UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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CIVIL RIGHTS

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In Reply Refer to:
EPA OCR File No. 3R-05-R9

Benjamin H. Grumbles
Director
Arizona Department of Environmental Quality
1110 West Washington Street
Phoenix, Arizona 85007

Re: DISMISSAL OF TITLE VI ADMINISTRATIVE COMPLAINT

Dear Mr. Grumbles:

The purpose of this letter is to notify the Arizona Department of Environmental Quality (ADEQ) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the administrative complaint dated, March 30, 2005, filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964,[1] as amended (Title VI), by Don't Waste Arizona (DWAZ or Complainant) against ADEQ. ADEQ is a recipient of EPA funds. The Complaint alleges that ADEQ intentionally discriminated against the African-American and Latino residents of south and west Phoenix by not requiring its Community Emergency Notification System (CENS) contractor to provide community outreach and education about evacuation and shelter-in-place procedures as they relate to the emergency telephone ring down system. Complainant also alleges that discriminatory effects occurred from ADEQ's failure to require such community outreach and education.

The Complaint met EPA's four jurisdictional requirements as found in 40 C.F.R. Part 7 and was accepted on April 21, 2009. OCR conducted an investigation from April 2009 to November 2010. Following its investigation, OCR finds insufficient evidence in the record to support the Complainant's allegations of intentional discrimination and that the African-American or Latino residents in south and west Phoenix suffered an adverse or disparate impact by virtue of the CENS community outreach. The Complainant's allegations regarding ADEQ's intentional discrimination and discriminatory effects are

[1] 42 U.S.C. §§ 2000d *et seq.*

dismissed. OCR finds no violations of EPA's Title VI regulations and concludes that the facts do not substantiate the Complainant's allegations.

I. LEGAL FRAMEWORK

A. Statutory Background

Title VI prohibits discrimination based on race, color, or national origin under any program or activity[2] receiving federal financial assistance.[3] Under Section 601 of Title VI,

> 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.[4]

This section prohibits intentional discrimination.[5] In addition, Section 602 "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance "to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability."[6] At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.[7] The Supreme Court has held that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.[8] The United States Environmental Protection Agency's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin.

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[2] The Civil Rights Restoration Act of 1987 broadly defines "program or activity" to include all of the operations of an entity, any part of which receives federal assistance. 42 U.S.C. § 2000d-4a.

[3] 42 U.S.C. §§ 2000d to 2000d-7.

[4] 42 U.S.C. § 2000d.

[5] *See Alexander v. Choate,* 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607-08 (1983).

[6] 42 U.S.C. § 2000d-1.

[7] *See Guardians,* 463 U.S. at 619 (Marshall, J. dissenting).

[8] *See Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh'g denied*, 7 F.3d 242 (11th Cir. 1993).

As provided at 40 C.F.R. § 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

B. Regulatory Background - Intentional Discrimination

EPA's Title VI implementing regulations prohibit intentional discrimination:

> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . .[9]

In addition, EPA regulations specifically provide, in part, that recipients shall not "[d]eny a person any service, aid or other benefit of the program,"[10] "[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,"[11] or "[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program."[12]

Where direct proof of discriminatory motive is unavailable, it is necessary to evaluate whether any circumstantial evidence of discriminatory intent exists. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.[13]

In addition, claims of intentional discrimination may be analyzed using the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell*

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[9] 40 C.F.R. § 7.30.

[10] 40 C.F.R. § 7.35(a)(1).

[11] 40 C.F.R. § 7.35(a)(2).

[12] 40 C.F.R. § 7.35(a)(3).

[13] *See Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

Douglas Corp. v. Green.[14] The elements of a *prima facie* case may vary depending on the facts of the complaint, but such elements often include the following:

> 1. that the aggrieved person or group belonged to a protected class;
> 2. that this person applied for, and was eligible for, a benefit provided by a federally assisted program;
> 3. that despite the group's or person's eligibility for the benefit, the group or person was denied or failed to receive the benefit; and,
> 4. that the recipient provided the benefit to other similarly situated individuals, or otherwise denied the person or group the benefit because of race, color, or national origin.[15]

