

December 1, 2021

Lillian Dorka, Director

US Environmental Protection Agency
Office of General Counsel (2310A)
External Civil Rights Compliance Office
1200 Pennsylvania Ave., NW, WCJN Room 2524
Washington, DC 20460

Re: *Don't Waste Arizona, Inc. (DWAZ) v Pima County Department of Environmental Quality*

Lillian Dorka/EPA Office of Civil Rights:

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, toxics, and air pollution issues. DWAZ is headquartered at 2934 West Northview Avenue, Phoenix, AZ 85051, and may be reached at (602) 881-3305. DWAZ has members in the affected area.

The Pima County Department of Environmental Quality (PCDEQ) 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 in its handling to date of its permit process regarding the proposed air pollution permit for Becton, Dickinson and Company (BD) Product Sterilization Facility, 7345 E. Valencia Road, Tucson AZ, 85747.

The Pima County Department of Environmental Quality has distributed via mail to roughly 18,000 residences its intention of holding an air pollution permit process that included a Virtual Open House on October 6, 2021, an in-person Open House on October 27, 2021 and a Virtual Air Pollution permit hearing on November 3, 2021, regarding a proposed Air Pollution Permit for the Becton, Dickinson and Company (BD) Product Sterilization Facility, 7345 E. Valencia Road, Tucson AZ, 85747. Of particular interest is the fact that the telephone number that was provided in the notice, (520) 724-7400, did not work correctly, and all a caller got was a message that the voice mailbox had not been set up yet. Also, the link as was provided did not have the meeting information. Natalie Shepp, Public Outreach and Education Manager for the Pima County Department of Environmental Quality, was made aware of these issues and later made changes, but it was only on an on-line posting with a different telephone number and code, but has never sent out another, updated notice to these 18,000 residences with a correct telephone number and link., effectively obstructing their ability to participate. The (520) 724-7400 is an internal number that only works for PCDEQ staff during normal business hours, and PCDEQ staff knew this before placing it on the PCDEQ notice that was sent in the mail.

At the October 6, 2021, virtual Open House held on behalf of permit applicant, Becton, Dickinson and Company (BD), for its new ethylene oxide sterilization facility in Tucson,

PCDEQ did not make a phone number available through its on-line postings or in the handouts about the meeting provided to households and residences near the proposed BD facility that would actually allow the public to participate. It is discriminatory on face value alone to not have just a regular phone number to use to call in and participate, and it is discriminatory on face value to require having a computer system with a particular web software downloaded onto it in order to participate in a public meeting regarding a potential agency action of issuing an air permit. The computer hardware and software requirements to participate would likely also include an internet subscription of some sort, at a monthly rate. All of those factors discourage and effectively lock poor people out of this process, and ethnic-minority people are disproportionately poor.

This was pointed out by DWAZ to Shepp, who adamantly asserted she didn't have to do anything differently, this making these alleged civil rights violations **informed and intentional**.

Another problem for those who were actually able to join the virtual meeting was that PCDEQ staff disabled the Q/A and chat functions on the Cisco WebEx platform used for remote open house meetings because someone at PCDEQ was afraid there might have been an "inappropriate comment". This tactic removed the ability of the public to ask questions or provide comments without disturbing the main audio of the presentation and for anyone attending to see these comments and questions. Almost all of the attendees/participants in the virtual meeting were ethnic minority, and most of them expressed their frustrations and concerns about how difficult their joining the meeting was, which should be part of PCDEQ's records of the meeting, if any were kept.

The result was that low-income and ethnic minority residents who dwell near the proposed facility and who were at most risk from toxic emissions from the proposed facility were not able to ask questions, make comments, or learn more about the facility even if they were able to join via the web.

Shepp was further informed that the proposed method of conducting the permit hearing for the proposed permit was an intentional, planned, violation of the Arizona Open Meeting Law, yet remains adamant that she doesn't have to follow that law. Even when someone is able to participate, their comments were not shared with others, and the chat functions of the on-line meeting were intentionally turned off. There will deliberately not be a telephone number offered to allow the public to call in to the public hearing using just a telephone to listen or comment.

