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SYRACUSE UNIVERSITY

COLLEGE OF LAW
OFFICE OF CLINICAL LEGAL EDUCATION

April 9, 2004

Ms. Karen Higginbotham, Director
U.S. Environmental Protection Agency
Office of Civil Rights
1200 Pennsylvania Ave NW
Washington, D.C. 20460

RE: Title VI Administrative Complaint on Behalf of the Partnership for Onondaga Creek

Dear Ms. Higginbotham:

The Partnership of Onondaga Creek ("POC") files this complaint under Title VI and its implementing regulations to challenge the collective actions of Onondaga County ("the County") and the New York State Department of Environmental Conservation ("DEC") in selecting and approving the placement of an above ground, regional treatment facility ("RTF" or the "Midland Avenue RTF") on Syracuse's Southside. The decision of the County and the DEC will discriminate against the predominantly African-American residents of the Midland Avenue community both because of the siting and the RTF's impacts on Onondaga Creek.

The POC is an alliance of neighborhood residents and others who have come together the shared goal of restoring Onondaga Creek and restoring environmental justice to the (communities on the Southside. They are represented in this matter by the Public Interest Firm I ("PILF I") of the Office of Clinical Legal Education at Syracuse University Colleg Law. PILF I is dedicated to providing representation to individuals and groups in community who cannot secure representation elsewhere. This complaint is also supported

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Declaration of [redacted] (included as Exhibit 1), a citizen of the Onondaga Nation. The Nation, while not joining this matter as a complainant, is fundamentally opposed to the proposed RTF because its discharges of partially treated sewage, chlorine and chlorine by-products into Onondaga Creek will affect the Nation's cultural relationship with and reliance upon Onondaga Creek.

I. Introduction

The POC is concerned that the above-ground RTF proposed by the County and the DEC's approval of the County's proposal will adversely impact the community's Creek restoration efforts, housing and retail development values in the area and the health and overall quality of life of the surrounding community. These impacts, along with the inappropriate and ineffective public participation provided to the community, create an adverse disparate impact on a predominantly African-American community in violation of Title VI and its regulations.

Although reducing the problem of raw sewage discharged into Onondaga Creek, the RTF will not solve the problem of hazardous effluents. The RTF will annually release 77 million gallons ("MG") of partially treated effluents into Onondaga Creek; and possibly as often as once a year will release raw sewage. In addition, the new discharges will include various chlorination by-products. These discharges will disrupt the POC's efforts to revitalize the Creek and, as a consequence, will impede the community's efforts to reclaim needed recreational areas, revitalize its economic base and improve the quality of life of its residents.

The neighborhood surrounding the proposed, above-ground, RTF is already burdened with multiple industrial facilities. There are seven facilities that produce and release air pollutants, two that have reported toxic releases and 136 which have reported hazardous waste activities.[1] These facilities, which include Coyne Textile Services, Byrne Dairy Inc., Fleet Garage, Central New York Centro Inc., Midstate Elevator, Upstate Amalgamated Services, and PT Fibison Cleaners, create an industrial burden on the residents of the community.[2] The emissions from, and the industrial character of, the RTF will only intensify the existing industrial blight and environmental stress on this community and will draw other industrial users to the area. Construction of the RTF will force the families close to the site to be relocated and expose neighborhood children to the hazards of a construction zone.

Finally, the POC is concerned that the decision-making process regarding the placement of the RTF in the Southside neighborhood was not adequate under the U.S. Environmental Protection Agency ("EPA") Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance") and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Investigative Guidance"). Community members were not provided with information in a form that they could easily understand. Participation in decision-making was only permitted after a treatment method had been selected, limiting the effectiveness of the public comment and some phases of the project have not yet been finalized or subjected to public comment.

For all these reasons, the POC believes that the actions of the County and the DEC violate Title VI. Their concerns would be significantly alleviated by adoption of the less discriminatory alternatives proposed by the community such as underground storage and/or sewer separation.

II. Jurisdiction

Title VI prohibits an agency receiving federal funds from discriminating based on race, color, or national origin.[3] To be considered by the EPA, Title VI complaints must be filed within 180 days of a discriminatory act by an agency receiving federal funds and that act must affect a protected class of people.[4]

a. Respondents Receive Federal Funding

Both Onondaga County and the DEC receive federal funds from the EPA and are bound by Title VI. The EPA administers a number of grant programs related to environmental protection and pollution control.[5] In both 2003 and 2004, Onondaga County received significant funds from the federal government.[6] On January 15, 2004, the EPA confirmed that it will provide up to $45 million to the Onondaga County Department of Drainage and Sanitation for the construction of the Midland Avenue RTF.[7] The DEC also receives federal funds for a variety of programs. The DEC received $27,414,000 in federal funds in 2002-2003 for Air and Water Quality Management Programs in New York State.[8] In addition, 18% of DEC's workforce positions in the fiscal year 2003-2004 are intended to be financed by federal grants.[9]

b. Proposed RTF Will Impact Members of a Protected Class: African-American Members of the POC

The actions of the County and the DEC disproportionately impact members of the POC and the affected community, who are members of a protected class as described in the Draft Investigative Guidance. Almost half of the POC's active members are African- American, including [redacted] and [redacted], whose declarations are included as exhibit 2. In addition, as noted in the 2000 U.S. Census, the Southside community which will be impacted by the RTF, and which is represented in the POC, is predominantly African- American (approximately 83%).[10] By contrast, in 2000, 25.3% of the City's population, 10 % of Onondaga County and 12.3% of the U.S. as a whole was African-American.[11]

c. This Complaint is Timely Filed

The DEC's approval of the County's "final facilities plan" on or around December 19, 2003 is the last necessary event before the building of the RTF. Based on that approval, the County could finally and formally authorize the project and the County now plans to begin construction in spring 2004. Because this complaint is filed within 180 days of this discriminatory event, it is timely.

