

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

July 11, 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 Individual Members of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP) v Arizona Department of Environmental Quality*

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

Don't Waste Arizona, Inc. is a non-profit environmental organization dedicated to the protection and preservation of the environment in Arizona. DWAZ is especially concerned about environmental justice and 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. DWAZ was a participant on the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP). The CAC was selected and convened by ADEQ.

The Arizona Department of Environmental Quality (ADEQ) has violated Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") implementing regulation, 40 C.F.R. § 7.35, by discriminating on the basis of race in its administration of the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP). The ADEQ intentionally and deliberately mishandled the EPA grant designed to collaboratively reduce toxics in South Phoenix, a low-income, ethnic minority area known for disproportionate amounts of toxics in its environment. The ADEQ took the one chance South Phoenix had to reduce toxics through an EPA grant, and made certain through its administration of the grant that no toxics there would indeed be reduced.

Five years ago, the U.S. Environmental Protection Agency gave the Arizona Department of Environmental Quality (ADEQ) a grant to clean up toxics in a 12-square-mile swath of south Phoenix. That largely low-income, ethnic-minority area has a high concentration of pollution-producing industrial facilities. The ADEQ set up a panel of community

members in May 2003, and asked them to offer ideas on how they'd like to see toxic pollution reduced in their neighborhoods.

The project targeted a 12-square-mile section bounded by the Union Pacific Railroad tracks on the north, Broadway Road on the south, 25th Avenue on the west and 24th Street on the east. Companies there emit a stew of toxic chemicals including cyanide, lead, benzene and hydrogen fluoride, according to the EPA. Neighborhoods and industrial facilities are more closely intertwined there than in other parts of Phoenix. Although only 3 percent of residentially zoned areas in metro Phoenix directly abut industrial zones, in south Phoenix, that jumps to 35 percent, according to an Arizona State University study. .

But only recently has the ADEQ finalized a work plan to utilize the last of the EPA grant money for the project, and the ADEQ completely ignored the recommendations of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP). The community board spent more than a year crafting a list of 10 major steps they wanted regulators to take. Most of the things the CAC asked for are: a study of the health risks posed to their neighborhoods, stricter enforcement at polluting facilities, and better zoning to prevent industries from locating next to homes - never materialized.

Despite complaints and concerns expressed by the CAC members, and the public, throughout the project about how the ADEQ was administering the EPA grant for this project, ADEQ and its Director Stephen Owens never took any corrective action.

Discrimination in selecting the Panel

The grant was designed to ask a panel of South Phoenix residents and other interested citizens to develop recommendations to reduce toxic pollution in the largely minority community. Immediately, ADEQ discriminated against people in South Phoenix who had been active and concerned about the chemical fires that had adversely affected the area by refusing to put them on the CAC. Despite complaints, this never changed. This exclusion was quite deliberate and intentional.

Unscientific air monitoring a waste of federal funds

According to the Toxics Release Inventory, the top polluter in South Phoenix was the Phoenix Brick Yard, which emitted tens of thousands of pounds of hydrogen fluoride annually. The ADEQ arranged faulty, unscientific air monitoring of the Hydrogen Fluoride emissions from this facility to determine ambient air concentrations, and never did conduct proper monitoring. The air monitoring for Hydrogen Fluoride was conducted in February 2003, during one of the rainiest weeks in many years, with the air monitors sited north of the emissions point, when normally air monitoring would be placed either east or west of an emissions point, due to the prevailing winds in Phoenix blowing from southeast and southwest. (Even the wind rose for this monitoring provided by ADEQ indicated that the prevailing winds were east and west.) This also appears to be the deliberate and intentional misuse of the federal funds involved with that.

The free technical services of Technical Outreach Services for Communities (TOSC) to ADEQ to create the proper monitoring plan and methodology had been previously recommended and ignored. TOSC is a program funded by an EPA grant to a small, select number of universities around the country to help contaminated communities with technical assistance in understanding pollution, contamination, and methods to reduce it. TOSC helps communities determine the extent of pollution and cleanup options.