The Virtual Open House on October 6, 2021 and the November 3, 2021 permit hearing, which by definition are subject to the Open Meeting Law (ARS 38.431 *et seq*), were deliberately not being held so that members of the general public could attend, listen, and/or participate. Instead, it could only be attended by registering through a website, downloading software onto a computer or electronic device, which would also require a subscription to a service that allows internet access. This effectively prohibits the public from attending, listening, and participating. It also is discriminatory on face value and likely violates the civil rights of people who might

want to attend, listen, and participate. This procedure also flies in the face of federal requirements of the Clean Air Act.

This scheme by Shepp flies in the face of the clear language of the law:

38-431.01. Meetings shall be open to the public

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

Further, Shepp has planned, since the inception of this scheme, to severely limit the time allowed for public comment on an issue that could potentially cause large numbers of people to be concerned and desire to offer public comment. Normally, air permit hearings utilize one or more court reporters who record oral comments, and an opportunity to comment is proffered until no more comments are made.

The fact that the same agency held an in-person Open House for this facility on Wednesday, October 27, 2021, illustrates that an in-person public hearing on the proposed permit could be indeed held, and that COVID concerns don't rule this out.

When the proposed restricted air permit hearing proceeded, it was invalid pursuant to ARS 38-431.05:

38-431.05. Meeting held in violation of article; business transacted null and void; ratification

All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.

The Arizona Open Meeting Law gives the right to all citizens in Arizona to attend, listen, and provide comment when comments are accepted, so this Arizona law bestows certain rights to all Arizonans that PCDEQ took away from potential participants.

The November 3, 2021, virtual permit hearing was rife with technical issues that are clearly the fault of PCDEQ. Many people who attempted to join by calling the number posted on-line merely got a busy signal, despite repeated attempts. Some who were able to join the meeting by telephone were still unable to participate because the phone connection was so poor that their statements and comments were inaudible or too faint to hear, causing the PCDEQ staff to disconnect the call. It took several attempts for one caller to actually get a connection where ;

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Making these technical

requirements in order to participate is also discriminatory on face value, as no one ever has to spend money on technology in order to participate in an air permit hearing.

Another problem for those who were actually able to join the virtual permit hearing was that PCDEQ staff disabled the Q/A and chat functions on the Cisco WebEx platform used for remote meetings, just as it did in the October 6, 2021 Virtual Open House meeting. Again, this tactic removed the ability of the public to ask questions or provide comments without disturbing the main audio of the presentation, as well as preventing other participants from hearing/knowing these comments. Another problem with the conduct of the hearing was that despite the fact that some participants were indicating that they wanted to speak, the PCDEQ staff instead went to a different caller and ignored these requests, yet some of the callers the PCDEQ staff tried to allow to speak were unable because of the technical issues – They were silent or inaudible, and one can only wonder if this was planned. This certainly frittered away some of the little time that was allotted by the arbitrary and capricious time limits of the permit hearing. There were callers/attendees who were waiting to speak and had indicated that they wanted to speak who were unable to participate because the hearing was ended at 6:30PM.

The November 3, 2021, virtual permit hearing also was evidently prepared in advance to limit comment. On face value alone, sending out 18,000 mailers to people and announcing a one-hour virtual permit hearing is communicating that the hearing as planned will be a farce. If even ten percent, or 1,800 of the recipients of the notice even wanted to participate, there wouldn't have even been enough time for all of them to announce their name, much less state their concerns and/or make technical comment. Any recipient of this notice would be immediately skeptical about whether the entire process was a ruse or a sham, which indeed it was.

The virtual air pollution permit hearing was scheduled from 5:30PM to 6:30PM, but the first ten minutes were taken up by PCDEQ staff talking. Participants were told that they were only allowed three minutes each to make substantive comments and told to mail in, in writing, any other comments. In a normal air permit hearing, people are allowed to make only oral comments, which are usually recorded verbatim by a court reporter. This is another example of, how, by design, this entire “public” process was designed to prevent public participation.