On December 22, 2000, [redacted] filed a complaint with the U.S. Department of Justice which was referred to the EPA Office of Civil Rights ("OCR") on February 5, 2001. That complaint was improperly rejected by the EPA as untimely because the EPA incorrectly understood that the project had begun construction more than 180 days before the complaint was received. The only "construction" begun at the rejection point was the laying of a single conveyance, which did not signal the final approval of the RTF. The merits of the Title VI violations in [redacted]'s complaint were not addressed.[12]

III. The Environmental Justice Analysis Done in the Environmental Assessment Did Not Comport with the Title VI Guidelines Set Forth in the Draft Recipient Guidance And Therefore Additional Review is Not Precluded

The POC recognizes that the EPA briefly considered the environmental justice implications of this project in the Environmental Assessment ("EA") conducted in 1999. This review, however, did not satisfy the requirements of a Title VI analysis. Under EPA's Title VI regulations and Draft Revised Guidance, upon receipt of a Title VI administrative complaint, the EPA must first determine whether there is a significant disparate adverse impact. If so, the

proponents of the challenged project try to show that the impact is justified. Finally, if an appropriate justification is offered, the EPA must try to identify and explore less discriminatory alternatives, including appropriate mitigation measures.[13]

The EPA admitted in the Environmental Justice ("EJ") analysis that the project had the potential to cause disproportionately high adverse impacts.[14] The EPA decided that the identified adverse impacts were not "disproportionate" because "the selection of the site was based on engineering and feasibility considerations" and because the County had included substantial mitigation measures in its proposal and provided for public participation.[15] This analysis does not preclude additional Title VI review, because the EA (1) did not properly consider cumulative impacts, 2) did not adequately consider whether the public participation provided was appropriate or meaningful, 3) failed to consider a range of less discriminatory alternatives and relied on mitigation that was only possible, not actual and 4) inappropriately relied on "engineering and feasibility" considerations as evidence that there was no disparate impact from the project.[16]

First, although the EA recognized that there were other industries in this residential area, it did not consider the impacts of these facilities themselves or the effect of the RTF *combined* with the residual effects of the other industries.[17] The EJ analysis itself does not mention the other existing industries at all.

Second, public participation is mentioned in the EA, but the EPA nowhere assesses whether the public participation provided was appropriate or allowed meaningful opportunities to influence the County's decision. A more detailed analysis of the adequacy of public participation is in Section V, infra.

Third, the EA's discussion of less discriminatory alternatives was focused almost entirely on alternative locations for the RTF as designed by the County, ignoring alternative technologies like underground storage.[18] In addition, the EA relies on mitigation that has only been proposed and that, in fact, the County has taken off the table, or has yet to be bring in final form before the community members.

For example, the EA states that part of the mitigation will be "more than 100 construction jobs that are created" and that "the County will make every legal effort to ensure that local residents have the opportunity to be included in the labor force."[19] The County is one month

away from its major milestone of building the RTF and the community had yet to hear about any jobs. To the contrary, POC members have heard that the jobs were being contracted out to workers in Atlanta. In addition, at a November 25, 2002 Onondaga County Legislature public hearing, County legislators announced that $3 million community in enhancements that was originally made part of the RTF proposal was no longer available for the Southside community.[20]

Fourth, and perhaps most important, the EA inappropriately relies on engineering and feasibility justifications to avoid consideration of the actual adverse impacts of the RTF or consideration of less discriminatory alternatives. Under the Draft Guidance, justifications are only considered after the adverse discriminatory effects have been determined and do not excuse the agency from identifying and quantifying those impacts. Moreover, proper justification for the significant adverse discriminatory impacts that may be created by the RTF should go beyond mere engineering convenience. Finally, even a proper justification does not preclude full consideration of less discriminatory alternatives or mitigation measures and, as noted above, the EA does not even consider the less discriminatory and viable options later proposed by the POC, such as underground storage and sewer separation.

For all these reasons, the EJ analysis done in the Environmental Assessment is **not** the same analysis that is being asked to be done under Title VI. That analysis should not be substituted for a proper and complete Title VI review of the project.

IV. Background

a. History of the Southside Neighborhood

Many of the residents of Syracuse's Southside were once residents of Syracuse's historically African-American 15th Ward. They had a community and an identity. Over the years, this community has been disrupted by urban renewal projects, highway construction, and other forced relocations. The decision to place the above-ground RTF at Midland Avenue will target a community that has already been the victim of disproportionate and adverse treatment and impacts.

Since 1940, the African-American population of Onondaga County has grown rapidly while the white population has decreased. In 1950, 93% of all African-Americans lived in Syracuse's 15th Ward contiguous to downtown and bordered by Erie Boulevard, North Burt

Street, South State Street, and Syracuse University.[21] The City's attempts to better the 15th Ward by eliminating substandard housing through the Near East Side Urban Renewal Project, increased the shortage of low and middle income housing. The Near East Side Urban Renewal project resulted in the razing of 27 blocks of the 15th Ward, which included the demolition of the houses of 75% of the city's African-American population, four of the five major African-American churches, and most of the stores, businesses, and social centers owned by African-Americans.[22] Many of the demolished homes were replaced with public facilities, high-rise apartment buildings and office space.

The residents were next disrupted with the construction of Interstate 81 and the expansion of Upstate Medical Center. About 5,500 residents, many of whom were non-white, low income individuals, were relocated between 1959 and 1969.[23] Due to the lack of adequate housing, many of these residents were forced to live in overcrowded substandard housing units, mostly on the City's Southside.

Currently, most African-Americans in Onondaga County live in the City of Syracuse and these residents have been pushed primarily into the Southside. In 1950, less than 10% of the population in the Southside neighborhood that will be most affected by the RTF was African-American.[24] The area where the proposed RTF is to be built is now comprised of approximately 83% African-Americans.[25] The increase in the African-American population in this one area reflects the forced concentration of one group of people into this area. The push of many African-Americans to the South Side of Syracuse dubbed this area, "Black Town."

