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VIA FACSIMILE TO 202-501-1836 and 202-501-1450 and CERTIFIED MAIL

March 27, 2007

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. and Concerned Residents of South Phoenix (CRSP) v Arizona Department of Environmental Quality and the Maricopa County Air Quality Department*

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 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 Concerned Residents of South Phoenix (CRSP) is a non-profit environmental justice organization concerned about air pollution, emissions and releases of hazardous chemicals into the community, and disparate impacts caused by inept environmental bureaucracies. CRSP is headquartered at 819 West St. Kateri Drive, Phoenix, AZ 85041, and may be reached at (602) 268-4475. CRSP has members in the affected area.

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 its air pollution program. More specifically, the ADEQ has issued permits for portable sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants to operate in Maricopa County and especially in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area, which is adjacent to an overwhelmingly ethnic minority population that is disproportionately and adversely affected by documented high levels of particulate matter pollution. The ADEQ yet has failed to administrate, manage and/or maintain a system whereby these same portable permitted facilities are monitored, including a systematic lack of inspections of these

permitted facilities and a systematic lack of emissions reports of these permitted facilities. This exacerbates the already severely polluted air, which does not meet federal NAAAQS for particulate matter, a situation so bad that the EPA has required that Maricopa County devise a plan to reduce particulate matter emissions by 5% per year until there is compliance with federal NAAAQS for particulate matter. The emissions from these portable facilities operating in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area is unknown, despite many observations and complaints by citizens that these facilities are not in compliance and emitting illegal amounts and volumes of dust and particulate matter. The failure of ADEQ to inspect these facilities and to require emissions reports of particulate matter from these facilities has a disparate impact on ethnic minority communities already disproportionately and adversely affected by high levels of ambient air pollution by particulate matter. Further, by failing to properly administrate its air pollution program in this manner, the ADEQ prevents meaningful and effective steps to reduce pollution in these areas by itself and others.

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. The MACQD has issued permits for sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants to operate in Maricopa County and especially in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area, which is adjacent to an overwhelmingly ethnic minority population that is disproportionately and adversely affected by documented high levels of particulate matter pollution. (The MCAQD already exhibited similar behavior when it missed its original deadline to promulgate the Salt River SIP.) The MCAQD has failed to administrate its air permitting program in terms of these types of facilities in what can only be characterized as a systemic failure of its entire program, including, but not limited to:

1) Failure to properly inspect facilities and to properly train staff to conduct inspections

A review of the files at MCAQD regarding the subject sand and gravel outfits, asphalt batch plants, and cement plants yields few inspection reports, but those in the possession of the agency that indicate inspections are not conducted on an annual basis; inspections that do occur usually, if not always, occur when the facility being inspected is not operating; and "inspections" that fail to notice, even after ten (10) years of a facility's operating with a permit issued by the agency, that facilities are not utilizing the proper methods such as control bars that spray water to control dust, watering piles of aggregate, and are operating facilities without water trucks, even when these are required by permit conditions.

2) Failure to maintain an inspections and enforcement staff that can respond to violations on weekends, holidays, evenings, nights, and early mornings.

The "inspectors" usually work from 8AM to 5PM on weekdays. This is equivalent to having police only during these hours and expecting no crime during the off hours. When inspectors are alerted, they show up days or even weeks later, and can take no enforcement action, and often do not even visit the facility. The sand and gravel outfits, asphalt batch plants, and cement plants in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area often operate 24 hours/per day and especially out of compliance with permit conditions during the times when there are no inspectors. Even when video of non-complying activities are presented to the director of the agency, no remedy, i.e. staffing inspectors on weekends, holidays, evenings, nights, and early mornings, is put into place.

3) Failure to properly respond to citizen complaints.

Despite claims by the agency that it accepts and even relies on citizen complaints of non-compliance to help with its administration of its air pollution program, the administration of these complaints is dismal. Complaints of dust pollution and non-compliance in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area are lost or not responded to at all. Inspectors will call complainants days or weeks after a citizen complains about pollution, and if they cannot reach the complainant, the complaint is dropped without an inspection of the subject facility. The agency also does not record all complaints, or loses them. The agency does not respond back to complainants to communicate the final disposition of the investigation.

