The Maricopa County Local Emergency Planning Committee (MCLEPC) originated the concept for the emergency telephone notification system, later named CENS (Community Emergency Notification System). The MCLEPC formed a subcommittee that studied the options for such a system for almost a year, and subsequently made

recommendations that later made the basis of the language for the SEP included in the TRW consent decree.

The TRW consent decree regarded a settlement of civil claims against TRW Vehicle Safety Systems located at 11202 East Germann Road in Mesa, Arizona, for its CERCLA 103 violations, which included the deliberate transfer of sodium azide hazardous wastes to the Butterfield Station landfill in Arizona, and other landfills in Utah. Upon investigation of the matter, EPA and ADEQ took a civil enforcement action against TRW Vehicle Safety Systems.

After the ADEQ proceeded to develop the bid process for the project, which came months after receiving the $2.5 million in settlement funds earmarked for the SEP, Greg Workman came to the last subcommittee meeting of the Maricopa County LEPC regarding the emergency telephone ring down system, and in an extensive conversation with several witnesses, was educated about the disproportionate, adverse impact upon minority populations in Maricopa County that a lack of public outreach and education about the emergency telephone ring down system and related evacuation and shelter-in-place procedures as they related to the emergency telephone ring down system would have.

Among what Greg Workman learned is that the vast majority of the facilities with reportable quantities of extremely hazardous substances, enough to require a facility emergency plan, and enough hazardous chemicals to have an off-site consequence, are located in the low-income, minority areas of west and South Phoenix. The ADEQ itself would have no inventory and reporting information that would provide Greg Workman this information. The MCLEPC receives the Tier Two reports (facility chemical inventory forms) required by the Emergency Planning and Community Right-to-Know Act (EPCRA), and reviews the data in promulgating and annually updating its Section 303 regional emergency plan.

In response to the conversations Workman had with MCLEPC subcommittee members, Workman asserted that he understood that a failure to conduct sufficient outreach and community education about responding to a CENS contact would have a disproportionate, adverse impact on low-income and minority populations because they are situated disproportionately where the facilities with hazardous chemicals are.

It must be noted here that a failure to provide any community outreach and education about the CENS, the evacuation and shelter-in-place strategies, even though perhaps neutral on face value, would have a disproportionate, adverse (disparate) impact on low-income and minority populations because they are situated disproportionately where the facilities with hazardous chemicals are.

Workman was taught that, without proper training and education before an incident occurred, people would not know what shelter-in-place entails, nor would they be prepared for an evacuation. He had to know that the effectiveness of any emergency

telephone ring down system is lessened when people are ill informed and ill prepared to respond.

Instead of insisting on making the contractor do what was necessary, the contractor that the CENS contract was awarded the contract was allowed to instead only hold a press conference and in a separate action, distributed a public service announcement that no one could document had ever played. The public service announcement was completely inadequate, and did not explore or explain shelter-in-place and evacuation strategies at all. The CENS coordinator also evidently appeared on some obscure television shows, certainly not ones watched by low-income and minority people near these dangerous chemical facilities. The press conference did not result in any material about shelter-in-place and/or evacuation strategies being published in newspapers or the television stations, so the populace has never had any of what Workman knows they need. Later, after issues were raised about the contractor, brochures were printed in English and in Spanish regarding the CENS, but these were not adequately distributed, nor were they sufficient in their content.

When all of the problems and inadequacies of the contractor awarded the CENS contract was brought to Greg Workman's attention, including him being reminded of these previous discussions he had had with MCLEPC subcommittee members, Workman refused to require the contractor to perform.

With his knowledge of the issues, it is safe to conclude that these are intentional acts on ADEQ/Greg Workman's behalf.

EPA's Program to Implement Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal financial assistance. Title VI itself prohibits intentional discrimination.

The Supreme Court has ruled, however, that Title VI authorizes federal agencies, including EPA, to adopt implementing regulations that prohibit **discriminatory effects** as well as intentional discrimination. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative."

I. PARTIES

A. Complainants

Don't Waste Arizona, Inc. (DWAZ), an environmental justice organization with affected members residing in west and South Phoenix, is filing this complaint against the ADEQ. ADEQ also administered an EPA grant in the mid 1990s in something titled the High

Risk, High Priority Study. DWAZ participated in this, which focused on the inherent dangers associated with communities being closely proximate to facilities with large inventories of hazardous chemicals. If ADEQ/Workman were to effectively and fairly administrate the SEP, the conclusions and recommendations of that High Risk, High Priority Study should have been reviewed and considered. DWAZ's members in south Phoenix are almost entirely made up of African-American and Latino members. Members of DWAZ have made comments at different public meetings of the ADEQ regarding inadequacies in the response to chemical incidents, along with the associated lack of planning and response, and the need for community education and outreach about shelter-in-place and evacuation.