Even within the Southside, community disruptions continue. Residents like [redacted] have been relocated multiple times.[26] He was first relocated from the 15th Ward. [redacted] then moved to the Southside and was relocated again in the 1970's when the Centro Bus Depot was constructed. [redacted], who lives adjacent to the Creek and the proposed sewage conveyance route on W.Castle Street, fears another relocation caused by this alarming trend toward the industrialization of his community.[27]

The economic status of the Southside community is low. In 1990, 80% of the non-family households and 81% of the Southside's family households were considered low-to-moderate income.[28] The substandard living of Southside residents is appalling: 21.7% of the African-American families in Syracuse live below poverty level.[29] In contrast, only 9.2% of U.S.'s

African-American family population lives below the poverty level.[30] Property ownership on the Southside is low with 80% of its housing units renter-occupied. [31] The homes of West Onondaga Street were once the pride of Syracuse. Now, the current residents lack the income, or family size to support the structures as single family homes. The majority of these homes have been turned into apartments or offices buildings, or simply abandoned.[32]

As a result of their economic status and concentration on the Southside, Syracuse's African- American population has limited power to affect policy changes. Much is needed to remedy the housing neglect of the Southside. Residents report landlords do little to alleviate health risks from poor plumbing, lead paint, and asbestos.

The placement of Interstate 81 through the heart of Syracuse also disproportionately affects the health of the community. Residents, including a number of children, have developed asthma,[33] which is likely to be aggravated by the fumes released from the thousands of vehicles that use Interstate 81 daily. The operation of industrial facilities in the community, substandard housing, the forced relocation for various improvements and construction of other "city/county amenities" like Interstate 81 have imposed significant and disproportionately high burdens on this community.

b. History of the RTF

On January 20, 1998, the Atlantic States Legal Foundation ("ASLF"), the DEC, the Onondaga County Department of Drainage and Sanitation and Onondaga County signed an Amended Consent Judgment ("ACJ"). The ACJ resolved a complaint filed by the Atlantic States Legal Foundation against Onondaga County alleging violations of the 1972 Federal Clean Water Act in the discharge of sewage into Onondaga Lake from the County's Metropolitan Sewage Treatment Plant ("Metro") and various combined sewer overflow ("CSO") points. The ACJ established a framework for the approval and timely implementation of various upgrades and other measures needed to bring the County's effluent discharges from Metro and CSO's into compliance with the State's effluent limitation and water quality standards.[34]

Under the ACJ, all the work the County is required to perform is subject to review and approval by the DEC prior to the initiation of such work.[35] Appendix B of the ACJ notes the Midland Avenue Project with its RTF and conveyances. This project will service the Southside's combined sewer area. The area served by the Midland Facility (2,345 acres) is

almost twice as large as the service areas for the two other proposed regional treatment facilities, Harbor Brook (1,288 acres) and Clinton Street (971 acres) and will be required to accommodate a higher volume of sewage overflows.[36] The Midland Avenue RTF has always been proposed for Oxford and Blaine Streets and Onondaga Creek near Midland Avenue, a main traffic artery.

According to the 2003 Midland Avenue Facilities Plan Amendment, the proposed Midland Avenue RTF will include coarse screening in front of the facility's pump station wet well. At the wet well, pumps will be used to lift the flow from the CSO transmission pipelines to the vortex device. In the vortex, floatables and gross solids will be removed.[37] However, it is likely that vortex separators will not be very effective at removing fine sediments.[38] The flow will then proceed to the disinfection tank, where it will be disinfected with either sodium hypochlorite or another disinfectant. All treatment and transmission processes will be sized to accommodate the one-year storm. Concentrated solids from the RTF will be discharged back into the Main Interceptor Sewer ("MIS") for treatment at Metropolitan Syracuse Wastewater Treatment Plant ("Metro").[39]

Existing collector and trunk sewers in the Midland service area can now store approximately 74% of the average annual wet weather flow. The County's proposal will store an additional 18% of the average annual wet weather flow. All stored flow will be conveyed to Metro for treatment and disposal. The remaining 8% (approximately 77 million gallons annually) of the average annual wet weather flow will be treated in vortex units (swirl concentrators), disinfected, and de-chlorinated before discharge into Onondaga Creek.[40] In the case of extremely heavy rainfall, raw sewage may by-pass the swirler and continue to be discharged directly into the Creek.[41]

On the other hand, the underground storage and sewer separation option proposed by the POC would include a tank or a combination of tanks, underground piping and underground ancillary equipment which would capture underground at least 98% of the combined sewage volume and upgrade two of the City's aging sewer districts. In these districts, the sewer separation upgrade will solve the problem of streets and basements flooding with combined sewage. It will also eliminate sanitary discharges into Onondaga Creek, decreasing the adverse impact on the Creek's inhabitants (fish and other wildlife). More importantly, sewer separation

will decrease contact risk with pathogens and bacteria from domestic sewage in Onondaga Creek.[42]

Because the storage and sewer separation option will have a smaller above-ground "footprint" and be closer to the goal of zero CSO's than the proposed, above- ground RTF, the POC has been willing to compromise and accept the construction of an underground storage tank at the Midland site. Unfortunately, this concession on the part of the POC has been to no avail. The County responded by unilaterally increasing the storage system connected to the RTF by only 13%. This small increase in storage did reduce the size of the above-ground RTF by a third, but it did little to reduce its partially treated effluent to the Creek. The RTF's effluent of 77 MG is a far cry from the POC's goal of zero CSO's.