If the *prima facie* case can be established, the burden shifts to the recipient to provide a justification or "establish[] that the same decision would have resulted even had the impermissible purpose not been considered."[16] If the recipient can make such a showing, the inquiry shifts back to EPA to show whether the justification proffered by the recipient is actually a pretext for discrimination.[17] While the *McDonnell Douglas* analysis concerns the burden of producing evidence, for purposes of this administrative investigation, the ultimate burden of proof remains with EPA.[18]

C. Regulatory Background - Discriminatory Effects

Under Section 602 of Title VI, EPA promulgated 40 C.F.R. § 7.35(b). This section provides that an EPA funding recipient may not use criteria or methods of administering its programs and activities that have the effect of discriminating against persons based on their race, color, or national origin. In accordance with this provision, recipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the

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[14] 411 U.S. 792 (1973); *see also Baldwin v. Univ. of Texas Med. Branch at Galveston,* 945 F. Supp. 1022, 1031 (S.D.Tex. 1996); *Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools,* 936 F. Supp. 649, 658 n.17 (D.Minn. 1996).

[15] *McDonnell Douglas*; *Cf. Bass v. Board of Comm'rs, Orange County, Fla.,* 256 F.3d 1095, 1104 (11th Cir. 2001) (describing elements of *prima facie* case under Title VII).

[16] *Id.* at 271, n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

[17] *Id. See generally*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[18] *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (notwithstanding *McDonnell Douglas*'s burden shifting analysis, the burden of proof remains with the plaintiff).

recipient selects the site or location of permitted sources.[19]

In determining whether a recipient's procedures or practices have had a disparate impact on a protected group, OCR must evaluate the causal connection between these facially neutral procedures or practices, and a disproportionate impact on the protected group.[20] If OCR finds such a connection, the recipient may offer a "substantial legitimate justification" for the challenged practice.[21] If the recipient can make such a showing, the inquiry must shift to whether there are any "equally effective alternative practices" that would result in less racial disproportionately or whether the justification proffered by the recipient is actually a pretext for discrimination.[22] Evidence of either will support a finding of liability.

II. ALLEGATIONS

The Complainant alleges that ADEQ intentionally discriminated against the African-American and Latino residents of south and west Phoenix by not requiring the CENS contractor to provide community outreach and education about evacuation and shelter-in-place procedures as they relate to the emergency telephone ring down system.[23]

To support this allegation, the Complainant asserts that the ADEQ representative in charge of the CENS contract was "well-informed about the need for community

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[19] *See Alexander*, 469 U.S. at 293 ("[A]ctions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."); *Guardians*, 463 U.S. at 592 (opinion of White, J.) ("[T]hose charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination."); *id.* at 623 (Marshall, J., dissenting) ("I would hold that Title VI bars practices that have a discriminatory impact and cannot be justified on legitimate grounds."); *id.* at 645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting) ("[A]lthough the petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of the statute, they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of valid federal law.").

[20] *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston*, 997 F.2d at 1407 (citing *Georgia State Conf.*, 775 F.2d at 1417).

[21] *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (1985).

[22] *Id. See generally*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[23] *See generally*, Acceptance of Administrative Complaint from United States Environmental Protection Agency Office of Civil Rights (US EPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (April 21, 2009) (on file with US EPA OCR).

outreach and education about evacuation and shelter-in-place procedures."[24] According to DWAZ, the ADEQ representative learned through meeting with DWAZ and the Maricopa County Local Emergency Planning Committee 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."[25] DWAZ asserts that "instead of making the contractor do what was necessary, the contractor that was awarded the CENS contract was allowed instead only to hold a press conference and in a separate action, distributed a public service announcement that no one could document had ever [aired on radio or television]."[26] These issues were brought forth to ADEQ, and DWAZ asserts that "with [t]his knowledge of the issues, it is safe to say that these are intentional acts on ADEQ's … behalf."[27]

The Complainants also allege that ADEQ's failure to require the CENS contractor to provide community outreach and education about evacuation and shelter-in-place procedures as they relate to the emergency telephone ring down system resulted in a disparate impact on the African-American and Latino residents of south and west Phoenix.[28]

To support the effects allegation, DWAZ states "that a failure to provide any community outreach and education about the CENS, the evacuation and the shelter-in-place strategies, even though perhaps neutral on its face would have a disproportionate, adverse (disparate) impact on the … minority populations [of south and west Phoenix] because they are situated disproportionately where the facilities with hazardous chemicals are [located]."[29] The Complainants allege 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.[30] Further, "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 … ethnic minority community of South Phoenix and west Phoenix."[31] Finally, DWAZ also states, "The failure of the

