VIA EMAIL, FACSIMILE TO 202-501-1836 and 202-501-1450 and U.S. MAIL

August 12, 2009

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

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

Re: *Don't Waste Arizona, Inc. (DWAZ) v the Maricopa County Air Quality Department (MCAQD) in the Matter of Fisher Sand and Gravel*

Dear EPA Office of Civil Rights Director Higginbotham and Lisa Jackson, 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, toxic and hazardous air pollutant emissions in ethnic minority communities, and related air pollution issues. . DWAZ is headquartered at 6205 South 12th Street, Phoenix, AZ 85042, and may be reached at (602) 268-6110. DWAZ has members in the affected area.

The Maricopa County Air Quality Department (MCAQD) 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 its air pollution program. Specifically, the MCAQD has failed to administrate its Title V and synthetic minor air permits program in ways to prevent illegal and unhealthy emissions of particulate matter, carbon monoxide, VOCs, HAPs, and strong chemical odors in an ethnic minority community adjacent to the Fisher Sand and Gravel facility located at 3826 South 28th Street in Phoenix, AZ. Levels of particulate matter, carbon monoxide, VOCs, HAPS, and strong chemical odors in the affected community are so high that adverse health effects and adverse impacts on the local area residents' quality of life are routinely experienced. Numerous complaints about odors, burning eyes, burning nasal passages and lungs, headaches caused by the pollution, and more have been filed for years by the members of the affected community.

Fisher Sand and Gravel was issued a permit in 2007 by the MCAQD for its asphalt plant. The facility is a synthetic minor that must limit its asphalt processing and production to

500 tons/hour of asphalt and 2,400 tons/day of asphalt. Fisher also operates a sand and gravel operation at the same site under terms and conditions of a separate air pollution permit.

In June 2009, MCAQD requested Fisher Sand and Gravel provide its production records for the sand and gravel operations at the Fisher Sand and Gravel facility, but to date, Fisher has not provided these requested production records, despite specific permit conditions that require these records be provided MCAQD upon request.

But MCAQD has not issued an NOV for this nor taken any enforcement action against Fisher for failing to provide these requested records. These sand and gravel production records are needed to assess and determine whether site wide emissions at the Fisher Sand and Gravel facility are sufficient to make the site a Title V facility.

Further, MCAQD has determined that Fisher has provided daily asphalt production records of its asphalt plant that have discrepancies, and even issued a press release to that effect. Fisher provided two different records for the same date in Mach 2008 for asphalt production that have different amounts for asphalt production and fuel usage. One of these daily records is clearly false and it appears that it was deliberately falsified. Section 113 of the Clean Air Act clearly identifies such an act as a criminal act. Failing to provide the requested records is also a criminal act pursuant to Section 113 of the Clean Air Act.

Yet MCAQD has not even issued an NOV to Fisher, much less brought criminal charges against Fisher for either of these.

The failure of the MCAQD to properly enforce the applicable conditions of both air pollution permits issued to Fisher and the applicable sections of the Clean Air Act have the effect of allowing Fisher to operate in violation of permits and in ways detrimental to the health of local residents, almost entirely ethnic minorities. It is clear that MCAQD is conducting sham enforcement and sham oversight at the expense of an entirely ethnic minority community adjacent to the facility.

This all appears to be a deliberate and intentional decision and action on the part of MCAQD, an elaborate scheme, perhaps even racketeering, to protect the egregious polluter and not the affected environmental justice community adjacent to the Fisher facility. It is also a procedure contrary to common sense and normal enforcement procedures of any environmental regulatory agency. (DWAZ itself has conducted extensive citizen suit enforcement of federal environmental laws, winning or settling every case, about 90 of them, so we at DWAZ have a good sense of what EPA enforcement is.)

Such a decision at MCAQD must be caused by the direction of someone at the highest management position within this agency and cannot reasonably be caused by an error in judgment or carelessness. This suggests criminal intent and/or criminal behavior within the MCAQD, as well as deliberate, poor training.

A federal grand jury should be convened to investigate this matter at all levels.