V. Lack of Adequate and Meaningful Public Participation as Required by EPA Draft Recipient Guidance

The POC state that its members were not allowed adequate meaningful public participation in the permitting process for the Midland RTF required by under the Draft Guidance. The Draft Investigative Guidance states:

> "It is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process **without** a finding in the substantive outcome of that process, such as discriminatory human health or environmental effects."[43]

The POC and its members believe that, because their participation was not sought early enough in the process, they were unable to participate meaningfully and adequately in the project. The EJ analysis in the EA devotes one sentence to this concern: "The County indicated that public participation in the planning process could not begin until after the signing of the ACJ on January 28, 1998 and County's initiation of the planning effort later that spring."[44] However, this ignores the original Consent Judgment that was entered in 1989 and created almost a decade of participation opportunities. The County and the DEC could and should have used a more inclusive approach.

By 1991, two years after entering the original consent judgment, the County essentially made its decision to use swirler technology:

> "An evaluation of various technologies for settleable solids and floatables removal prior to disinfection for bacterial reduction was performed as part of the County's 1991 CSO Facilities Plan. **The 1991 plan determined that vortex**

> **solids separators, and in particular, the EPA's swirl regulator/concentrator, provided the most efficient demonstrated removal of settleable solids and floatables for high rate treatment operations.** Vortex Separators were, therefore, incorporated into the ACJ as the technology for the regional high-rate treatment facilities followed by disinfection."[45]

In July 1998, the County hired the Midland RTF project engineers and the preliminary design was submitted in the beginning of September 1998. Though there were meetings between select private parties and elected officials in August, the County's first public hearing on the RTF was not held until two weeks after the submission of the plans on September 30, 1998.[46] In essence, this was seven years after the initial selection of control technology was made.

The Draft Recipient Guidance states that participation should be early, inclusive and meaningful. The Draft Recipient Guidance states that meaningful participation "engages the public during the pre-permitting process, as well as during the permitting process, whenever possible."[47] Similarly, under the stakeholder POP ("public owns project") approach, endorsed by the EPA, the community is encouraged to be involved every step of the way. [48] Concerns, ideas and information all flow freely between the parties as plans and proposals are being developed.[49] If either model had been applied to the Midland Avenue RTF, public participation would have been provided much earlier than it was. Once the favored RTF design was selected in September 1998, public participation was limited to commenting on and tweaking an existing plan.

Efforts at negotiating a resolution to this dispute demonstrate the difficulty of meaningfully influencing the County's decision once a design was selected. From December 2001 to August 2002, representatives of the County, City, DEC, Nation, ASLF and POC met weekly to negotiate Midland RTF controversy. With the help of engineers, the parties came up with two underground storage alternatives to the proposed RTF. As the parties neared an agreement, however, the County ended negotiations by adding an unexpected and unreasonable condition on the City and returned to its favored swirler technology.[50]

The County stated that it would use the underground storage alternative proposed by community, that included no RTF and used sewer separation, **only if:** 1) the City contributed $7.9 million for the sewer separation, 2) the City contributed the City owned properties for both the Midland and the Clinton CSO abatement projects and 3) the City support the construction of an RTF project for the Clinton abatement project. [51] The County put the City in an impossible position; the City either had to support the building of an RTF in the residents' of Armory

Square's back yard, two miles away, or give up the fight against building the RTF in Midland. According to POC members who were part of the negotiations, the situation was made more difficult because the County had explicitly limited previous discussions to the Midland Avenue facility only, had not invited Armory Square stakeholders to the table, and did not mention Armory Square until the end of negotiations.

The County also undermined public participation by intentionally moving the legal deadlines to begin construction of the Midland RTF forward by 4 years. According to the 1998 ACJ, the original deadline to begin construction on the RTF was May 1, 2004. Due to community opposition to the plant, the County received a letter on February 24, 1999 from the EPA indicating that the agency anticipated some delays in reviewing the project. The following day, February 25th, the County requested that the initiation deadline be pushed up to May 2000, from the original May 2004 date.[52] This compression not only shortened the time for public participation, but community members believe it was a major factor in the cancellation of a national search for alternatives and requests for proposals conducted by the Army Corps of Engineers. Over time, however, deadlines returned to the original dates.

Adequate and timely public participation continues to be impeded. The POC and other community members remain in the dark regarding the final phase of the project, which involves the laying of conveyance pipes, 9 to 12 feet in diameter, stretching over a mile in length that will connect the remaining upstream CSO's to the RTF. Community members, like [redacted] have yet to be told the route of these pipes, how many families may be displaced and which families those might be. [redacted] lives on Hudson Street and still has not been told when he and his family will have to move or how much money he will be given to compensate the move.[53] Because of the uncertainty regarding this phase, the POC feels it is impossible for an adequate environmental assessment or Title VI review to have been done. Further, any public participation that may be provided for this phase is again likely to be offered too late to be meaningful or to reasonably influence the County's decisions regarding location of the pipes.

The Draft Recipient Guidance also sets specific standards or goals for meaningful public participation as an essential part of the permitting process and notes that participation cannot be adequate or meaningful if the information needed to participate is not easily understood. The Draft Recipient Guidance states that the recipient must provide "understandable information

necessary for effective community involvement."[54] Although the EA mentions the need for adequate and appropriate public participation, it fails to analyze whether the participation that took place was adequate under the standards set forth in the Draft Recipient Guidance. A review of the facts proves this burden was not met.

In deciding whether the information presented to the community members was adequate, the information has to be looked at through the eyes of the recipients, in this case the community members. Although the DEC and the County held public meetings to explain key information, such as the possible effects of the chlorination/de-chlorination process on the environment and Onondaga Creek, the analysis presented was incomprehensible to the average lay person and therefore insufficient under the Guidance.[55]

For example, POC members stated that the information presented at the CSO Disinfection Workshop was difficult to understand. Not only did the community members have to ask for the information to be deciphered after the meeting by an expert they themselves located, but the analysis failed to discuss long-term effects on human health. Though both the County and the community members' expert said that the effects were unknown, the community should have received an assessment of potential effects of the RTF combined with the effects of the pre-existing industrialization in the community. This would have allowed the community to assess the potential cumulative impacts of the RTF, a review that is required under Title VI.