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[24] *See generally*, Administrative Complaint from Stephen Brittle, President, DWAZ to US EPA OCR (Mar. 22, 2005) (on file with US EPA OCR).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

ADEQ to properly administer the SEP [Supplemental Environmental Project] ... has had severe environmental and public health consequences in 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."[32]

III. POSITION STATEMENT FROM THE RECIPIENT

In its response to the complaint, ADEQ "categorically denies it has violated Title VI of the Civil Rights Act of 1964 or EPA's nondiscrimination regulations of 40 C.F.R. § 7.10 et seq. by failing to require the Community Emergency Notification System ('CENS') contractor to provide community outreach and education about evacuation and shelter-in-place procedures as they relate to the emergency telephone ring down system resulting in a disparate impact on African-American and Latino residents of South and West Phoenix."[33]

To support its position that it did not intentionally discriminate, ADEQ states that "the CENS project reflects a great deal of effort and experience of federal, state, and local authorities to meet a recognized need in greater Phoenix and Maricopa County ... ADEQ, EPA and the Department of Justice were a party to and approved of Consent Decree CIV' 01 0095 PHX VAM (DOJ Case No. 90-7-1-06715) ... which included the CENS project as a Supplemental Environmental Project ('SEP')."[34]

ADEQ also stated, "[it] worked with the selected contractor to maximize and ensure that the public awareness campaign was robust. The SEP provided limited funding for the CENS project and based on the judgment of both ADEQ and [Maricopa County Association of Governments] MAG that the system could only be funded by the SEP for 3 years, a decision was made to ensure limited resources were primarily focused on system operations." In addition, ADEQ stated "[it] and MAG achieved both goals of substantial public awareness and adequate funding for the three years of CENS operation."[35]

ADEQ provided a Public Awareness Log outlining public education through use of TV, radio and print of Public Safety Announcements (in English, Spanish, and for the

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[32] *Id.*

[33] Letter with Attachments from Bret Parke, Administrative Counsel, Arizona Department of Environmental Quality (ADEQ) to Helena Wooden-Aguilar, Assistant Director, US EPA OCR (Mar. 4, 2010) (on file with US EPA OCR).

[34] *Id.*

[35] *Id.*

hearing impaired), participation in fairs at local Phoenix malls, and distribution of CENS video to local PSAPs from November 2003 through October 2004.[36]

In response to the allegation of discriminatory effects, ADEQ states, "CENS is a notification platform for reverse calls, integrated with the existing Maricopa County-wide 911 network. This system was proposed by the Maricopa County Association of Governments ("MAG") because it 1) allows all 26 Public Safety Answering points ("PSAP") in all 26 cities in the region to send between 1,000 – 2,000 calls per minute; 2) with specific telephone messages to residents; and 3) based on judgment of the Incident Commander from the local public safety agency. Each PSAP in the Region then creates its own policies for using the system based on set guidelines. Clear instructions, including evacuation and shelter-in place, if needed, are provided in English and Spanish or other languages as appropriate, based on the community and the incident. This allows local first responders to make a case-by-case judgment on the needs of their community, avoiding even an appearance of discriminatory effect."[37]

Additionally, ADEQ states that "the CENS is not facially discriminatory to any group, including those with Limited English Proficiency because CENS is provided for all 26 local public safety answering points in the over 10,000 square mile of Maricopa County region. The message system was designed to allow local responders to relay their message in whatever language they determined appropriately meets their needs, including English [and] Spanish. As a result, the CENS system itself also has no discriminatory effect." [38]

IV. FINDINGS OF FACT

1) On March 6, 2001, the U.S. District Court for the District of Arizona approved an enforcement settlement in the case, United States of America and the State of Arizona, ex rel, Jacqueline E. Schafer, Director, Arizona Department of Environmental Quality. v.TRW Vehicle Safety Systems Inc. This case concerned alleged violations of Sections 3008(a) and (g) and 7002 of the Resource Conservation and Recovery Act ("RCRA") with respect to hazardous waste treatment, storage and disposal and aquifer protection permit requirements applicable to the TRW Vehicle Safety Systems airbag manufacturing

[36] *Id.* at Attachment Blue Tab 1(MAG Public Awareness Log).