There is also either a failure on the part of MCAQD to properly train staff, or a deliberate order to inspection staff to not take appropriate civil and criminal action against Fisher for these violations. In any case, the failure of the MCAQD to properly oversee this facility's permits, to conduct sham enforcement and sham oversight of Title V facilities and synthetic minors is an ongoing civil rights violation, as it has a disparate, adverse impact on the low-income, ethnic minority community adjacent to and affected by the emissions from this facility.

There is no other source in Maricopa County with such a consistent pattern of noncompliance and flagrant violation of permit conditions. The neighborhood surrounding Fisher Sand and Gravel is particularly vulnerable to the effects of air pollution. A 2005 Arizona State University study found that the neighborhood's ZIP code has one of the highest rates of asthma-related emergency room visits in Phoenix, as well as one of the highest concentrations of industrial air emissions.

The MCAQD is either negligent in the oversight of its air programs delegated by EPA, or incompetent. Either way, it is a violation of the civil rights of people in the affected area.

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

Complainant

Don't Waste Arizona, Inc. (DWAZ) is an environmental justice organization with affected members residing in South Phoenix, including members who reside near the Fisher Sand and Gravel facility, and DWAZ is filing this complaint against the MCAQD.

Respondent

The Maricopa County Air Quality Department (MCAQD) administers air pollution permits in Maricopa County. The MCAQD, 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 is timely filed since the MCAQD has allowed and still is allowing Fisher to operate in flagrant noncompliance with the conditions of its synthetic minor permit and its sand and gravel permit. The Fisher facility's violations are current as of today's filing of this complaint, and the MCAQD still has not taken appropriate action as of today's date, so this complaint is within 180 days of that.

The failure of the MCAQD to properly administer its Title V air pollution program is causing, and has caused, a disproportionate, adverse effect on the low-income, ethnic minority community adjacent to Fisher Sand and Gravel.

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 MCAQD, a direct recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by failing to properly administrate its Title V HAPs air pollution program.

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 MCAQD to properly administer its Title V air pollution program, as aforementioned, has had severe environmental and public health consequences in the overwhelmingly ethnic minority community adjacent to Fisher Sand and Gravel.

All complainants must show is that when applied in a particular manner, the MCAQD's "method of administering its Title V air pollution program," yields a discriminatory outcome. As the abovementioned sections demonstrate, the MCAQD's method of its Title V air pollution program has resulted in discriminatory impacts throughout the low-income, ethnic-minority communities community adjacent to Fisher Sand and Gravel.

The effect of MCAQD's administration of its Title V air pollution program is clear: People of color will bear disproportionate risks and impacts from air pollution, yet the MCAQD will not properly administrate its Title V air pollution program and comply with applicable statutes as mentioned before in this complaint; and the MCAQD will not provide a means to decrease risks and impacts to this affected community.

The MCAQD has administered its Title V air pollution program 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, that MCAQD:

    - **1) revoke the synthetic minor permit for Fisher Sand and Gravel's asphalt plant as well as its sand and gravel operation;**
    - **2) create a real inspections and enforcement program that protects the health of environmental justice communities in its jurisdiction;**

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

- 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 MCAQD, pursuant to 40 C.F.R. §7.25, if the MCAQD fail to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, ethnic minority community adjacent to Fisher Sand and Gravel in Phoenix, Arizona, typifies the low-income and/or communities

of color burdened in Arizona by disproportionate adverse environmental impacts because of the MCAQD's administration of its Title V air pollution program.

The discriminatory impact created and sanctioned by the MCAQD's actions is a clear violation of Title VI as implemented by EPA regulations. Because the MCAQD receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations.

This complaint is timely filed since the MCAQD has allowed and still is allowing Fisher to operate in flagrant noncompliance with the conditions of its synthetic minor asphalt plant permit and sand and gravel permit. The MCAQD has allowed Fisher to not comply with the terms of its sand and gravel permit and has allowed with no enforcement the promulgation and filing of falsified records. So there is no final agency action on these issues.

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

DWAZ 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.

The MCAQD is the subject of several civil rights complaints filed by Don't Waste Arizona, Inc. and the MCAQD deserves a full federal investigation by the EPA's Office of Civil Rights. The agency's pattern of behavior in terms of intentional civil rights violations of low-income and ethnic minority communities is flagrant, apparent and appalling.

Sincerely,

Stephen M. Brittle
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