VI. Adverse Impacts of the RTF Construction

a. Creek Restoration Efforts

Creek restoration is one of the primary goals of the POC. Their plans, which have recently received some initial EPA funding, include dechannelizing the Creek, slowing the current, restocking the fish and reclaiming the Creek and its banks as a recreational, aesthetic and economic resource for the surrounding community. The County's plan to continue to use the Creek as a conduit for raw and partially treated sewage disrupts these plans. Even after the completion of the Midland project, the CSO's will continue to dump 77 MG of raw and partially treated effluent into the Creek. As noted above, the POC proposes that the County use either sewer separation and/or underground storage to eliminate the CSO problem. Unlike the RTF, this combined approach would eventually end the dumping of raw sewage into the Creek, paving the way for the planned Creek restoration efforts.

Due to the rapid and incomplete nature of the sewage treatment, the RTF is not designed to and will **not** remove the phosphorus or ammonia from the liquid waste that is going to be discharged into the Creek.[56] In addition, as stated above, during heavy storms, raw sewage may continue to be dumped into the Creek untreated.

Ammonia and phosphorus are two major contributors to the Creek's pollution.[57] The ammonia that has been and will continue to be released is toxic to a wide range of aquatic life forms.[58] The partially treated effluent will also contain harmful nutrients that deplete the available oxygen in the Creek and chlorinated by-products that are harmful to all life. The chlorination/dechlorination process will add to the chemical contamination of the Creek. The nutrients left in the effluent could cause a massive overgrowth of algae. Millions of gallons of dechlorinated effluent will be deposited into the Creek after the sewage is treated, potentially exposing fish to harmful chlorine and chlorinated by-products. In addition, the RTF may at times dump fecal coliform bacteria into the Creek via raw sewage that will not be captured by the RTF during heavy storm events.[59] The ACJ sets bacteria standards for the upper reaches of Onondaga Lake so it will be swimmable. The POC wants the Creek to meet that standard upon restoration.

These chemicals, nutrients and sewage will continue to be dumped into water the community would like to use for recreational activities. Moreover, all of these impacts could be amplified through the planned Creek restoration efforts. For example, the community would like to slow the Creek's flow to allow fish populations to recover and to allow for recreational uses of the Creek. However, slowing the flow would increase the amount of time needed to flush contaminants from the Creek and could result in increased exposure of aquatic life to the contaminants and partially-treated sewage being released from the RTF. Efforts to reclaim the Creek will only be effective if the Creek is cleaned at the same time that its flow is slowed.

The EA does not consider the community's vision of restoring Onondaga Creek nor does it discuss what the Creek once was and what it could be. The community has been attempting to restore the Creek to the viable artery it once was as little as 40 years ago; the building of the RTF and using the Creek as a sewer, flies directly in the face of these restoration efforts.

Although the Draft Investigative Guidance states that permits and decisions that generally improve environmental and health conditions will not be investigated, this RTF will contribute to continuing hazardous environmental and health conditions through its discharges. It will reduce

the problems of raw sewage in the Creek, but it will not address other problems at all: it will add new contaminants and may significantly disrupt the POC's efforts to restore the Creek. In addition, the proposed RTF will create significantly more adverse environmental impacts than the community's preferred underground storage option. For all these reasons, the EPA should not deny Title VI review of this project.

b. Zoning

The above-ground RTF is being placed in a residential community. This area is primarily zoned Residential B, which allows only private residences.[60] The County and the EPA has recognized that the RTF, as an industrial or at best institutional use, will be incompatible with the current zoning of the area. Typically, such a non-conforming use would not be allowed without a variance, that is, "permission to build in an otherwise restricted portion of the property."[61]

As a general rule, the variance cannot create any unnecessary hardship to people in the community. Before granting a variance, the record must show that 1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; 2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning itself; and 3) the use to be authorized by the variance will not alter the essential character of the locality.[62]

If the County had to apply for a variance, the request would likely not be granted because its use could not pass the Otto test described above.[63] However, because it is the County's project, it is exempt from having to apply for a zoning permit. This exemption eliminates an important opportunity for public participation and comment on the compatibility of the proposed use with the surrounding residential community. The POC believes that it is unjust for the County to be allowed to place this non-conforming use in their residential community and that the incompatibility of the RTF with the surrounding community should be given consideration and significant weight in the Title VI review.

In addition, the zoning of the areas where other RTF's are slated to be built in Syracuse are noticeably different. To alleviate the sewage problem, the County proposes to build three other RTF's besides Midland: two on Syracuse's Westside (the Harbor Brook area) and one near downtown Syracuse in Armory Square, about ½ mile north of Midland. While the Midland RTF is sited in a primarily residential area, the sites proposed for these additional RTF's are mostly in

areas primarily zoned industrial with a small area of residential.[64] The zoning maps show that more residences will be disrupted with the building of the Midland RTF than with the others. The County has not addressed this disparity.

c. Creeping Industrialization

[redacted] has lived on Midland Avenue for 52 years. She has watched industry after industry push its way into her neighborhood. Her hope is that the County will allow her to remain peacefully in the home that her late husband worked two jobs to purchase, nuisance free.[65] Unfortunately, it not likely that the County will take notice of her hope.

