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From: "Don't Waste Arizona" [dwaz@fastq.com]

Sent: 01/26/2011 04:26 PM MST

To: Karen Higginbotham; Jared Blumenfeld; Colleen McKaughan

Subject: Don't Waste Arizona, Inc. (DWAZ) v the Maricopa County Air Quality Department (MCAQD) in the Matter of Fisher Sand and Gravel

January 26, 2011

Karen Higginbotham
EPA Office of Civil Rights
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Lisa Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Don't Waste Arizona, Inc. (DWAZ) v the Maricopa County Air Quality Department (MCAQD) in the Matter of Fisher Sand and Gravel

Dear EPA Office of Civil Rights Director Higginbotham and Lisa Jackson,
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. DWAZ has itself extensive experience in enforcement of federal environmental laws, settling over 90 enforcement cases.

DWAZ has previously alleged that 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 its Title V and synthetic minor air permits program in ways to prevent illegal and unhealthy emissions of particulate matter, carbon monoxide, VOCs, HAPs, and strong chemical odors in an ethnic minority community adjacent to the Fisher Sand and Gravel facility located at 3826 South 28th Street in Phoenix, AZ. Levels of particulate matter, carbon monoxide, VOCs, HAPs, and strong chemical odors 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 pollution, and more have been filed for years by the members of the affected community.

Fisher Sand and Gravel was issued a permit in 2007 by the MCAQD for its

asphalt plant. The facility is a synthetic minor that must limit its asphalt processing and production to 500 tons/hour of asphalt and 2,400 tons/day of asphalt. Fisher also operates a sand and gravel operation at the same site under terms and conditions of a separate air pollution permit.

In June 2009, MCAQD requested Fisher Sand and Gravel provide its production records for the sand and gravel operations at the Fisher Sand and Gravel facility, but to date, Fisher has not provided these requested production records, despite specific permit conditions that require these records be provided MCAQD upon request.

But MCAQD has not issued an NOV for this nor taken any enforcement action against Fisher for failing to provide these requested records. These sand and gravel production records are needed to assess and determine whether site wide emissions at the Fisher Sand and Gravel facility are sufficient to make the site a Title V facility.

Further, MCAQD has determined that Fisher has provided daily asphalt production records of its asphalt plant that have discrepancies, and even issued a press release to that effect. Fisher provided two different records for the same date in March 2008 for asphalt production that have different amounts for asphalt production and fuel usage. One of these daily records is clearly false and it appears that it was deliberately falsified. Section 113 of the Clean Air Act clearly identifies such an act as a criminal act. Failing to provide the requested records is also a criminal act pursuant to Section 113 of the Clean Air Act.

Yet MCAQD has not even issued an NOV to Fisher, much less brought criminal charges against Fisher for either of these.

The failure of the MCAQD to properly enforce the applicable conditions of both air pollution permits issued to Fisher and the applicable sections of the Clean Air Act have the effect of allowing Fisher to operate in violation of permits and in ways detrimental to the health of local residents, almost entirely ethnic minorities. It is clear that MCAQD is conducting sham enforcement and sham oversight at the expense of an entirely ethnic minority community adjacent to the facility.

This all appears to be a deliberate and intentional decision and action on the part of MCAQD, an elaborate scheme, perhaps even racketeering, to protect the egregious polluter and not the affected environmental justice community adjacent to the Fisher facility. It is also a procedure contrary to common sense and normal enforcement procedures of any environmental regulatory agency. (DWAZ itself has conducted extensive citizen suit enforcement of federal environmental laws, winning or settling every case, about 90 of them, so we at DWAZ have a good sense of what EPA enforcement is.)

Such a decision at MCAQD must be caused by the direction of someone at the highest management position within this agency and cannot reasonably be caused by an error in judgment or carelessness. This suggests criminal intent and/or criminal behavior within the MCAQD, as well as deliberate, poor training.

As stated, Fisher was issued 1368 NOVs in June 2009, and has now settled with MCAQD for \$1 million, despite a \$6.7 million penalty proposed in

April 2010, a discount of over 80%.

There are many reasons why this penalty is inappropriate and illustrative of a pattern of civil rights violations against this affected community:

- 1) This penalty is insufficient to deter further violations, normally a criterion in assessing penalties.
- 2) DWAZ has seen a study in the Fisher file that was contracted for by MCAQD via a private vendor to determine what equipment and process changes would be needed to bring Fisher into compliance with its permit conditions, and the cost was projected at over \$1.4 million. In assessing penalties, the cost of needed equipment upgrades to assure compliance is normally examined and used in part to determine penalties and any reductions in penalties.
- 3) The \$1 million penalty doesn't even recoup or negate the excess profits made by the deliberate exceedances of Fisher's daily asphalt production limits.
- 4) The \$1 million penalty ignores the methodology of penalty calculation set forth in the MCAQD's published penalty policy, and any deviance needs to be explained, much less an 80% reduction. The message is clear from MCAQD to polluters and the public that excess emissions are not considered as serious a violation when they occur in a low-income, ethnic minority community in Maricopa County. MCAQD will tolerate enormous and egregious violations, even deliberate, criminal actions by polluters, if they occur in a low-income, ethnic minority community in Maricopa County.
- 5) The \$1 million penalty and its timing gives the impression that MCAQD waited long enough to let the furor over Fisher's harmful air emissions die down, then let Fisher off the hook.
- 6) MCAQD itself never revoked Fisher's permit, and deliberately did not look for violations.
- 7) MCAQD still has never gathered the information or completed an investigation to other violations and exceedances self-reported by Fisher, some of which can be found in the public file at MCAQD.
- 8) MCAQD has also not filed criminal charges against Fisher for falsifying records.
- 9) MCAQD continued, until Fisher Sand and Gravel's voluntary cessation of activities in February 2010, to allow Fisher to operate in flagrant violation of its synthetic minor permit.

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

Complainant

Don't Waste Arizona, Inc. (DWAZ) is an environmental justice organization with affected members residing in South Phoenix, including members who reside near the Fisher Sand and Gravel facility, and DWAZ is filing this complaint against the MCAQD.

Respondent

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 has just settled the penalty amount with Fisher, and the complaint is within 180 days of that decision. logs, so there is no final agency action on these issues. No penalty for the 1,368 violations has been proposed either.

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

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 air pollution program, as aforementioned, has had severe environmental and public health consequences in the overwhelmingly ethnic minority community adjacent to Fisher Sand and Gravel.

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

The effect of MCAQD's administration of its Title V 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 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 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 not be allowed to deviate from its published penalty policy.
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- 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.
- Require that, as a condition of continuing to provide federal financial assistance, that MCAQD not be allowed to deviate from its published penalty policy.

Conclusion

As this complaint makes clear, the low-income, ethnic minority community adjacent to Fisher Sand and Gravel 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 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 has just issued the \$1 million penalty.

Don't Waste Arizona, Inc. and its affected members 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 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 flagrant, apparent and appalling.

Sincerely,

Stephen M. Brittle
President
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602-268-6110

Cc: Lisa Jackson, USEPA Administrator
Jared Blumenfeld, US EPA Region 9 Administrator
Colleen McKaughan, USEPA Region 9