

January 28, 2002

Governor Christine Whitman, Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Ann Goode, Director  
Office of Civil Rights  
Ariel Rios Building  
200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

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

Dear Governor Whitman and Director Goode:

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 failing to provide a method for low-income and Latino citizens in Hayden and Winkelman, Arizona, to complain about severe air pollution noncompliance issues associated with the ASARCO copper smelter in Hayden, Arizona. The ADEQ is the agency that issues air pollution permits for facilities in Hayden and Winkelman, and has indeed issued a Title V permit for this facility.

The towns of Hayden and Winkelman are over 90% Latino, and overwhelmingly low-income. Don't Waste Arizona, Inc. (DWA) is an environmental justice organization with members in the affected area. Some of these DWA members do not have a home telephone number or access to a phone to call ADEQ other than the ADEQ toll-free number.

The ASARCO copper smelter in Hayden, Arizona, is already an enormous source of air pollution and releases reported under the Toxics Release Inventory. Indeed, this facility is and has been one of the top releasers in the nation reporting to the TRI. There are serious problems and adverse health consequences in the towns of Hayden and Winkelman associated with smoke and particulate matter emitted from this ASARCO facility, particularly at night, but also even during the day. The ASARCO air emissions are contaminated with lead, arsenic, and other heavy metals, as well as sulfur dioxide and sulfuric acid mist. The ATSDR issued a report in 1997 fingering Hayden as one of the most impacted by sulfur dioxide emissions. So Hayden and Winkelman residents who are Don't Waste Arizona, Inc. members are already at a disproportionate, adverse risk from toxic emissions from this facility, and from the chemicals used and stored there.

When there are additional noncompliance and excess emissions issues associated with this facility, it only exacerbates the disproportionate, adverse conditions of risk and impact upon the local low-income and ethnic minority residents.

The ADEQ, unlike most agencies that issue air permits under EPA delegation, issues air pollution permits mostly for facilities that are not proximate to its headquarters in Phoenix. The ADEQ has no real way of knowing if most of the facilities it has permitted are actually complying with or violating the terms of air pollution permits without ADEQ staff visually observing air pollution violations. Few air pollution permits issued by the ADEQ require Continuous Emissions Monitoring.

And the ADEQ has a dismal record of inspecting the facilities it has permitted, and "annual" inspections are very rare. Some facilities ADEQ permits are never inspected at all, or not while process equipment is actually operating. Many inspections occur only after the ADEQ receives a citizen complaint. The timeliness of agency notification of an air pollution problem at a facility is especially important and relevant to the effectiveness of citizens' air pollution complaints. So to legitimize its administration of the air pollution program, ADEQ must rely on citizens calling to query and/or complain, as the agency conducts no other real oversight. Thus to have a credible enforcement program as a duty of its Clean Air Act delegation authority, the ADEQ must have a telephone system that can take complaints at any time of the hours of operations that it has provided any facility it has permitted. The ASARCO-Hayden smelter operates 24 hours/day, seven days a week, as do many of the other facilities permitted by the ADEQ.

The ADEQ does have a "hotline," 1-800-234-5677, allegedly for people outside the Phoenix metro area to use to call the agency and file citizens complaints regarding the facilities permitted by the agency. However, when Hayden and Winkelman residents have tried to utilize this, they have had consistent problems. If Hayden and Winkelman residents attempt to use this hotline during evening, nighttime, or weekend, hours, the hotline provides no way to leave a message or a complaint. Yet the ADEQ was notified years ago via a Clean Air Act citizen suit notice letter that there were significant excess emissions at night in Hayden that appeared to violate the Clean Air Act. With this knowledge, the ADEQ still took no action to provide a method for citizens to complain about excess emissions from the ASARCO-Hayden smelter at nighttime in Hayden and Winkelman. A member of Don't Waste Arizona, Inc., Betty Amparano, has tracked the nights this fall of 2001 when there were excess emissions from the ASARCO-Hayden smelter, but was never able to call the ADEQ via the hotline during these nighttime events and even leave a message, much less contact a person.