The Midland community is overburdened with industrialization. Within several hundred yards of the RTF site are three major industries: CENTRO -- the city transit service's bus maintenance garage, [redacted]'s main trucking / distribution plant, and Coyne Textile Services' industrial laundry, which also requires extensive trucking activity.[66] There are seven facilities that produce and release air pollutants, two that have reported toxic releases and 136 which have reported hazardous waste activities.[67] The Midland area is located only ½ mile from Interstate 81, Syracuse's north/south major interstate highway. Not only must community members deal with the nuisance of living close to a highway, but they must live amid manufacturing noises and smells, airborne pollution and buses and trucks coming and going, day and night. With each, new non-conforming use, more industries are likely to be drawn to the community, pushing more residents out and further disrupting community cohesion and reducing the quality of life. In addition, like many communities in industrializing areas, local activists report that the Midland Avenue area suffers from illegal dumping and excessive debris. The County is now attempting to add a new burden to this already besieged community.

The community has been trying to combat this trend with investments in new homes in the area. Recently, the neighborhood has been "on the path of revitalization."[68] Private and not-for-profit businesses have recently built over 100 homes and town homes in the community.[69] According to Rich Pulchalski, executive director of Syracuse United Neighbors, a grassroots community group with more than 900 members, over 130 houses have been built within a 10 block radius of the proposed plant.[70] These investments are jeopardized by the RTF and the continued industrialization of the community.

d. Effect on Community Cohesiveness

With the construction of the above-ground RTF, some 36 families (11 permanently, 25 temporarily) will be relocated. Prior to the RTF threat, this area was a unified and cohesive community. Many had lived in the area for years. Former residents say the adage, "it takes a village to raise a child," was practiced here.[71] Everyone looked out for each other's children. Former residents of 115 Oxford Street apartment complex, for example, say that they will miss the community environment they had at their apartment building before their forced relocation in 2000. The construction of the RTF and relocation of these families will break these community ties, which in some cases had lasted decades.

The 115 Oxford Street residents, if they can be located, along with those residing at 129, 131, 133, and 135 Blaine Street, will be given only $5,250 as payment for their permanent dislocation (totaling $57,750 for 11 homes). 115 Oxford Street will be torn down. The four Blaine townhouses will be converted to other uses and will be unavailable as housing upon completion of the project. The rest of the families on Oxford and Blaine Streets will be given anywhere from $500 to $1,500 as a moving allowance. Since their houses will still be available as housing upon completion of the project, the current residents will not be compensated for their "temporary" dislocation. The residents of Oxford and Blaine Streets have been offered choices of public, "section eight" or private sector housing. Finding private sector housing, however, will be difficult, since rent subsidies won't exceed $600. Clearly, this mitigation is inadequate and can't begin to replace the village quality of this neighborhood.

e. Quality of Life

Those residents who will remain in the Midland Avenue community have raised numerous concerns about the construction and operation of an above-ground RTF in their neighborhood. These concerns include: (1) the sewage and chemical odors; (2) the RTF's imposing and stigmatizing appearance; (3) the impacts of the construction and necessary relocation of residents surrounding the proposed site; and (4) the economic impact on property in the neighborhood.

i. Odors

The residents fear that, despite odor control efforts, the RTF will emit noxious smells from the chlorine treatment and/or from the raw sewage that is left untreated. For many reasons,

the amount of raw sewage that will remain in the effluents is uncertain. A similar swirler technology was abandoned in the District of Columbia because the swirl concentrators did not function correctly. This raises concerns that the swirler technology at the Midland RTF will also fail and that the sewage solids will not be separated out from the liquid waste. With this design, the pumps that lift the sewage into the swirlers may act like a blender, macerating the solids into small pieces and making it difficult for the swirlers to remove them. The release of this 'treated' water into the Creek may foul the air in neighborhoods along the Creek corridor.

In addition, the effects of the RTF odors should be considered in combination with existing odor sources in the area. These include chemicals from Coyne's industrial laundry, diesel fumes from CENTRO, and the other traffic and industry-generated odors in the area.

ii. Visual

The community has voiced general concern regarding the RTF structure to be built. The RTF site is in a neighborhood with many residential homes. Despite efforts to make the building "blend," the RTF will be a massive presence -- 24,000 sq. ft. and about 24 ft. high - dwarfing the residential homes nearby.[72] Because of its size and its industrial character, residents fear that the RTF will be a stigmatizing structure that will dominate the immediate area.

iii. Construction Impacts

The construction of the RTF will have a sustained impact on the community. There will be enormous amounts of noise and dust in the neighborhood due to construction, besides limited access to those coming in and out of the neighborhood. Construction will entail hazardous vehicles moving in and out of the neighborhood placing the many neighborhood children in danger. The construction with its many harmful objects that might attract a child's attention and expose it to danger is a major concern in a community where nearly half the population is under 18.[73]

iv. Economic/Property Value Impacts

As a result of all these impacts, the residents are concerned that neighborhood property values and its attraction for retail activities will decrease. In the short term, the damage may be because of the disruption to the neighborhood created by construction, and, in the long term, because of the unappealing environment that will be created. As noted above, increasing

industrialization may change the character of the community, making it less attractive to retail and other community-friendly businesses. If underground storage as proposed by the POC were adopted, the problem of the visual afflictions, potential odors, industrial character and community disruptions caused by the RTF would be largely remedied.

f. Health Impacts

The chemicals the RTF will dump into the Creek are hazardous to human health. In the workshop the County provided for the communities to discuss the RTF's chlorination/ dechlorination process, 41 chemical byproducts were identified as probable discharges into the Creek.[74] Some of the main by-products are formaldehyde, tolulene-d8, chloroform, hydrochloric acid, chlorine dioxide, chloramine and bromodichloromethane.[75]

Exposure to toluene affects the nervous system and can cause short-term tiredness, confusion, weakness, loss of memory and other related problems.[76] Bromodichloromethane is a possible human carcinogen.[77] Chloroform can cause dizziness, fatigue and headache with short-term exposure and, with longer term exposure, is a possible human carcinogen and can cause liver and renal damage.[78] Hydrochloric acid and chlorine dioxide both cause respiratory irritation.[79] Chloramine has not been investigated thoroughly in humans, but can cause skin and eye irritation.[80] Formaldehyde can cause irritation of the eyes, nose, throat and skin; asthmatics may be more sensitive to the effects of formaldehyde.[81]

Scientists know that these chemicals are often dangerous and sometimes lethal to humans. However, there is much uncertainty and concern about the effects of long-term exposure to nearby residences. It is also unknown how these chemicals will act in combination with the pollutants and byproducts from the existing industries in the community or what the particular sensitivities of the affected community may be. To date, it is the understanding of the POC that no study has been conducted regarding the potential contamination via soil or airborne transmission pathways, nor has there been any thorough evaluation of the risk posed to the community from potential chemical or mechanical malfunctions or spills.