[37] Letter with Attachments from Bret Parke, Administrative Counsel, Arizona Department of Environmental Quality (ADEQ) to Helena Wooden-Aguilar, Assistant Director, US EPA OCR (Mar. 4, 2010) (on file with US EPA OCR).

[38] *Id.*

facility. The Consent Decree required payment of civil penalties of $5.6 million to the United States and State of Arizona.[39]

2) The civil penalties against the defendant were to be paid into three separate Supplemental Environmental Projects (SEPs).[40]

3) A SEP is an environmentally beneficial project that a defendant agrees to undertake in settlement of an enforcement action, but which the defendant is not otherwise legally required to perform, in exchange for mitigation of the penalty to be paid.[41]

4) One of the SEPs required $2.5 million for the purchase and maintenance of a CENS for Maricopa County, Arizona. The SEP required the CENS to have the following:

a) Immediate telephonic notification of all potentially affected residents of an emergency occurring within Maricopa County, Arizona;
b) The notification shall include either a detailed explanation of the emergency or notification of a toll-free number to call for a detailed explanation of the emergency;
c) The database of phone numbers created for use in the CENS shall be maintained as confidential and shall not be used to any purpose other than implementation of the CENS.[42]

5) The CENS to be purchased by ADEQ was required at a minimum to:

a) Make at least 2000 telephone calls per minute;
b) Leave messages on voice mail and answering machines;
c) Call back "no answers";
d) Deliver messages in both English and Spanish;
e) Be available 24 hours a day:
f) Be capable of providing reports to be made available to ADEQ.[43]

6 ADEQ announced a Notice to Request for Offer (solicit for CENS implementation services) on April 11, 2002.[44]

7) ADEQ awarded the contract to MAG to establish and implement the CENS for

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[39] *Id.* at Attachment Red Tab 1 (Consent Decree CIV-01-0095 PHX VAM).

[40] *Id.*

[41] EPA Supplemental Environmental Projects Policy, effective May 1, 1998.

[42] *See* Footnote 39.

[43] *Id.*

[44] *See* Footnote 37.

Maricopa County on May 24, 2002.[45] MAG is an organization made up of agencies that represent the communities in the Maricopa region.[46]

8) The CENS could operate pursuant to the contract for three years.[47]

9) MAG sub-contracted with Qwest Communication for the Emergency Preparedness Network component of the system (computer hardware, resident information database).[48]

10) The CENS was fully implemented in the Maricopa region on January 1, 2004.[49]

11) The CENS program is activated (emergency notification) through Maricopa County's 26 Public Safety Answering Points (PSAPs). The PSAPs are local (municipal, tribal, and county) fire and police departments located throughout Maricopa County.[50]

12) The CENS was to be used for the following emergency situations.[51]
- Imminent threats to life or property
- Disaster notification
- Endangered children
- Endangered elderly
- Evacuation Notices

13) The CENS contract states:

> [T]he CENS Program manager will develop a training plan for the response community and a community awareness campaign. Training of the response community will include two groups, the PSAPs and the response managers. The 26 PSAPs in the region provide the dispatching of all public safety resources in the region and will need extensive training on when and how to activate the CENS. The response managers include command officers from the public safety agencies. This group will be the initiators of events and need to be aware of the threshold requirements for

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[45] *See* Footnote 37 at Attachment Red Tab 32 (ADEQ Offer and Contract Award Form).

[46] *Id.* at Attachment Red Tab 32 (MAG Response to Request for Offer).

[47] *See* Footnote 37 at Attachment Red Tab 2 (ADEQ Notice of Request for Offer).

[48] *See* Footnote 37 at Attachment Red Tab 32 (MAG Response to Request for Offer).

[49] *See* Footnote 37 at Attachment Yellow Tab 48 (Maricopa Region 911 - CENS 2004 Annual report).

[50] *See* Footnote 37 at Attachment Red Tab 4 (Maricopa Region 911 PSAP listing).

