

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

January 11, 2008

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) v Arizona Department of Environmental Quality*

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

Don't Waste Arizona, Inc. (DWAZ) is a non-profit environmental organization dedicated to the protection and preservation of the environment in Arizona. DWAZ is especially concerned about environmental justice, civil rights protections, and air pollution and toxics 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 areas of Hayden and Winkelman.

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 protect low-income and Latino citizens in Hayden and Winkelman, Arizona, from serious air and toxic pollution and contamination caused by the activities of the ASARCO smelter operation in Hayden, Arizona. ADEQ has the entire state-level oversight and authority for the ASARCO smelter complex operations in Hayden and Winkelman, Arizona.

The discrimination is ongoing, knowing, and intentional.

The ADEQ is the agency that issues air pollution permits for facilities in Hayden and Winkelman, and has indeed issued Title V permits for the ASARCO smelter operation, and receives the annual Form R reports of the releases of toxics into the environment pursuant to the Toxics Release Inventory. Thus, the ADEQ has institutional knowledge of the amounts and types of pollution emanating from the ASARCO Hayden smelter operation. The ASARCO-Hayden smelter and concentrator is a Title V, major source of

air pollution, and is in fact one of the largest toxic polluters in the state of Arizona, and indeed, in the entire country. ADEQ receives annual reports from the air permits and ASARCO Form R reports for the Toxics Release Inventory. Thus the ADEQ has knowledge of the extreme pollution, especially regarding releases of heavy metals in the town.

Further, there have also been many citizen complaints about air pollution and illegal night time activities of ASARCO, which causes widespread severe air pollution and subsequently results in human suffering. A videotape of the night time illegal activities by the ASARCO smelter was presented to the ADEQ director in 2003. The agency is reminded of this quite often, and as recently as January 9, 2008, and still, no action has ever been taken to stop these illegal night time activities. When queried, the ADEQ has acknowledged its own inspectors had observed these illegal night time activities. Later, the ADEQ even stated that someone within its own agency calls and tips ASARCO when the inspectors are planning to watch the Hayden smelter operation and complex at night.

The effects of this discrimination by ADEQ against the ethnic minority residents of Hayden and Winkelman are serious, including high incidences in the affected area of lung cancer, heart disease, kidney disease, miscarriages and infertility, low life expectancy, along with lead and arsenic contamination, property damage and devaluation, and other health problems.

Recently, the EPA commenced a Superfund investigation in Hayden and Winkelman, and found after initial sampling that there are high levels of arsenic, copper, and lead contamination in the soil at area homes, and arsenic and chromium in the ambient air exceeding the health screening levels. Hayden and Winkelman have very high rates of lung cancer, and if the chromium in the ambient air turns out to be hexavalent chromium, the failure of ADEQ to protect this Latino community may have caused extra deaths, and may even be gross negligence, which suggests that a criminal investigation is appropriate also.

Despite being the primary agency regulating ASARCO's operations, and despite being the recipient of environmental reports and complaints about ASARCO and pollution, and having as an agency extensive information about the pollution in Hayden and Winkelman the ADEQ never conducted the types of environmental sampling needed to assess the level of contamination in the affected area, allowing it instead to get worse and worse, along with the health and well-being of affected area residents, an overwhelmingly ethnic minority population. ADEQ also had no intention either of considering the addition of the affected towns of Hayden and Winkelman to its own state version of Superfund, the Water Quality Assurance Revolving Fund (WQARF).

There have also been civil rights complaints filed against the ADEQ regarding Hayden/Winkelman and the problems with the ASARCO smelter complex, and the agency has never sought to resolve those issues. Yet it does have knowledge of the issues brought forth in these previous civil rights complaints.

Despite all of this, a major, Title V source of air pollution and contamination, receiving the Toxic Release Inventory reports annually detailing enormous releases of pollution into the local environment, numerous and consistent citizen complaints, videotapes of illegal night time pollution and probable criminal activity releasing enormous amounts of dangerous air pollution, the ADEQ still never conducted an environmental justice assessment for anything regarding Hayden and Winkelman, despite its own purported policy of using these to help it comply with EPA Civil Rights requirements.

Even when provided an opportunity to rectify matters and respond appropriately, ADEQ still will not protect the residents of Hayden and Winkelman from ASARCO's pollution. An ADEQ staff member stated at a special August 27, 2007, Hayden Town Council meeting regarding the proposed NPL listing that he would report to the governor about what occurred at the meeting, yet never did. Residents of the town, not ASARCO employees, unanimously stated they wanted NPL listing and that ADEQ could not be trusted. The failure of ADEQ staff to report to the governor is a proximate cause of her delaying decision to concur with the NPL listing, delaying proper attention to the issues facing the town and its Latino population, which creates an adverse impact on the health of the community..

### **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), an environmental justice organization with affected members residing in Hayden and Winkelman, is filing this complaint against the ADEQ.

### **B. Respondent**

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-level Title V air pollution permits, and Title VI of the Civil Rights Act of 1964. The ADEQ administers the air pollution permits to the ASARCO Hayden smelter and

concentrator, and also receives Form R reports pursuant to the requirements of the Toxics Release Inventory from ASARCO. The 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 is timely filed since the ADEQ still do not comply with the requirements of Title VI, still has never conducted the environmental sampling needed to determine the risk to public health and safety in Hayden and Winkelman, still has never intervened to stop the illegal night time activities of ASARCO in Hayden, still has never conducted an environmental assessment of Hayden and Winkelman, and still has not resolved any of the issues raised in previous civil rights complaints. And there has been no final agency action on these issues.

Therefore, the violations of the civil rights of the residents of Hayden and Winkelman are ongoing and unabated. The failure of the ADEQ to properly administer its air pollution program and other institutional programs is causing, and has caused, a disproportionate, adverse effect on the low-income, ethnic minority communities of Hayden and Winkelman. The ADEQ has been provided specific notice of the problems, yet it has 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 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 its air pollution programs and other institutional 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).

The failure of the ADEQ to properly administer its air pollution program and other institutional programs, as mentioned before, has had severe environmental and public health consequences in Hayden and Winkelman, which have the highest lung cancer rates in Arizona, as well as high incidences of heart disease, kidney disease, miscarriages and

infertility, low life expectancy, along with lead and arsenic contamination, property damage and devaluation, and other health problems.

All complainants must show is that when applied in a particular manner, the ADEQ's methods of administering its air pollution program and other institutional programs yield a discriminatory outcome. As the abovementioned sections demonstrate, the ADEQ's method of administering its air pollution program and other institutional programs has resulted in devastating and discriminatory impacts throughout the low-income, ethnic-minority communities of Hayden and Winkelman.

The effect of ADEQ's administration of its air pollution program and other institutional programs is clear: People of color will bear disproportionate risks and impacts from air pollution and toxics, and ADEQ will not properly administrate its air pollution program and other institutional programs and comply with applicable statutes as mentioned before in this complaint; and the ADEQ will not provide a means to decrease risks and impacts to this affected community.

The ADEQ has administered its air pollution program and other institutional programs 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 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:

- Conduct peer-reviewed environmental justice assessments of Hayden and Winkelman, using local community and citizen involvement;
- 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, ethnic minority communities of Hayden and Winkelman, 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 its air pollution program and other institutional programs.

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 air pollution and toxics contamination in Hayden and Winkelman are continuing, and there has been no final agency action on these issues.

Don't Waste Arizona, Inc. and its affected members who are residents of Hayden and Winkelman 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*

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