In addition, there are many other sources of pollution or possible exposure to hazardous chemicals in the community. According to EPA's Enviromapper, there are at least 145 facilities that emit air or water pollution or handle hazardous waste in the area[82] Among these facilities are well-known pollution sources, such as CENTRO, Byrne Dairy and Coyne Laundry. At

minimum, the potential exposures from the RTF's operations should be considered in conjunction with the diesel fumes of CENTRO's buses, the emissions from traffic on Interstate 81 and emissions from Byrne Dairy and Coyne Laundry. In addition, the EPA should consider the impacts on a population that already suffers from disproportionately poor health.

Dr. Lloyd Novick, the County's health commissioner has stated that "childhood asthma is a priority health problem in Syracuse...."[83] The New York State Department of Health Statewide Planning and Research Cooperative System reported that 13202 zip code, which is the area in which the Midland RTF is being built, had one of the highest asthma hospitalization rates in the County for children ages 0-12.[84] The rate for the years 1998 -2000 was 371.1-596.1 per 100,000.[85] This rate is **13 times** higher than the majority of areas in the County.[86] Poverty may also limit access to healthcare, making exposures potentially even more dangerous.

Further, to the extent that an analysis of potential exposures and health impacts has been done, it was likely based on the current uses and conditions of the Creek. If the POC is successful in reclaiming portions of the Creek, the assumptions made to calculate exposure will change. Any successful restoration efforts will draw the community into closer contact with the water and will risk increasing the community's exposure to its toxic chemicals and the partially treated and raw wastes that will continue to be present in the Creek. All of these issues must be considered in assessing the effect of the RTF on this neighborhood.

VII. Less Discriminatory Alternatives Exist and Were Not Considered

The POC has not simply stood in opposition to the planned RTF. Instead, the POC has invested time, energy and resources in developing an alternative, which addresses their concerns. This alternative, a combination of underground storage and sewer separation, is described earlier in this complaint and was presented to the County during negotiations in 2001 and 2002.

In the *Onondaga County CSO Program Evaluation Report,* the County recognizes that the community's underground storage alternative is a viable solution. In the May 2001 report, the County states

> "Construction of a storage or overflow retention facility at Schiller Park may provide performance benefits to the CSO program as well as reduce flooding in nearby neighborhoods."[87]

This was the description of an underground storage facility to be built at Schiller Park. The Schiller Park design was proposed to combat the CSO problem upstream. The option consists of an underground storage tank that would provide temporary storage of excess combined sewer system flows. The Option is very similar to the underground storage plan proposed by the POC and rejected by the County.

One startling difference between Schiller Park and Midland Avenue is that the area surrounding the Schiller Park site is between 75% and 88.4% white.[88] The Midland area is in stark contrast with over 83% African-American residents.

VIII. Conclusion

For all the reasons above, the POC believes that the Midland Avenue RTF project violates Title VI and its regulations. The EPA should carefully review the Midland RTF project under the criterion set forth in the EPA's Draft Guidance should ensure that the DEC and the County comply with Title VI and its regulations in implementing any remedial measures to address CSO discharges to Onondaga Creek and Onondaga Lake.

Thank you for your attention to this complaint. Any questions, requests for additional information or response to this complaint may be directed to the Public Interest Law Firm at the address and phone number above or to POC member Aggie Lane at 478-4571 or at 340 Midland Avenue, Syracuse, NY 13202.

Sincerely,

Gemma de Lemos Mondala
Student Attorney

Shaunté Gordon
Student Attorney

Alma L. Lowry
Visiting Professor of Law
Director/ PILF I

[1] EPA Envirofacts Warehouse – Quick Start <http://oaspub.epa.gov/enviro/ef_home3.html?p_zipcode=13202&p_type=zip> (accessed on April 2, 2004); included as exhibit #3.

[2] Exh.3: Environmental Maps E-MAPS <http://198.102.62.140/emaps/index.asp?minx=-76.180605&maxx=-76.120605&miny=43.072793&maxy=43.012793> (accessed on April 3, 2004).

[3] 42 U.S.C. § 2000d; 40 CFR § 7.35.

[4] 40 C.F.R. §7.120(b)(2).

[5] 40 CFR §35.101.

[6] Onondaga County Annual Budget for 2004, Fiscal Summary, pp. 27-28 <http://www.ongov.net/Budget/home.html> (accessed on April 2, 2004).

[7] Public Announcement by Jane M. Kenny, Regional Administrator of the EPA on January 15, 2004; *see also* Letter of July 16, 1999 from the U.S. EPA accompanying the Environmental Assessment of the Midland Avenue Combined Sewer Overflow Project, p. 1.

[8] 2003-2004 New York State Executive Budget: Department of Environmental Conservation, Appendix 1, p.6, January 29, 2003. http://www.budget.state.ny.us/archive/fy0304appl/encon.pdf > (accessed on April 8, 2004).

[9] Id. at p.1.

[10] U.S. 2000 Census, U.S. Census Bureau at *http://www.factfinder.census.gov* (search by census tracts: 42,52,53,54,58,59).

