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**GEORGE D. MAZIARZ**  
Senator, 62nd District

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**ALBANY OFFICE:**  
ROOM 915  
LEGISLATIVE OFFICE BUILDING  
ALBANY, NY 12247  
(518) 455-2024  
FAX: (518) 426-6987

**DISTRICT OFFICE:**  
2578 NIAGARA FALLS BOULEVARD  
WHEATFIELD, NY 14304  
(716) 731-8740  
FAX: (716) 731-8746

**INTERNET ADDRESS:**  
maziarz@senate.state.ny.us

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**DIVISION OF  
LEGAL AFFAIRS**

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NYS DEC

Office of Environmental Justice

625 Broadway, Albany, New York 12233-1500

fax: 518-402-9018

e-mail: [ej@gw.dec.state.ny.us](mailto:ej@gw.dec.state.ny.us)

I write to register my comments on the *Final Report of the New York State Department of Environmental Conservation Disproportionate Adverse Environmental Impact Analysis Work Group*.

Before offering concerns and ideas for improvement, I want to thank the members of the Work Group and the Advisory Group for taking on this complex and challenging but enormously important issue and the Agency for sponsoring it. Although I share the group's disappointment that they could not reach consensus on anything that would allow the New York State Department of Environmental Conservation to engage a process of building regulatory guidance, I appreciate the work and the production of this document. It should serve as a benchmark to further the conversation and deliberations and move us closer to providing burdened communities with an equitable, protective, and compensatory framework.

I also support the Report's call for statewide interactive maps of indicators of environmental burdens if attached to a productive use of the information to enhance those communities rather than redlining them. I also support the expansion of readily available indicators, and revisiting 6NYCRR Part 617 in terms of environmental justice.

However, I feel strongly that I must register this overarching criticism on behalf of my constituents. Unless the NYS DEC's environmental justice policy corrects its basic assumptions that environmental injustice happens only to minority or poor communities or if it does recognize this, continues to pursue policy that denies equal protection to these other burdened communities, any report, policy, or regulation will lack legitimacy.

With this in mind, these are my most troublesome concerns and some ideas for improvement:

1. Page 2, defining language. The current vague language opens some definitions to confusion and confrontation at best and obstructs any meaningful regulatory action at worst. These need to be clarified. For example, the words to define a community of concern (COC) is rife with vague

terms. A COC is defined as "*an area whose population is likely to be affected by one potentially significant adverse environmental and/or human health impact.*" What determines "likely?" What determines "potentially?" What determines "significant?" And what determines "adverse?" The group recognized the unmet challenge of defining these terms, but they must be delineated.

2. Further, the definition of an environmental justice community of concern (COC) is ironically misleading and ultimately unjust. The Report's introduction accurately uses part of the federal definition to generally define environmental justice as the expectation that no one, regardless of race or income, should bear a disproportionate burden of negative environmental impacts. The Report's definition on page 2 also accurately reflects the federal language in its initial definition of a COC.

However, on page 7, the Report suddenly and dramatically shifts to qualify the communities the Work Group and indeed, the entire state EJ effort, are really interested in protecting. On page 7, the Report declares, without any explanation for its arbitrary bias, that it is interested only in "*low-income and minority populations.*" On page 11, the Report states unequivocally that "*a COC must have a minority and/or low income area within it in order to proceed with any disproportionate impact analysis.*"

I want to make clear that I am in no way discounting or diminishing the established fact that minority and low income communities have historically been targeted and continue to bear the brunt of disproportionate burden of negative environmental impacts. However, it is unjust to arbitrarily cut out communities that are equally or more burdened but are not minority or poor. It is unjust for the State of New York to not care how saturated a community is unless it meets a race or income test.

As I have written before, I represent a large portion of Niagara County, arguably among the most environmentally burdened counties in the nation. Niagara County is the location of Love Canal, whose tragic case of toxic exposure and impacts led to the creation of the federal Superfund program for addressing hazardous waste. The data collected through this program was used in the 1987 United Church of Christ *Report on Race and Toxic Waste in the United States* that led to the 1995 Presidential Executive Order that turned the US Environmental Protection Agency's attention to environmental justice.

It is also the location of communities burdened with heavy levels of radioactive and chemical contamination. It "hosts" the only commercial hazardous waste disposal facility in the entire Northeast. People who have taken the time to understand the situation there often note that the area is so burdened that if they saw a documentary on it, they might think the filmmakers were making it up.

