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March 15, 2005

NYS DEC
Office of Environmental Justice
625 Broadway
Albany, NY 12233-1500

**Re: Reports of the Disproportionate Adverse Environmental Impact Analysis
Work Group and the Health Outcome Data Work Group**

Dear Sir/Madam:

On behalf of the Partnership for Onondaga Creek (POC) and on its own behalf, the Public Interest Law Firm files these comments on the Reports of the Disproportionate Adverse Environmental Impact Analysis (DAEIA) Work Group and the Health Outcome Data (HOD) Work Group. The Partnership for Onondaga Creek is a community organization based in South Syracuse whose primary focus is the protection and remediation of Onondaga Creek and the surrounding community in South Syracuse. Much of its work has revolved around efforts to find an appropriate solution to the problem of combined sewer overflows in the South Syracuse area. The Public Interest Law Firm (PILF) is a legal clinic at the Syracuse University College of Law (SUCOL). PILF provides free representation on civil rights and civil liberties issues to people and organizations that could not otherwise afford or find representation.

In general, PILF and the POC were pleased to see the Department of Environmental Conservation (DEC) taking additional steps to flesh out and implement its environmental justice policy. However, we had several concerns about the general scope of these reports and the specific recommendations made.

I. Report of the DAEIA Work Group

First and foremost, we were disappointed by the scope of the report produced by the DAEIA Work Group. This Work Group was asked to make recommendations on how to conduct a disproportionate adverse environmental impact analysis as part of an Environmental Impact Statement (EIS) under the State Environmental Quality Review Act (SEQRA) process. By limiting its charge in this way, the DEC lost an important opportunity to get advice on how environmental justice concerns and, in particular, information regarding the total environmental burden on and the unique vulnerability of environmental justice communities might trigger an EIS. At minimum, it would be useful to consider whether more limited additional environmental harms might be considered "significant" for communities that are already suffering a heavy

Act (SEQRA) process. By limiting its charge in this way, the DEC lost an important opportunity to get advice on how environmental justice concerns and, in particular, information regarding the total environmental burden on and the unique vulnerability of environmental justice communities might trigger an EIS. At minimum, it would be useful to consider whether more limited additional environmental harms might be considered "significant" for communities that are already suffering a heavy burden of environmental harms or are uniquely vulnerable to environmental harms due to existing health status, cultural issues or class status.

General Concerns:

The DAIEA Work Group defined "disproportionate adverse environmental impact analysis" as a method of determining whether "potentially significant adverse impacts as determined under SEQRA would disproportionately affect low-income and minority communities." Given the methodologies described in the report, the Work Group appears to have understood these impacts to include only those created by the proposed project itself. This definition excludes consideration of cumulative impacts, including those impacts not created by the proposed project, and baseline burdens in the host community. In fact, of the review methods recommended, only Methods E and F try to quantify the cumulative environmental impacts on a host community and only Method F provides a complete picture of the environmental burdens facing a host community and the likely impact of adding yet another environmentally damaging facility to the mix.

In addition, the DAIEA Work Group generally failed to consider the existing health status and vulnerability of the host community. Communities which are inundated with environmental insults or whose population is already suffering significant health impacts may be more vulnerable to and more likely to be harmed by additional environmental exposures. Although the HOD Work Group was simultaneously developing methods to collect and report health outcome data for environmental justice communities affected by new projects, the DAIEA Work Group failed to even acknowledge that this information would be available or might be useful in cataloguing threats to environmental justice communities. Again, only Method F includes any efforts to understand the existing health status of the affected communities.

This failure is important, because environmental justice claims have typically focused on the cumulative environmental impacts imposed on and the unique vulnerability of a host community. Understanding existing environmental load and community characteristics, such as health status and income level, are fundamental to properly characterizing the threat faced by an environmental justice community. By defining its task in a way that excluded consideration of these issues, the DAIEA Work Group has guaranteed that its recommendations and proposed review methods will be unable to answer core environmental justice concerns about proposed projects.

The Work Group also recommended that any required disproportionate adverse environmental impact review rely on "readily available data." While we understand the practical reasons for making such a recommendation, we are concerned that many

potentially significant impacts will be ignored, because there is no "readily available data" to review. This recommendation removes any incentive for DEC or permit applicants to develop additional data on the environmental and health impacts of particular exposures or combinations of exposures. This is a particular concern because so many impacts central to environmental justice concerns, such as cumulative and synergistic effects, are not well understood at present.

Finally, in laying out the process for creating a "comprehensive description of the environmental setting," the Work Group failed to consider a primary source for information – the residents of the affected community. The Work Group recommended walking the affected area, which could help identify obvious and persistent environmental concerns. However, it might not identify sporadic or periodic concerns, such as strong odors at certain times of day or in certain seasons or heavy early morning truck traffic. For these reasons, we recommend that a community survey be included in the recommendations for describing the existing environmental setting.

Method-Specific Concerns:

In addition to the overall concerns describe above, PILF and the POC have some concerns with the specific analysis methods proposed. Our primary concern remains the failure of Methods A, B, C and D to consider cumulative impacts and the failure of all the analysis methods but Method F to consider the particular vulnerabilities of the host community.

Methods A and E rely on comparisons of the impacts within the "affected community" and a "reference community," but fail to provide adequate guidance on how to choose an appropriate reference community. The only advice provided suggests limiting the reference community to the "geographic areas in which the project could realistically be built." We are concerned that, without appropriate parameters, a permit applicant could define the reference community in an artificially narrow way by setting inappropriate limits on areas that could feasibly host the proposed facility.