The free technical services of TOSC to review the air monitoring that had already occurred were recommended and ignored.

After the improper and unscientific air monitoring, upon which ADEQ spent thousands of dollars from the EPA grant, ADEQ was then asked by the CAC to at least transmit the data to TOSC so the air monitoring data and air-monitoring plan could be reviewed. This was first brought up at a Citizens Advisory Council meeting for the South Phoenix project, and Ward Jacox, the ADEQ SPMMPTRP project manager, and Patrick Gibbons, public relations person for ADEQ, promised that the materials would be provided to TOSC. After TOSC staff indicated a few weeks later that they had finally received something from ADEQ, they found they could not access the data, which had been only provided electronically. When asked about this, Jacox and Gibbons then asserted there was no way to convert the data files to a program TOSC could use. When asked to provide a hard copy instead, evidently this never happened. Hard copies were available and were presented for public review after a public records request. So these actions were intentional and deliberate.

It would have been better to serve the interests of South Phoenix, the CAC, and ADEQ, along with all stakeholders, by allowing TOSC to review the air monitoring data and the air-monitoring plan so that real professional experts could comment on the methodology. ADEQ itself has acknowledged that the air monitoring in question indicates the need for more detailed monitoring. And this additional monitoring never occurred.

No record on file to support expenditures for grant

When a CAC member tried to gather the data TOSC requested, through an ARS 39-121 request (Arizona Public Records law) to ADEQ to review and/or obtain the same materials, there was no evidence that the contractor for the monitoring, Sonoma Technologies, which was paid thousands of dollars by ADEQ through this EPA grant to create an air monitoring plan for the hydrogen fluoride emissions from the Phoenix Brick Yard, had done any such plan. There were never any records showing ANY air monitoring plan except some memo that was generated by ADEQ itself. To date, the air-monitoring plan developed by Sonoma Technologies for the hydrogen fluoride at the Phoenix Brick Yard has still not been produced for public review.

Poorly planned meeting or deliberate and intentional activity?

The monthly meetings of the CAC usually lasted about two hours, and the vast majority of the time (about 90 minutes of the 120 minutes) was been taken up not with CAC

interaction or discussion, but rather by EPA, ADEQ, or other environmental agency staff talking.

CAC meetings were poorly planned and facilitated

Other ADEQ projects have been facilitated by actual, paid, professional facilitators. And even the SPMMPTRP's literature called for such. This would appear to be somewhat discriminatory and intentional. Ward Jacox was not qualified to be a facilitator, and he was not certified or properly trained as such. Further, his conflict of interest was apparent as he cut CAC panel members off when they talked about issues he was not comfortable with, especially when critical of his work or ADEQ in general. He also promulgated the CAC agendas, and besides his apparent inability to gauge the time needed by each agenda item, he was also incapable or unwilling to enforce time constraints for agenda items when meetings with the CAC were conducted. The agenda presented to the CAC was developed without CAC input by ADEQ facilitator, Ward Jacox, each time listed these environmental agency-talking events as 30-35 minutes in length, but each time, these just went on and on. And the information provided in each was very limited, certainly not comprehensive, and could have been provided as a handout with a five-minute talk. The agency deliberately and intentionally wasted the CAC's time on unrelated materials.

At each monthly scheduled meeting that occurred, when the time had come for CAC interaction, the CAC was told to hurry up or to write down its questions/comments for review and possible response, or the CAC members were told that it was time to move on to another agenda item. Even when the CAC had reached consensus on putting an item on the agenda, Ward Jacox severely limited the time, and rushed the CAC. This was discriminatory and intentional, treating the CAC like second-class citizens. When citizens who were not CAC members were allowed to make comments and ask questions, usually at the end of the meetings, their remarks were never properly recorded or addressed.