[51] *See* Footnote 37 at Attachment Red Tab 5 (MAG 911 Oversight Team meeting).

the system use. The public is an integral part of the system and through public service announcements, educational flyers, and community meetings will be educated about the Maricopa region CENS. Community awareness is critical to ensure the public understands the messages are real and follow the instructions provided.[52]

14) The CENS contract also requires that community awareness will also be a continuing process to ensure that all Maricopa residents are aware of the system so they can respond appropriately when notified of an emergency.[53]

15) The public awareness campaign, prepared by the CENS contractor, occurred throughout Maricopa County by use of Public Services Announcements (PSAs), news articles (including the *Arizona Republic, Ahwatukee Foothills News, East Valley Tribune, La Voz* (Spanish), *Paradise Valley Independent, Daily News Sun, Glendale Star, and East Valley Independent*), and press releases conducted in English and Spanish through use of print, radio (KTAR Radio), TV (including TV Channels 3, 5, 10, 11, 12, 15, 33, 48, 53, Mas! Arizona Ch. 55, and Telemundo), and live events (including Glendale Fire Safety Fair, Phoenix Fire Prevention Desert Sky Mall, Phoenix Fire Prevention Paradise Valley Mall) from November 2003 through October 2004. The Public Awareness Log lists 27 separate sources of communication regarding the CENS that occurred from November 2003 through October 2004, including addressing the Phoenix Mayor and Council which was covered by Phoenix Channel 11.[54]

16) English and Spanish-speaking members of the Phoenix Fire Department (City of Phoenix PSAP) created video PSAs for TV broadcast to all Phoenix residents. The City of Phoenix PSAPs includes communities in south and west Phoenix.[55]

17) According to the CENS contractor, community outreach was conducted in the following manner:

i) MAG made presentations to local police and fire agencies [PSAPs] educating them on the CENS Program.[56]

ii) MAG prepared and left brochures and video (both in English and Spanish) with the PSAPs and asked the PSAPs to inform their respective communities of the CENS

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[52] *See* Footnote 37 at Attachment Red Tab 32 (MAG Response to Request for Offer).

[53] *Id.*

[54] *See* Footnote 37 at Attachment Blue Tab 1(MAG Public Awareness Log).

[55] See Footnote 37 at Video CD: Phoenix Fire Department (on file with US EPA OCR).

[56] *See* Footnote 37 at Attachment Red Tab 25 (E-mail from Liz Hunt, MAG Administrator to Greg Workman, ADEQ Project Manager (Dec. 1, 2003, 08:46 AM) (on file with US EPA OCR).

system.[57]

iii) MAG contacted the Phoenix Neighborhood Services Department (NSD) to help facilitate two high foot traffic events in Phoenix in 2004 (Safety Fairs at the Paradise Valley and Desert Sky Malls). MAG set up an outreach booth at these events to educate the public.[58]

18) The Phoenix NSD is part of the City of Phoenix government. Its purpose is to preserve and revitalize Phoenix neighborhoods and help residents' access city services and programs. It also oversees public outreach and education programs.[59]

19) There were a total of 14 launches (emergency calls) of the CENS made in 2004. They were made by both law enforcement agencies and fire departments. The launches involved the following types of incidents: ammonia leak, missing Alzheimer patient, water treatment fire, hostage incident, suspect at large, missing child, and barricaded subject. None were launched in the west and south Phoenix area.[60]

V. METHODOLOGY OF THE INVESTIGATION

EPA OCR conducted an investigation from April 2009 to November 2010. The investigation included gathering and reviewing all information submitted by the Complainants and Recipient relevant to the complaint. This included the initial complaint and clarification information filed by DWAZ on March 22, 2005, and December 13, 2005, and also rebuttal information submitted by ADEQ on May 3, 2005, and March 4, 2010, respectively. The investigation also included an interview with Liz Graber, the MAG CENS Administrator (ADEQ Contractor) on May 20, 2010.

VI. ANALYSIS AND RECOMMENDED DETERMINATIONS

OCR began its analysis by determining whether ADEQ intentionally discriminated against the African-American and Latino residents of west and south Phoenix by not requiring the ADEQ contractor to provide community outreach and education about evacuation and shelter-in-place procedures as they relate to the emergency telephone ring down system. OCR then analyzed whether ADEQ's action caused a disparate impact on the residents of west and south Phoenix.

A. Intentional Discrimination

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[57] Telephone Interview with Liz (Hunt) Graber, MAG Administrator (May 20, 2010).

[58] *Id.*

[59] City of Phoenix Neighborhood Services Department web site at http://phoenix.gov/NSD/index.html.