The PCDEQ deliberately conducted its EJ analysis for this facility by expanding the one-mile radius from the facility to a three-mile radius, which then included more distant communities that are not so ethnic-minority and quite better off financially than those closer to the proposed facility. There are low-income and ethnic minority populations very near the proposed facility, and it appears the rationale for the expansion of the EJ analysis was to dilute the statistics deliberately.

The discrimination by PCDEQ was intentional, pervasive, 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. Complainant

Don't Waste Arizona, Inc. (DWAZ) is a statewide environmental justice organization with affected members residing in the Tucson area and Pima County.

B. Respondent

The Pima County Department of Environmental Quality (PCDEQ) administers air pollution permits in Pima County. The PCDEQ, 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 PCDEQ did and does not comply with the requirements of Title VI, the offense occurred within the last 180 days, and there has been no final agency action on these issues.

The failure of the PCDEQ to properly administer its air pollution program is causing a disproportionate, adverse effect on the low-income, ethnic minority community of adjacent to the proposed BD facility.

The PCDEQ had been provided specific notice of the problems and deficiencies; yet had not remedied the problem.

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 PCDEQ, a direct recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by failing to properly administer its 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).

All the complainant must show is that when applied in a particular manner, the PCDEQ's "methods of administering its air pollution program" yield a discriminatory outcome. As the abovementioned sections demonstrate, the PCDEQ's method of administering its air pollution program has resulted in discriminatory impacts.

The effect of PCDEQ's administration of its air pollution programs is clear: People of color will bear disproportionate risks and impacts from air pollution, yet the PCDEQ will not properly administrate its air pollution program to prevent civil rights violations.

The PCDEQ has administered its 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, the PCDEQ institute a program of complete inclusiveness in any and all meetings it invites the public to participate in, with telephone numbers to call in that actually work that are also properly noticed to the public, that access to or participation in any public meeting or hearing does not require owning or having access to a computer system, that all comments and questions are allowed to be posted to a public platform that doesn't require acquiring any particular software to be downloaded, and all parties are welcomed to participate.

- Require PCDEQ to nullify any permit issued to BD and start the entire process over, but this time with proper notice, with telephone numbers to call in that actually work that are also properly noticed to the public, that access to or participation in any public meeting or hearing in this new permit process does not require owning or having access to a computer system, that all comments and questions are allowed to be posted to a public platform that doesn't require acquiring any particular software to be downloaded, and all parties are welcomed to participate.
- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to PCDEQ;
- 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 PCDEQ, pursuant to 40 C.F.R. §7.25, if the PCDEQ fails to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, ethnic minority communities proximate to the proposed BD facility typifies the low-income and/or communities of color shut out of participation in permit processes because of the PCDEQ's discriminatory administration of agency's air pollution programs.

The discriminatory impact created and sanctioned by the PCDEQ's actions are a clear violation of Title VI as implemented by EPA regulations. Because the PCDEQ receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since the PCDEQ still does not comply with the requirements of Title VI, and the PCDEQ administration of the air pollution program is still a failure as described, the offense occurred within the last 180 days, and there has been no final agency action on these issues.

Don't Waste Arizona, Inc. and the affected members of the organization look forward to an active investigation by EPA Office of Civil Rights.

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

Sincerely,

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Don't Waste Arizona, Inc.

2934 West Northview Avenue

Phoenix, AZ 85051

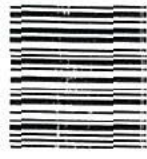
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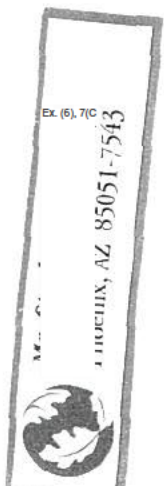
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