ADEQ is the state environmental regulatory agency that is responsible for implementing, administering, and enforcing the settlement money and SEP.

The ADEQ, as a recipient of federal funds from EPA, is subject to the requirements of Title VI of the Civil Rights Act.

II. RIPENESS

This complaint comes as a prolonged effort to develop an effective emergency telephone notification system and provide the basic outreach and training to the ethnic minority communities seems to have been thwarted by Greg Workman of ADEQ. The SEP is still under contract, with at least another year of ADEQ oversight. Greg Workman has been approached verbally and in writing about these issues, to no avail.

The failure of the ADEQ to properly supervise and coordinate the activities of the CENS contractor is causing, and has caused, a disproportionate, adverse effect on the low-income, ethnic minority community of South Phoenix and west Phoenix.
The ADEQ and Greg Workman have been provided specific notice of the problem and deficiency; yet have not remedied the problem.

Claims

A. Title VI

Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.

The ADEQ, a direct recipient of federal financial assistance from EPA has violated Title VI as implemented through EPA's regulations by failing to properly administer the SEP from the TRW settlement.

EPA must ensure that recipients of EPA financial assistance are not subjecting people to discrimination. In particular, EPA's Title VI regulations provide that an EPA aid recipient "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b).

The failure of the ADEQ to properly administer the SEP from the TRW settlement, as aforementioned, has had severe environmental and public health consequences in South Phoenix. There have been chemical fires and disasters in both west and South Phoenix, all in the midst and/or proximate these overwhelmingly ethnic minority communities.

All complainants must show is that when applied in a particular manner, the ADEQ's "method of administering the SEP" yields a discriminatory outcome. As the abovementioned sections demonstrate, the ADEQ's method of administering the SEP from the TRW settlement has resulted in discriminatory impacts throughout the low-income, ethnic-minority communities of west and South Phoenix.

The effect of ADEQ's administration of the SEP is clear: People of color will bear disproportionate risks and impacts from releases of hazardous chemicals air pollution and the associated response, yet the ADEQ will not properly administrate the SEP and comply with applicable statutes as mentioned before in this complaint; and the ADEQ will not provide a means to decrease risks and impacts to this affected community.

By failing to comply with EPCRA, the ADEQ has administered the SEP in such a way as to discriminate against people based on race, color, and national origin, in violation of Title VI.

Remedies

In order to provide effective remedies for the patterns of discrimination described in this complaint, the complainants request that EPA:

- Require that, as a condition of continuing to provide federal financial assistance, the ADEQ immediately require the CENS contractor to conduct significant outreach and community education about CENS and the proper strategies for shelter-in-place and evacuation in the low-income, ethnic minority communities of South and west Phoenix where populations are proximate to facilities with large inventories of dangerous or hazardous chemicals.
- Require, as a condition of continuing to provide federal financial assistance, that the ADEQ review its failures in the CENS SEP administration and examine its other programs in every low-income and ethnic minority community within its jurisdiction, and develop a competent, credible, scientific method of determining it is not violating the civil rights of communities of color and/or low-income communities.

- Require, as a condition of continuing to provide federal financial assistance, that the ADEQ actively evaluate the need for resources necessary to adequately administer the TRW SEP, including the additional resources that are needed to prevent the continuing incidence of civilian injuries during hazmat disasters in west and South Phoenix through improved notification systems, actual planning, evacuation plans and/or shelter-in-place plans, communications and training, and other issues.

- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to ADEQ;

- Provide complainants with copies of all correspondence to or from the respondent throughout the course of the EPA's investigation, deliberation and disposition of this complaint;

- Sue to compel compliance with the law, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;

- Terminate its assistance to the ADEQ, pursuant to 40 C.F.R. §7.25, if the ADEQ fails to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, ethnic minority community of west and South Phoenix, Arizona, typifies the low-income and/or communities of color burdened in Arizona by disproportionate adverse environmental impacts because of the ADEQ's administration of the TRW SEP.

The discriminatory impact created and sanctioned by the ADEQ's actions is a clear violation of Title VI as implemented by EPA regulations. Because the ADEQ receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since the ADEQ still does not comply with the requirements of Title VI. And there is also a recent event when Greg Workman/ADEQ failed to address the issues, which was less than 180 days ago, and there has been no final agency action on this issue.

Don't Waste Arizona, Inc. and its affected members look forward to an active investigation by EPA.

The complainants will be pleased to file further documentation of these claims as needed within the next few weeks, once EPA has specified to whom the documentation should be sent, and what further documentation is needed.

Sincerely,

Stephen M Brittle

Stephen M. Brittle

For the Complainants
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