And even when the Hayden and Winkelman residents attempt to call the ADEQ during normal business hours, they have found there is no one to take their complaint or who is even qualified to address their concerns. On December 3, 2001, for example, a DWA member, Teresita Olmos, contacted ADEQ via this hotline to attempt to report excess daytime smoke and emissions from the Hayden-ASARCO smelter, but was unable to reach anyone at the agency. In January 2002, Teresita Olmos contacted ADEQ via this hotline to attempt to report that sulfuric acid mist emitted from the ASARCO smelter was

falling like rain onto the community, posing a health risk and damaging vehicles. She was informed that all of the "qualified staff" were gone for the day. The receptionist also declined to take a message, to ask for Ms. Olmos' name and contact number, or to take any vital information. The receptionist obviously had not been trained to do so. Indeed, the receptionist instead tried to refer Ms. Olmos to the Gila County authorities, who do not even have jurisdiction in these matters.

Clearly the ADEQ has failed to provide a reliable mechanism for low-income and ethnic minority people living in rural and out state areas, where almost all of the ADEQ-permitted facilities are located, to report environmental concerns and noncompliance regarding these facilities. And yet the director of the Air Quality Division, Nancy Wrona, was specifically contacted regarding the problems with the hotline on August 1, 2000. The ADEQ has certainly been adequately notified of this problem. The failure to rectify this problem with the hotline at this point must be assumed to be deliberate and intentional, and not an aberration.

Repeatedly, poorer communities of color, like this Latino community, have been the designated recipients of disproportionate, dangerous amounts and types of air pollution from facilities permitted by ADEQ, bearing a disproportionate share of the state's environmental dangers, with no mechanism provided by ADEQ to mitigate the disproportionate, dangerously large amounts and types of air pollution by providing a method for the public to effectively complain about incidents involving noncompliance.

And a review of the ADEQ's budget submittals indicates that over half of citizens' complaints regarding air pollution from ADEQ-regulated facilities are not even responded to at all. This clear pattern of discriminatory impact cannot be ignored any longer by ADEQ or USEPA.

## I. PARTIES

### A. Complainants

Don't Waste Arizona, Inc., an environmental justice organization with affected members residing in Hayden and Winkelman, is filing this complaint against ADEQ. Some of these Don't Waste Arizona, Inc. members do not have a home telephone number or access to a phone to call ADEQ other than the ADEQ toll-free number.

### B. Respondent Arizona Department of Environmental Quality (ADEQ)

ADEQ is the state agency that is responsible for implementing, administering, and enforcing the Arizona SIP, which includes both Class II permits (non-Title V) as well as federal Title V air pollution permits, and Title VI of the Civil Rights Act of 1964. 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 result of recent incidents, after a history of incidents, where serious air pollution problems and probable noncompliance with a facility's Title V permit requirements, especially at night, were impossible to provide to the ADEQ because the agency steadfastly refuses to provide a reliable method to do so. The need for a 24-hour, manned, toll-free number or other method of contacting the agency regarding serious environmental problems that must be available to those without telephones. The low-income, ethnic minority people of Hayden and Winkelman who are impacted by the noncompliance are unable to contact the agency without a viable telephone number and administrative processes inside the agency to actually handle these citizens' complaints. The ADEQ has been provided specific notice of the problem and deficiency, yet has not remedied the problem.

## III. CONTEXT

Don't Waste Arizona, Inc. had notified the ADEQ of problems with the "hotline" via written and oral communications, as well as the particular problems in Hayden with air pollution, especially at night, via a copy of a Clean Air Act citizen suit notice letter.

The community (affected area) of Hayden and Winkelman was identified years ago as having high incidences of lung cancer and lead found in children. This data was found in the ADEQ Air Quality Division's files.

The affected area is currently comprised of mostly (>90%) Latino, while the Latino population is now only 25.3 percent of the state's 5,130,632 residents

### 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.

ADEQ, a recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by repeatedly failing, after notice, to provide an effective mechanism for low-income and Latino people living in Hayden and Winkelman, Arizona, to report severe noncompliance with Title V permit conditions at the ASARCO-Hayden smelter, and severe environmental and public health consequences.

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 ADEQ to provide an effective mechanism for low-income and Latino people living in Hayden and Winkelman, Arizona, to report severe noncompliance with Title V permit conditions at the ASARCO-Hayden smelter, and severe environmental and public health consequences is ADEQ's method of discrimination, and is an extremely egregious example of its discriminatory practices. It is impossible for the ADEQ to claim that it provides proper administrative oversight of its permitted facilities without providing a mechanism for citizens' complaints.