For example, Onondaga County proposed a Regional Sewer Treatment Facility for the South Syracuse neighborhood in which the POC is based. The County's preferred alternative was a substantial above-ground treatment facility; the community initially preferred a series of smaller, scattered underground storage tanks. The locations on which the project as defined by the County could "realistically be built" were far more limited than the available locations for the project defined by the community. However, both alternatives were feasible. Limiting analysis to the County's definition of the proposed project would have greatly, and unnecessarily, restricted the "reference community" in any disproportionate adverse environmental impact analysis of the RTF. Applicants should not be allowed to narrowly define the potential RC by setting unnecessary restrictions or parameters on the proposed project.

Methods B and C consider only the disproportionate distribution of environmental hazards by race and income within the community of concern, and do not even touch on

the potential environmental disparities between the affected area and non-host communities. While it may be important to understand how environmental hazards are dispersed within an affected area, these methods ignore the fundamental question about the environmental justice impacts of facility siting – that is, whether minority or low-income communities are asked to host environmentally hazardous facilities at a significantly higher rate than non-minority and middle- or upper-income communities. Because Methods B and C ignore this fundamental question, they are inadequate and should only be used in conjunction with other analyses that consider impacts on the affected and non-affected communities.

Method D focuses on the relative impacts that a proposed project would have on alternative sites. This method is an interesting way to uncover conscious or unconscious discrimination in the selection of a final project design or location from various alternatives. However, this Method fails to consider whether a particular project is so environmentally damaging or creates such heavy burdens on an already impacted minority or low-income community that it should not be undertaken at all or should include additional pollution controls. In addition, it is possible that all the alternatives proposed or considered might impact predominantly minority or low-income communities. In that case, this method, like Methods B and C, would fail to make the fundamental comparison between the environmental burdens that a project imposes on minority communities and those that typically fall on non-minority and middle- or upper-income communities.

Method E requires consideration of cumulative impacts and the existing environmental burdens on a host community to the extent that these burdens may be exacerbated by the proposed project. For this reason, we believe that it is the only truly acceptable method of the first five proposals. However, Method E limits its analysis to whether a proposed project creates “an additional significant burden” on the host community without defining the term “significant.” As discussed above, lesser environmental harms might be “significant” for heavily impacted or uniquely vulnerable communities. We are concerned that this method ignores the fact that a heavily impacted community may be unable to bear any additional environmental burden.

We are most impressed with Method F. While this proposal is certainly more complex than the others and may go beyond the scope of this Work Group’s mandate, it is the only proposal that recognizes the complexity of the issue and tries to incorporate existing burdens, cumulative impacts and community vulnerabilities. In addition, this method highlights the need for the DEC to move beyond simply studying, quantifying and identifying environmental justice impacts to actually controlling them. Until the DEC recognizes that it must prevent the imposition of disproportionate adverse environmental impacts on minority and low-income communities, environmental injustice will never be fully addressed.

II. Report of the HOD Work Group

PILF and the POC were impressed with the thoroughness of and concrete recommendations in the Report of the HOD Work Group. However, we were left with one fundamental question – how would or should the data being so carefully collected and presented be used? The Work Group gives no recommendations about how this data would or should affect the permitting or SEQRA process. Without a clear understanding of how the data would be used, it is difficult to assess the adequacy of the data used or the appropriateness of the reporting methods chosen or the comparison groups studied. In addition to this overarching concern regarding the scope of the report, PILF and the POC have several more narrow concerns with the recommendations of the Work Group.

The Work Group sets out four criteria for data to be used in HOD reports. While PILF and the POC agree that these criteria describe the ideal data, we believe that health-related data meeting may still be important if it does not meet all four criteria. Rather than skipping the analysis if the “ideal data” is not available, we believe the best available data should be collected and reviewed. In such cases, the permit applicant should certainly include an explanation of the limitations of the data, but the lack of “perfect” data should not preclude a review of the existing health status of the affected community.

The Work Group recommends that data be divided into age, gender and/or race/ethnicity categories, only if there is a known difference in the rates of a particular health outcome by these specific categories. PILF and the POC believe that limiting category-specific reporting to these instances is unnecessary and may preclude collection of valuable information. Instead, health data should be collected and reported in age, gender and race/ethnicity categories in any instance in which the data pool is adequate to show meaningful trends within these categories. The results could reveal important differences between the above categories, even if existing research has not yet shown an age, gender or race/ethnic difference in incidence or mortality rates.

Finally, the HOD limits its recommendations concerning the data that should be reviewed and reported based on current availability of data in useful forms. While this information is important in developing guidelines for immediate use, we are disappointed that the Work Group did not make recommendations about the type of health data that should be collected in the future to provide a more complete picture of the health status and potential environmental vulnerability of environmental justice communities. We ask the Work Group to add recommendations regarding the health data that would be most useful in making this assessment, regardless of its current availability.

Conclusion

PILF and the POC applaud the DEC for taking these necessary first steps toward implementing its Environmental Justice Policy. We look forward to seeing the revisions to these proposals based on comments received and hope that the DEC will choose to focus on a disparate adverse environmental impact analysis method that incorporates

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cumulative impacts and existing environmental burdens and that makes full use of available community health data.

We are filing these comments by e-mail today; a hard copy will follow by mail. If there are any questions or concerns about these comments, please feel free to contact me at 315-443-4582.

Sincerely,

A handwritten signature in cursive script that reads "Alma L. Lowry" followed by a diagonal slash and the letters "alg".

Alma L. Lowry

Visiting Assistant Professor of Law
Public Interest Law Firm

cc: Aggie Lane, Partnership for Onondaga Creek