Yet, these communities are not necessarily low-income or minority populations, nor are they wealthy. They were victimized in a time when no environmental laws or regulations existed or if they did, were not able to protect them. It was easy for industry to site facilities next to the Great Lakes and throughout the county. This was also a time when the federal government used

eminent domain to take 7500 acres of peach orchards on the Niagara escarpment to use as a dump for radioactive waste from atomic bomb research, jet fuel testing, and the toxic waste from other WWII activities. The Porter-Lewiston area now has, among its other environmental burdens, a federal FUSRAP (see [www.lrb.usace.army.mil/fusrap/nfss/nfss/](http://www.lrb.usace.army.mil/fusrap/nfss/nfss/)) and DERPFD site (see <http://www.lrb.usace.army.mil/derpfuds/loow/>).

3. Add "economic" to indicators of environmental burden. Identifying and measuring indicators is the key to assessment. Unfortunately, "disproportionately burdened" falls within the realm of "knowing it when you see it" but the agency needs to empirically identify the indicators and their thresholds. I appreciate the efforts that the Work Group made to clarify indicators, but an obvious gap is the lack of economic indicators. The State Environmental Quality Review Act (SEQRA) requires environmental impacts to be balanced with social and economic factors, as the Report correctly quotes, but the group failed to include economic indicators in its list.

Economic consequences of environmental burden occur in the form of impacted property values, red lining for loans, and avoidance of brownfields by likely investors. This is because it often costs more to clean up a brownfield in upstate New York than the property will be worth when remediated. In upstate rural communities, this results in the further destruction of green fields for development leaving impacted communities still burdened with contaminated and unproductive sites. This is not the situation downstate, where land is at a premium and is almost always worth far more cleaned up, regardless of the cost. Economic indicators should be added to environmental and human health impacts in the Report's definition of a Community of Concern (page 5).

4. Add "presence of active hazardous waste sites" to indicators of environmental burden. On page 9, the presence of inactive hazardous waste sites is listed as an indicator of burden. It makes sense that the Work Group would want to also include the presence of an active hazardous waste site as an indicator, yet this is not included in the Report's list. I prefer to believe that this is an oversight rather than the deliberate exclusion of the Lewiston-Porter communities whose populations do not meet minority or low income thresholds but which "host" the state's (and the Northeast's) only active hazardous waste site.

5. Reframe "incomplete data" as part of the field characterization. On page 9, the Report notes that "incomplete data," "imprecision of existing environmental analysis tools," and regional rather than local impacts of regulatory approaches" limits the ability to do a complete and comprehensive description of the environmental setting. I suggest that rather than limiting a site's characterization, these gaps represent a significant part of it and a gap analysis should be identified as part of the scoping and be required to be filled in as part of the environmental impact statement.

6. Public participation in the Burdened Area Analysis. Item 5 on page 17 notes that if an applicant desires to take action that adversely impacts a Burdened Area, the applicant must "implement an enhanced public participation process in which the community truly participates in the impact analysis." This begs the question, "enhanced" and "truly participates" in contrast to

what? Is the Report suggesting that the public participation process attached to the SEQRA process for non-burdened areas is substandard and does not allow for true participation?

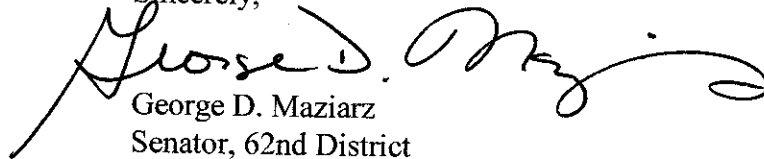
Beyond this, however, I am troubled by the consequences if Item 5's directive is not followed. The Report notes that the project "may not be approved" and the applicant "may be permitted to apply for an exemption." This vague sense of benign consequences renders the directive ineffective. Further, this "enhanced" public participation, in item 6 on page 17, must provide for notice and "the opportunity to be heard." This strikes me as no different than the worst stereotype of the current SEQRA public hearing process, in which an opportunity to be heard does not mean that you will be heard.

The anticipated outcome of this enhanced opportunity to be heard is evident in Item 7. Item 7 directs that if after all this, DEC still allows for the project and it eventually violates the guarantees (presumably outlined as special conditions in the operating permit, although this is not specified), the agency will levy fines. Not to worry, however, because Item 7 also notes that a formal public participation process will be conducted to determine how these funds will be used. It is not clear how this sequence benefits any community of concern or protects against further burden.

Again, I appreciate the Work Group's efforts and recognize how difficult its task was. The objectives pursued but not achieved by the Work Group are critically important and need to continue being engaged. I encourage the NYS DEC to support continuing efforts to build a regulatory framework to assess environmental burden and protect communities from continuing to bear a disproportionate burden of negative environmental impacts. I also urge the Agency to reconsider the assumptions on which they base their understanding of what constitutes a community of concern.

Thank you for the opportunity to comment on this Report. If I can be of further assistance in your efforts, please do not hesitate to contact me.

Sincerely,



George D. Maziarz  
Senator, 62nd District

Cc: Merton K. Weipert, Porter Town Supervisor  
Vince Agnello, Residents for Responsible Government

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