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

September 21, 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. (DWAZ) and Concerned Residents of South Phoenix (CRSP) v the Maricopa County Air Quality Department (MCAQD) in the Matter of the Phoenix Brick Yard*

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, 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 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 and racist 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 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 and maintain its Hazardous Air Pollutant (HAPs) air permitting program in ways to prevent illegal and unhealthy emissions of hydrogen fluoride (HF) in an ethnic minority community adjacent to the Phoenix Brick Yard. Levels of HF 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 HF pollution, and more have been filed for years by the members of the affected community, including at recent public hearings during the permitting of a significant permit revision to the Phoenix Brick Yard.

The emissions of HF that the MCAQD is allowing from the Phoenix Brick Yard are illegal because the MCAQD has failed to require MACT standards for a facility that emits more than 10 tons of a single Hazardous Air Pollutant, HF, despite the clearly stated requirements under the Clean Air Act to control these HAPs emissions. Both CRSP and DWAZ had filed comments during the public hearing process for a Significant Permit Modification for the Title V permit for the Phoenix Brick Yard on January 16, 2007, pointing out that MACT (Acid Fume Scrubbers) is required by Arizona statutes. For your reference, this excerpt from the comments filed by DWAZ and CRSP (and the cite) is:

49-480.04. County program for control of hazardous air pollutants

A. Within six months after the adoption of rules pursuant to section 49-426.06, subsection A, the board of supervisors shall by rule establish a county program for the control of hazardous air pollutants meeting the requirements of this section. The program established pursuant to this section shall apply to the following sources:

**1. Sources that emit or have the potential to emit with controls, ten tons per year or more of any hazardous air pollutant or twenty-five tons per year or more of any combination of hazardous air pollutants.**

**C. A permit issued to a new or modified source that is subject to the county hazardous air pollutant program under subsection A, paragraph 1 of this section *shall impose the maximum achievable control technology for the new source or modification*, unless the applicant demonstrates pursuant to subsection D of this section that the imposition of maximum achievable control technology is not necessary to avoid adverse effects to human health or adverse environmental effects.** (Emphasis added)

DWAZ and CRSP had also commented on January 16, 2007:

The failure of the MCAQD to [require MACT] 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 large emissions of hydrogen fluoride. The neighborhood surrounding Phoenix Brick Yard 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 had previously used the EPA's promulgated NESHAP standard for brick kilns as a loophole for the extraordinary emissions of HF from the Phoenix Brick Yard and its failure to require MACT for the Phoenix Brick Yard, but the EPA's promulgated NESHAP standard for brick kilns was thrown out by the United States Court of Appeals for the District of Columbia in March 13, 2007 as unlawful. The significant permit modification permit was issued by MCAQD on April 12, 2007, almost a month to the day after the EPA standard was deemed unlawful.

The requirements for the MCAQD in this scenario are clear in the statutes. **42 U.S.C.A. 7412 (j)(2) & (5)** specifically speaks to this scenario, and is also known as the "MACT Hammer."

Under these sections of federal law, MCAQD is required when granting the permit to use the standards in the proposed rule that would, in this case and this industry, constitute a 95% reduction in original, non-controlled emissions.

According to the **42 U.S.C.A. 7412 (j)(2) & (5)**, and upon review of the schedule set forth by the US Congress when it passed the law, USEPA was required to promulgate the MACT standard for brick yards by November 15, 2000. (MCAQD should actually have been required to issue a MACT permit to the Phoenix Brick Yard by May 15, 2002.) EPA Guidance documents from 1993 are very clear on the "MACT Hammer" and how it applies in this situation. This proposed Title V permit was therefore required to have controls that limit 95% of the pollution. The idea behind the MACT Hammer was to keep government and industry from stalling the 1990 Clean Air Act for decades or centuries and to prevent agencies like MCAQD from issuing bogus permits that violate the 10 ton rule under **42 U.S.C.A. 7412 (a)(1**)."

In this case, the MCAQD is either negligent in keeping itself aware of the requirements and changes to the laws affecting its permitting program, or incompetent. Either way, it is a violation of the civil rights of people in the affected area.