[60] *See* Footnote 37 at Attachment Yellow Tab 48 (Maricopa Region 911 - CENS 2004 Annual report)

In order to prove intentional discrimination the investigator must show that "a challenged action was motivated by the intent to discriminate."[61] The investigation would have to show that the decision maker was not only aware of the complainant's race, color, or national origin, and that the recipient acted, at least in part, because of the complainant's race, color, or national origin.[62]

Analysis

DWAZ filed the complaint on behalf of African-American and Latino residents of south and west Phoenix. African-Americans and Latinos are members of a protected class by virtue of race and/or nation origin. In addition, the resident-complainants were eligible for the benefits of the CENS, a program of ADEQ, a recipient of federal financial assistance.

Contrary to the Complainant's assertion, the investigation revealed that the CENS contract did require community outreach and education and that the ADEQ contractor did conduct community outreach and education. In addition, there is no indication that community outreach and education was conducted differently for members outside the Complainant's protected classes. The record does not establish that the Complainant's were denied participation in a federally assisted program or that ADEQ provided the benefits only to those outside the Complainant's protected class. Thus, OCR finds that a *prima facie* case of intentional discrimination has not been established.

The CENS program was established as part of a Consent Decree, which included SEP provisions for the establishment of the CENS system for Maricopa County, Arizona.[63] ADEQ awarded MAG the contract to establish and implement the CENS for Maricopa County.[64] While the SEP did not specifically mandate community outreach, the CENS contract did require training of the PSAPs and the response managers. The purpose of this consolidated training approach would help to ensure that the appropriate people knew under what circumstances the CENS should be activated since the "26 PSAPs in the region provide the dispatching of all public safety resources and will need extensive training on when and how to activate the CENS. … This group will be the initiators of events and need to be aware of the threshold requirements for the system use. The public is an integral part of the system and through public service announcements, educational flyers, and community meetings, will be educated about the Maricopa region

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[61] *See Elston v. Talladega County Bd of Education*, 997 F.2d 1394,1406 (11th Cir. 1993).

[62] *Id.*

[63] Finding of Fact 1.

[64] Finding of Fact 7.

CENS."[65] For example, once the Phoenix Fire Department (City of Phoenix PSAP) received comprehensive CENS training, they became knowledgeable about the process and were able to create video PSA's to educate the public about the CENS program.[66]

The investigation revealed that the public awareness campaign occurred throughout Maricopa County by use of Public Services Announcements (PSAs), news articles, including the *Arizona Republic, Ahwatukee Foothills News, East Valley Tribune, La Voz* (Spanish*), Paradise Valley Independent, Daily News Sun, Glendale Star, and East Valley Independent*), and press releases conducted in English and Spanish through use of print, radio (KTAR Radio), TV (including TV Channels 3, 5, 10, 11, 12, 15, 33, 48, 53, Mas! Arizona Ch. 55, and Telemundo), and live events (including Glendale Fire Safety Fair, Phoenix Fire Prevention Desert Sky Mall, Phoenix Fire Prevention Paradise Valley Mall) from November 2003 through October 2004. The Public Awareness Log lists 27 separate sources of communication regarding the CENS that occurred from November 2003 through October 2004, including addressing the Phoenix Mayor and Council which was covered by Phoenix Channel 11.[67]

More importantly, the investigation also revealed that additional community outreach did occur by virtue of the presentations made to local police and fire agencies educating them on the CENS Program. MAG developed and distributed brochures and videos (both in English and Spanish) with the PSAPs. The PSAPs were expected to inform their respective communities of the CENS system. In fact, English and Spanish-speaking members of the Phoenix Fire Department (PSAP for Phoenix, which includes communities in south and west Phoenix) created video PSAs for public outreach broadcast to the benefit of all Phoenix residents.[68] MAG then contacted Phoenix NSD to assist with community outreach in various communities. The NSD facilitated high foot traffic events in Phoenix such as fairs at local malls where MAG could set up an outreach booth in which to educate the public.[69]

Due to the limited funds ($2.5 million) and the duration of the contract, a determination was made to ensure the limited resources available were primarily focused on CENS system operations.[70] Even though the community outreach was not as vigorous as DWAZ believed it should be, OCR concludes that ADEQ did require the CENS

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[65] Finding of Facts 13 and 17.

[66] Finding of Fact 16.

[67] Finding of Fact 15.

[68] Finding of Fact 16.

[69] Finding of Facts 17 and 18.