Accounting Issues

When the CAC asked about records regarding the accounting for the SPMMPTRP, it was stonewalled, and a full accounting was never presented, and still has not been to date. Further, when reviewing the sketchy materials that were provided, CAC members found to their dismay that huge amounts of the EPA grant had gone for salaries of people who never made any discernable contribution to the meetings. One woman with ADEQ appeared to have been paid more than \$13,000 out of the grant funds, and all she ever did was bring cookies and spaghetti. Other people allegedly on the staff for the SPMMPTRP were never available when CAC members attempted to contact them, and did not return phone calls or answer questions left on voicemail.

ADEQ also contracted for publications for the SPMMPTRP that were mere compilations of readily available data about the South Phoenix study area, and spent thousands of dollars for this data, without CAC approval. The CAC agreed the materials were a waste of funds.

This all appears to have always been a deliberate ploy to march the CAC on to the conclusion the ADEQ wanted it to reach, rather than what had been advertised as what would be the purpose for deliberations of the CAC to provide EPA/ADEQ project's recommendations for measurable pollution reduction.

Administrative issues

Draft minutes of the CAC meetings were prepared without a subsequent agenda item for review and ratification or modification. The "draft minutes" of the CAC meeting of July 2003 were certainly a first, and they did contain misinformation, and "sanitizing" of issues and concerns. The agenda for the CAC meetings did not include review or ratification. One thing in particular, at the July 2003 CAC meeting, comments from call to the public included the question about how these agency staff drone on and on for 90 minutes, "stealing" the CAC's time. Those citizen remarks did not make it into the "draft minutes" however. This was intentional.

At the August 2003 CAC meeting, the time was taken up by a 90-minute presentation about permitting. There was nothing of substance presented.

ADEQ Refused to Provide TRI data to the CAC

When asked to provide data about the TRI or other information at ADEQ, the agency never provided the data, refusing to deliver even basic TRI information within a year's timeframe. The ADEQ itself is a recipient of Form R reports, and has the data at its fingertips. It took a CAC member to promulgate the information using the EPA's on-line TRI database.

ADEQ Interference with CAC Deliberations and Decisions

When the CAC tired of the stonewalling and mishandling of the project, it decided to promulgate its own recommendations. Then the Citizens Advisory Committee came under pressure from ADEQ and EPA not to identify top polluters in the area selected to study and reduce toxics as it began to finalize its recommendations. ADEQ also began interfering with Citizens Advisory Committee Leadership committee meetings and changing the recommendations provided by citizens.

Refusal to Advertise the Final CAC Meeting

After receiving and spending almost \$270,000 of the grant from the US Environmental Protection Agency, *the Arizona Department of Environmental Quality didn't want anyone to know about the meeting* where the results would be presented. After promising to notify the press and community groups about the meeting, which was an ADEQ-sponsored event, paid for from the EPA grant funds for the project, the agency at the last minute refused to publicize the event.

The refusal by the ADEQ to publicize the final meeting of the Citizens Advisory Committee is seen as retaliation by some participants for holding meetings without ADEQ staff present. Executive sessions were held without ADEQ staff to compile and finalize all recommendations by the entire Citizens Advisory Committee.

ADEQ Refused Spanish Translation Services to the CAC

The ADEQ also refused the resources to provide Spanish language version of the recommendations the CAC came up with. The CAC also voted to have the ADEQ print and distribute a newsletter to the entire project study area, in English and in Spanish, stating our findings and recommendations. If an environmental consultant had not volunteered his time, the CAC would have not even had its own recommendations compiled to present in English. Spanish-language versions of shelter-in-place and other environmental information were even provided to the ADEQ by CAC members

No Toxics Reduction

Not one pound of toxins was reduced. There has been no reduction in pollution and risks in South Phoenix, to the Latino and African-American communities. Meanwhile, pollution is rising. A review of EPA data shows that toxic emissions in the study area rose from 542,706 pounds in 2004 to 585,846 pounds in 2005, the most recent year for which data is available.

The discrimination by ADEQ 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 well as intentional discrimination. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative."