4) Failure to require accurate and complete particulate matter emissions inventories from these sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants.

A review of the files at MCAQD regarding the subject sand and gravel outfits, asphalt batch plants, and cement plants yields emissions reports where sand and gravel outfits located in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area file **zero (0)** emissions of particulate matter, year after year. The agency does not maintain an effective enough program to catch these errors, at a minimum, and the implication is one of corruption, as not only does the agency not notice these obvious errors in particulate matter emissions reporting, but evidently the sand and gravel outfits know that these bogus particulate matter emissions reports will be accepted and not challenged by the agency. Further, as these subject sand and gravel outfits, asphalt batch plants, and cement plants located in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area are located in areas with documented exceedances of the NAAAQS for particulate matter, and the area is documented as being adjacent to an overwhelmingly ethnic minority population, there should be special scrutiny in place for these facilities and their emissions reports, and the failure to do so is more evidence of an **intentional failure** on the MCAQD's part to properly and effectively administrate its air pollution program.

5) Failure to maintain an administration that is competent and capable in determining non-compliance with emissions reporting requirements.

If it is not corruption that causes the aforementioned problem, then it is an issue of failing to properly train staff and develop the air pollution program so that blatant defects in reporting are noticed and corrected. When these erroneous emissions reports are filed over a period of years, it must be a systemic failure in administrating the air pollution program. The disparate impacts are well-documented, as the highest particulate matter readings from air monitoring activities are detected in the subject area year after year. And the affected area is also well documented as home to an overwhelmingly ethnic minority population. These same erroneous emissions reports were also then used for and relied upon for baseline particulate matter "reports" to other government entities such as EPA, the Maricopa Association of Governments, the governor of Arizona, and the Arizona Legislature. These government decision-making entities relied on these erroneous reports to determine ways to reduce particulate emissions in Maricopa County by 5% each year until compliance with NAAAQS standard for particulate matter. These inaccurate reports hence exacerbated the disparate impact to these aforementioned ethnic minority communities because the opportunity to solve the problems associated with the particulate matter emissions from these sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants has been missed, prolonging the high pollution in the affected area the along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area.

6) Failure to require the appropriate controls to avoid dust and particulate pollution emissions in its permitting process and its technological requirements.

The MCAQD has allowed these subject sand and gravel operations to operate for years without any or adequate water trucks to suppress dust and without water lines that are routed to the storage piles of aggregate dirt that these types of operations create as a part of normal operations. Without these controls, there is much more dust and particulate matter allowed into the ambient air in an ethnic minority area that already demonstrably has the worst air in Maricopa County in terms of particulate matter. Water or other dust suppressants should be applied at every step of the process involved, from excavating the aggregates, to crushing, screening, and all other steps of the sand and gravel outfits' processing.

Further, there are more stringent control technologies for dust control measures utilized in California and other states that should have been implemented and required here years ago, including such measures such as partially enclosing the sand and gravel operation and venting particulate matter emissions to a baghouse and/or building a temporary dome over the operation to reduce particulate matter emissions. These more stringent control technologies or Best Available Control Technology (BACT) should have been required many years ago when these particulate matter exceedances commenced, and certainly now.

7) Failure to require an appropriate dust control plan for these sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants **and their types of operations.**

A review of the dust control plans on file at the MCAQD indicates that the agency routinely accepts dust control plans with many types of inaccuracies and even absurdities. The MCAQD routinely accepts dust control plans with obvious errors, and even those that assert: "Material from the pit has natural moisture content which minimizes fugitive dust generated by mining operations." In dry Arizona, this is simply not true, and it underscores why there is such a documented problem with particulate matter in the affected area. This is another systemic failure in administering the air pollution program. A facility is in violation of air quality regulations if it does not have a dust control plan on file with the MCAQD, and if it has not posted its dust control plan, but there is no quality, or absurdity, control on these dust control plans by MCAQD, no proper oversight, and they are generally so deficient that they do not prevent excessive dust pollution.