All complainants must show is that when applied in a particular manner, ADEQ's "method of administering its program" yields a discriminatory outcome. As the following sections demonstrate, ADEQ's method of administering its air pollution program has resulted in discriminatory impacts throughout this low-income, Latino community.

By issuing the ASARCO-Hayden copper smelter a Title V (major source) air pollution permit, and then failing to provide a method for the low-income and ethnic minority people living in the vicinity of the facility to complain about egregious air pollution violations caused by the facility, particularly those that reoccur at night and weekends, the ADEQ has failed to meet its statutory duties under Title VI. ADEQ permitted a facility in this low-income, ethnic-minority town, and yet does not provide sufficient means in the administration of the air permitting program to monitor compliance.

The effect of ADEQ's Title V air pollution permitting process is clear: Latinos and other people of color will bear disproportionate impacts from air pollution; the agency will not properly administer its air pollution program; and the ADEQ will not provide a means to facilitate citizen complaints about noncompliance with Title V requirements, even when notified of problems with the complaint system.

By failing to provide a means for citizens to complain about noncompliance with Title V requirements, ADEQ has administered its 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, ADEQ immediately develop a method for citizens in the low-income and/or minority communities where ADEQ has issued Title V air pollution permits to

make telephonic complaints about facility noncompliance with Title V permit conditions so these citizens may effectively register their complaints, 24 hours per day, seven days per week, or else limit Title V air pollution permits issued by ADEQ to hours that ADEQ agency staff are actually available to take citizens' complaints from members of low-income and/or ethnic minority communities where ADEQ has issued Title V air pollution permits;

- Require that, as a condition of continuing to provide federal financial assistance, ADEQ immediately develop a method to respond adequately and promptly to citizen complaints about facility noncompliance with Title V permit conditions from low-income and/or ethnic minority communities where ADEQ has issued these Title V permits *and* conduct an outreach to the low-income and/or ethnic minority communities where ADEQ has issued these Title V permits to inform these communities of the availability of the citizens' 24 hours per day, seven days per week, complaint line and complaint process;
- Impose an immediate moratorium on ADEQ's permitting of any other industrial facilities requiring Title V permits in low-income and/or communities of color;
- Withdraw ADEQ's authorization to administer the Clean Air Act Title V program for regulation of major sources of air pollution in low-income communities of color until such a moratorium is in place;
- Require, as a condition of continuing to provide federal financial assistance, that ADEQ withdraw any existing Title V air pollution permits, and cease issuing any new Title V air pollution permits, for new or expanded facilities in low-income and/or communities of color in Arizona until it has a competent, credible, scientific method of determining it is not violating the civil rights of communities of color and/or low-income communities;
- 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;
- Request ADEQ to end its discriminatory statewide pattern of issuing Title V air pollution permits to industrial facilities in low-income and/or communities of color, and that, to this end, request that ADEQ use demographic data in considering permit applications;
- 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 ADEQ, pursuant to 40 C.F.R. §7.25, if ADEQ fails to implement the above requested changes.

## Conclusion

As this complaint makes clear, the low-income, Latino community adjacent to the ASARCO copper smelter in Hayden and Winkelman, Arizona typifies the low-income and/or communities of color burdened in Arizona by disproportionate adverse environmental impacts because of ADEQ's permitting process and subsequent failure to administrate these air pollution permits and provide a credible mechanism for citizen complaints about facility noncompliance. The discriminatory impact created and sanctioned by ADEQ's actions is a clear violation of Title VI as implemented by EPA regulations. Because ADEQ receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since ADEQ has still not provided a method for citizens in low-income and/or minority communities where ADEQ has issued Title V air pollution permits to facilities to file complaints about Title V permit violations in January 2002, 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.

Attached please find a letter from Teresita Olmos regarding this complaint. Also, please view the December 2, 2001 daytime ASARCO-Hayden smoke incident at <http://www.fastq.com/~dwaz/hayden02.html>. Images and video clips showing an example of the chronic nighttime excess smoke and emissions are on the Internet at <http://www.fastq.com/~dwaz/copperg.html>. Also attached please find the August 1, 2000, letter from Don't Waste Arizona, Inc. to Nancy Wrona, Director, ADEQ Air Programs noting problems with the hotline.

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  
President,  
Don't Waste Arizona, Inc.  
For the Complainants