I. PARTIES

A. Complainants

Don't Waste Arizona, Inc. (DWAZ) is an environmental justice organization with affected members residing in South Phoenix. The various members of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP) are residents of South Phoenix and/or are very concerned about pollution in the area. DWAZ and the appointed members of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP) are filing this complaint against the ADEQ.

The Arizona Department of Environmental Quality (ADEQ) administered the grant from EPA (a two-part grant), is a recipient of other federal funds from EPA, and is subject to the requirements of Title VI of the Civil Rights Act.

II. RIPENESS

This complaint is timely filed since the ADEQ is still implementing its own work plan related to the project, and still does not comply with the requirements of Title VI. The ADEQ's administration of the EPA grant is still a failure as described, and there has been no final agency action on these issues.

The failure of the ADEQ to properly administer the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project is causing, and has caused, a disproportionate, adverse effect on the low-income, ethnic minority community of South Phoenix. The ADEQ has been provided specific notice of the problems and deficiency; yet has not remedied the problem, or even responded to the CAC or DWAZ.

Claims

A. Title VI

Title VI of the Civil Rights Act of 1964 provides:

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

The ADEQ, a direct recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by failing to properly administer the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project: Part One, recommendations, completed and presented at an open public meeting, September 9, 2005; Part Two, implementation, never affected since September 9, 2005, by ADEQ.

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

The failure of the ADEQ to properly administer the South Phoenix Multi-Media Toxics Reduction Project, as aforementioned, has had severe environmental and public health consequences in South Phoenix, which has the highest asthma rates in Maricopa County and a disproportionate amount of toxics in the ambient air.

All complainants must show is that when applied in a particular manner, the ADEQ's "methods of administering the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project " yielded a discriminatory outcome. As the abovementioned sections demonstrate, the ADEQ's method of administering the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project has resulted in discriminatory impacts throughout the low-income, ethnic-minority communities of South Phoenix.

The effect of ADEQ's administration of the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project is clear: People of color will bear disproportionate risks and impacts from toxic air pollution, yet the ADEQ will not properly administer any grant monies from EPA to reduce toxics, and will instead deliberately and intentionally work to counter such efforts, and ADEQ will not provide a means to decrease risks and impacts to this affected community of South Phoenix.

The ADEQ has administered the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project in such a way as to discriminate against people based on race, color, and national origin, in violation of Title VI, and in gross misuse of a federal grant for said project.

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 repay the entire amount of the grant for the South Phoenix Multi-Media Toxics Reduction Project;
- Require that, as a condition of continuing to provide federal financial assistance, the ADEQ immediately implement the recommendations of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project;
- Refuse to provide any more grants of a similar nature to ADEQ;
- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to ADEQ;
- Provide complainants with copies of all correspondence to or from the respondent throughout the course of the EPA's investigation, deliberation and disposition of this complaint;
- Sue to compel compliance with the law, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;

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

Conclusion

As this complaint makes clear, the low-income, ethnic minority community of South Phoenix, Arizona, typifies the low-income and/or communities of color burdened in Arizona by disproportionate adverse environmental impacts because of the ADEQ's administration of grants from EPA designed to reduce toxic pollution.

The discriminatory impact created and sanctioned by the ADEQ's actions are a clear violation of Title VI as implemented by EPA regulations. Because the ADEQ receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since the ADEQ still does not comply with the requirements of Title VI, the ADEQ's administration of the EPA grant for the South Phoenix Multi-Media Toxics Reduction Project is still a failure as described, and there has been no final agency action on these issues.

Don't Waste Arizona, Inc. and the individual members of the Citizens Advisory Committee (CAC) for the South Phoenix Multi-Media Toxics Reduction Project (SPMMTRP) look forward to an active investigation by EPA.

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

Sincerely,

Stephen M. Brittle
President
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602-268-6110

Members of the Citizens Advisory Committee for the South Phoenix Multi-Media Toxics
Reduction Project

Citizen Attendees of the SPMMTRP May 2003-September 2004