8) Failure to enforce violations sufficiently to provide a disincentive for non-compliance.

For years, the Maricopa County Attorney Rick Romley refused to enforce against dust violations, and now that there is some enforcement, the penalties levied are not enough to deter non-compliance or to fully penalize for the damage to the environment and persons adversely affected. These penalties are so paltry that they are merely a cost of doing business. Because there is not a sufficient disincentive for non-compliance, these dust violations continue almost unabated. Specific examples will be provided when the full investigation of this civil rights complaint commences.

CUMULATIVE IMPACT OF MCAQD'S FAILURE

This systemic failure of the MCAQD's entire air pollution program exacerbates the already severely polluted air in the affected area, which already does not meet federal NAAAQS for particulate matter, a situation so severe that the EPA has required that Maricopa County devise a plan to reduce particulate matter emissions by 5% per year until there is compliance with federal NAAAQS for particulate matter. The emissions from these portable facilities operating in areas along the Salt River bed from 32nd Street to 91st Avenue in the Phoenix area is unknown, despite many observations and complaints by citizens that these facilities are not in compliance and emitting illegal amounts and volumes of dust and particulate matter.

The discrimination by MCAQD is intentional and informed.

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

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 and ADEQ, direct recipients of federal financial assistance from EPA have violated Title VI as implemented through EPA's regulations by failing to properly administer their respective air pollution programs.

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 and ADEQ to properly administer their respective air pollution programs, as aforementioned, has had severe environmental and public health consequences in South Phoenix, which has the highest asthma rates in Maricopa County. There have been many exceedances of the NAAAQS for particulate matter 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 MCAQD and ADEQ's "methods of administering their respective air pollution programs" yield a discriminatory outcome. As the abovementioned sections demonstrate, the MCAQD and ADEQ's method of administering their respective air pollution programs has resulted in discriminatory impacts throughout the low-income, ethnic-minority communities of west and South Phoenix.

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

The MCAQD and the ADEQ have administered their respective air pollution programs 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 all recipients of portable permits for sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants to report all emissions from all years operating in Maricopa County, and that the ADEQ inspect all portable operations while actually operating on a regular and continuing basis and do so during all hours of operation.

- Require that, as a condition of continuing to provide federal financial assistance, that MCAQD:

    - **1) properly inspect sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants and properly train staff to conduct inspections;**
    - **2) maintain an inspections and enforcement staff that can respond to violations on weekends, holidays, evenings, nights, and early mornings**
    - **3) properly respond to citizen complaints;**
    - **4) require accurate and complete particulate matter emissions inventories from facilities;**
    - **5) maintain an administration that is competent and capable in determining non-compliance with emissions reporting requirements**
    - **6) require the appropriate BACT controls to avoid dust and particulate pollution emissions in its permitting process and its technological requirements;**
    - **7) require an appropriate dust control plan for these sand and gravel outfits (aggregate mining), cement batch plants, and asphalt batch plants and their types of operations; and**
    - **8) enforce violations sufficiently to provide a disincentive for non-compliance.**

- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to ADEQ and 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 ADEQ and MCAQD, pursuant to 40 C.F.R. §7.25, if the ADEQ and MCAQD fail 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 MCAQD and ADEQ's administration of their respective agency's air pollution programs.

The discriminatory impact created and sanctioned by the MCAQD and ADEQ's actions are a clear violation of Title VI as implemented by EPA regulations. Because the MCAQD and ADEQ receive federal funding from EPA, they are subject to Title VI as implemented by EPA regulations. This complaint is timely filed since the MCAQD and ADEQ still do not comply with the requirements of Title VI, the air pollution violations for the NAAAQS particulate standards are continuing, and the ADEQ and MCAQD's administration of the air pollution programs are still a failure as described, and there has been no final agency action on these issues.

Don't Waste Arizona, Inc., Concerned Residents of South Phoenix, and the affected members of both organizations 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,

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