[70] *See* Footnote 37.

contractor to conduct public outreach to implement the CENS program and that the outreach conducted does not support a finding of intentional discrimination. In addition, OCR finds that the outreach was conducted in an equitable manner throughout the County and did not result in persons outside the Complainant's protected class receiving a benefit denied to the Complainant's. The relaying of CENS information over the radio and TV and through print in both English and Spanish provided the residents of west and south Phoenix the same educational benefit as other residents of the County.

While the *prima facie* elements are not rigid and are merely intended to provide a framework for establishing discrimination, the investigative record does not reveal other indicia of discriminatory intent. The record does not support the Complainant's assertion that ADEQ was motivated by the Complainant's race and or/national origin in developing the community outreach component of the CENS contract.

As a result of the facts discussed above, the Complainant's allegations regarding ADEQ's intentional discrimination are dismissed.

Discriminatory Effects

DWAZ also alleges that ADEQ's failure to require the CENS contractor to provide community outreach and education about evacuation and shelter-in-place procedures resulted in a disparate impact on the African-American and Latino residents of west and south Phoenix "because they are situated disproportionately where the facilities with hazardous chemicals are [located]."[71]

In order to prove that an action had a discriminatory effect it must be shown that a recipient's actions, while not facially discriminatory, had a disproportionate and adverse impact on a protected group. OCR has determined, based on the record, that the community outreach provided on the CENS system did not result in an adverse and disparate discriminatory effect upon the residents of west and south Phoenix.

OCR found that the CENS contractor conducted community outreach by virtue of presentations by MAG to local police and fire agencies educating them on the CENS program.[72] MAG developed and distributed brochures and videos in English and Spanish with the PSAPs and requested the PSAPs inform their respective communities of the CENS system. In addition, MAG contacted the Phoenix Neighborhood Services Department (NSD) to help facilitate high foot traffic events in Phoenix (such as safety fairs at local malls). MAG set up an outreach booth at these events to educate the

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[71] *See* Footnote 24.

[72] Finding of Fact 17.

public.[73] In addition, the Public Awareness Log provided by MAG lists 27 separate sources of community outreach regarding the CENS that occurred from November 2003 through October 2004.[74]

The Complainant asserted the public service announcements were inadequate in explaining evacuation and shelter-in-place procedures as they relate to the CENS. Even if true, OCR finds no support in the record that African-Americans or Latinos were impacted differently than persons outside those classes. The Complainant asserted that the residents of south and west Phoenix were impacted differently because industrial facilities are located near their communities, and they would have been disproportionately impacted by a lack of training in the CENS. However, the record revealed that the CENS was not activated for any emergency activity in the south and west Phoenix area during 2004, and that the CENS was not designed solely, or even primarily, for use in such emergencies.

OCR's investigation revealed that the CENS was to be used for the following types of emergencies: i) Imminent threats to life or property, ii) Disaster notification, iii) Endangered children, iv) Endangered elderly, and v) Evacuation Notices.[75] In 2004, there were a total of 14 launches (emergency calls) of the CENS. They were made by both law enforcement agencies and fire departments. The launches involved the following types of incidents: ammonia leak, missing Alzheimer patient, water treatment fire, hostage incident, suspect at large, missing child, and barricaded subject. None of the emergency launches occurred in the west and south Phoenix area.[76] This is significant in that the Complainant did not suffer any adversity by virtue of the CENS outreach since there were no emergencies that required deployment of the CENS in the west and south Phoenix area during 2004. Thus, there is no support in the record that the African-American or Latino residents suffered an adverse or disparate impact by virtue of the CENS community outreach and the Complainant's allegations regarding ADEQ's discriminatory effects are dismissed.

VII. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that the Complainant's allegations of unlawful intentional discrimination and disparate impact are not supported by the record. Thus, OCR finds no

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[73] Finding of Fact 17.

[74] Finding of Fact 15.

[75] Finding of Fact 12.

[76] Finding of Facts 11 and 19.

violation of EPA's regulations implementing Title VI, and hereby dismisses DWAZ's complaint against ADEQ, pursuant to 40 C.F.R. § 7.120(g).

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,

Rafael DeLeon

Rafael DeLeon
Director

cc: Stephen Brittle, President
Don't Waste Arizona, Inc.
6205 South 12th Street
Phoenix, AZ 85042-4327

Jo Ann Asami, Title VI Contact
EPA Region 9

Stephen G. Pressman, Associate General Counsel
Civil Rights & Financial Law Office (MC 2399A)