Further, MCAQD violated the civil rights of the affected citizens in the area by the MCAQD's operating the public process allowed under Title V permits as a total sham. The community was effectively denied its right to the proper, legal, Title V process in this case because the MCAQD entered into a settlement agreement with the Phoenix Brick Yard to allow the installation of the very equipment at issue before there was even a public hearing regarding the permit. This illegal activity by MCAQD now has set a new precedent: **the sham public hearing**. By entering into a settlement agreement with the applicant to allow the installation of the very equipment at issue is to make a sham and a mockery of the entire proceedings and procedure. DWAZ and CRSP know of no other similar action taken during the notice and public hearing portion of any air permit issued ever before in Arizona history, not from the Arizona Department of Environmental Quality, and not from the predecessor agency to the MCAQD, the Maricopa

Environmental Services Department. This settlement action does not conform to the rules adopted by the EPA administrator pursuant to title V of the clean air act, and therefore violates state law as well as federal statutes. (See ARS 49-426.01 *et seq*.) Therefore, whatever the merits of allowing the installation of the subject control equipment, the MCAQD lacked the legal authority to enter into the settlement agreement and allow the installation of the subject equipment before the close of the public comment period and response to comments by the MCAQD.

Also, ARS 49-426. Permits; duties of director; exceptions; applications; objections; fees, states, "
A. A permit shall:
1. **Be issued by the director in compliance with the terms of this section.**
2. Be required for any person seeking a compliance extension pursuant to section 49-426.03, subsection B, paragraph 3 and section 112(a)(5) of the clean air act **and for any person beginning actual construction** of or operating any source, except as prescribed in subsection B of this section or section 49-426.01.

The actions of the MCAQD by allowing this settlement are in violation of this statute also. This is lawlessness, intentional lawlessness, perhaps even **racketeering!**

It was certainly deceitful for the agency's representatives to not announce or even mention this settlement at the January 16, 2007 public hearing, which was the first public hearing on the proposed significant modification to the permit. (There was a second public hearing on March 1, 2007 because the first public hearing had not been properly noticed.)

So evidently the affected community was, in actuality, robbed of its opportunity for a public hearing on this matter. This is a clear violation of the civil rights of the affected area residents, who have been denied the same process and procedure normally and usually offered each and every other resident of Maricopa County. And they are already disproportionately and adversely affected by the emissions of the subject facility.

There is a pattern now with this agency in regards to this facility and its handling of the public process, and together, it all adds up to **AN INTENTIONAL CIVIL RIGHTS VIOLATION.**

## 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), and Concerned Residents of South Phoenix, (CRSP) are environmental justice organizations with affected members residing in west and South Phoenix, including members who reside near the Phoenix Brick Yard, and DWAZ and CRSP are filing this complaint against the MCAQD.

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 issued the permit on April 12, 2007, and the complaint is within 180 days of that decision, the final agency action on these issues.

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

# 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 HAPs air pollution program, as aforementioned, has had severe environmental and public health consequences in the overwhelmingly ethnic minority community adjacent to the Phoenix Brick Yard.

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

The effect of MCAQD's administration of its Title V HAPs 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 HAPs 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 HAPs 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) immediately promulgate a MACT standard for the brick kilns like the Phoenix Brick Yard as required by 42 U.S.C.A. 7412 (j)(2) & (5) and ARS 49-480.04;**
    - **2) revoke the Title V permit for the Phoenix Brick Yard;**
    - **3) issue a new and legal permit for the Phoenix Brick Yard that requires MACT; and**
    - **4) cease and desist in the future from entering into illegal settlements allowing the installation of equipment subject to a public hearing before the public hearing and issuance of a Title V permit;**

- 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 the Phoenix Brick Yard 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 HAPs 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's final permit decision in this matter was issued on April 12, 2007, so the complaint is within 180 days of that decision, MCAQD still does not comply with the requirements of Title VI, the adverse health impacts in the affected ethnic minority community are continuing, and the MCAQD's administration of its Title V HAPs air pollution program is still a failure as described.

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.

The MCAQD is the subject of several civil rights complaints filed by Don't Waste Arizona, Inc. and the Concerned Residents of South Phoenix, 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 apparent and appalling.

Sincerely,

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