[11] U.S. 2000 Census, U.S. Census Bureau at *http://www.census.gov/*.

[12] August 24, 2001 Letter from the U.S. Environmental Protection Agency to Marlin Kisselstein.

[13] Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Investigative Guidance"), 65 Fed. Reg. 39650, 39683 (2000).

[14] July 1999 Environmental Assessment of Midland Avenue Combined Sewer Overflow Project ("Environmental Assessment") or ("EA"), p. 11; included as exhibit #4.

[15] Id. at p.11.

[16] Id. at p.11.

[17] Id. at pp.1,11.

[18] Id. at pp.6-7.

[19]: Id. at p.10.

[20] Adams, Catherine Mahala. *Defending Our Place: Protest on the Southside of Syracuse*, May 2003 p. 134, 161; excerpts included as exhibit #5.

[21] Id. at p.53.

[22] Id. at p.62.

[23] Id. at p.61.

[24] Id. at p. 65.

[25] U.S. 2000 Census, U.S. Census Bureau at *<http://www.census.gov>/*(accessed on April 8, 2004).

[26] "Not In My Backyard" by Joshua Katcher and Cara Merella; included as exhibit #6.

[27] Id.

[28] U.S. 2000 Census, U.S. Census Bureau < *http://www.factfinder.census.gov/*> searched by zip code (accessed on April 8, 2004).

[29] Id.

[30] Id.

[31] Exh. 5: *Defending Our Place*, p. 75.

[32] Id.

[33] *NYSDOH Statewide Planning and Research Cooperative System: Asthma Hospitalization Rates, Children 0-12 years by Zip code for Onondaga County, New York 1998 - 2000* <http://www.health.state.ny.us/nysdoh/sparcs/sparcs.htm> (accessed on March 30, 2004).

[34] 1998 Amended Consent Judgment of ASLF v. Onondaga County ("ACJ"), p. 4; excerpt included as exhibit #7.

[35] Id., p.15.

[36] Onondaga County Department of Water Environment Protection, Midland Avenue Regional Treatment Facility and Conveyances, Facilities Plan Amendment (June 2003) Tables 2-1 and 3-2; excerpts included as exhibit #8; Onondaga County Department of Water Environment Protection, Draft Harbor Brook CSO Abatement Facilities Plan (March 2002), Table 1.1, p. 1-6; excepts included as exhibit #9; Onondaga County Department of Water Environment Protection / Lake Improvement Project, Draft Clinton Street CSO Abatement Facilities Plan (March 2002), Table 1-1; excerpts included as exhibit #9.

[37] Exh. 8: Midland Avenue Facilities Plan Amendment, p. 4-1.

[38] California Stormwater BMP Handbook; New Development and Redevelopment. January 2003. MP-51 <http://www.cabmphandbooks.com/Industrial.asp> (accessed March 19, 2004).

[39] Exh. 7: ACJ, Appendix B, p.7.

[40] Exh. 8: Midland Avenue Facilities Plan Amendment, Table 3-3.

[41] Exh. 8: Id., Appendix C, p. 4.

[42] EPA, Combined Sewer Overflow Management Fact Sheet: Sewer Separation, p. 2 (Sept. 1999) (EPA 832-F-99-041); excerpt included as exhibit #10.

[43] Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance") 65 FR 39650, 39658 (June 27, 2000).

[44] Exh. 4: EA, p.1.

[45] Onondaga County Department of Drainage and Sanitation/Lake Improvement Office, *CSO Program Evaluation Report* (May 2001), p. 3-2; excerpts included as exhibit #11.

[46] Onondaga County Department of Drainage and Sanitation/Lake Improvement Office, Responsiveness Summary for Public Hearing on Midland Avenue, compiled May 4, 1999. p.14; excerpt included as exhibit #12.

[47] Draft Recipient Guidance, p. 39658.

[48] U.S. Environmental Protection Agency. Street Storage System for Control of Combined Sewer Surcharge: Retrofitting Stormwater Storage Into Combined Sewer Systems, EPA National Risk Management Research Laboratory, Cincinatti, Ohio, (1999) p. 6-6; excerpts included as exhibit #13.

[49] Id at 6-6.

[50] Exh. 8: Midland Avenue Facilities Plan Amendment, s. 2, p 3-4.

[51] Id. p. 2-4.

[52] *"SUN Begins Picket Line in Protest of County's Manipulation of Sewage Deadlines, $115,000 In Fines Paid with County Tax Dollars"* Syracuse United Neighbors, Press Release, August 8, 2003; included as exhibit #14.

[53] *"Homeowner, SUN Want Plant Details, Hudson Street Resident Learns He May Lose His Home to County Sewage Plant,"* Syracuse Post Standard, October 30, 2003, Section B6; included as exhibit #15.

[54] Draft Recipient Guidance, p. 39658.

[55] Onondaga County Department of Water Environment Protection/Lake Improvement Project Office, *CSO Disinfection Workshop*, October 15, 2002; excerpt included as exhibit #16.

[56] *"Midland Avenue CSO Troubles,"* Atlantic States Legal Foundation, Inc., Onondaga Lake Review, p.18 (March 2000); included as exhibit #17.

[57] Exh. 7: ACJ, p. 2.

[58] Id., p. 2.

[59] Id., p. 11.

[60] Syracuse Zoning Administration, map E-4; included as exhibit #18.

[61] NYS Dept of State, Zoning Board of Appeals: James A. Coon Local Government Technical Series, "Guidelines for Applicant to Zoning Board of Appeals,"www.dos.state.ny.us/lgss/list9.html (accessed April 9, 2004)

[62] Id.

[63] Otto v. Steinhilber, 282 N.Y. 347; *see also* Zoning Board of Appeals: James A. Coon Local Government Technical Series, NYS Dept of State, pp. 9-10.

[64] See attached zoning maps; included as exhibit #18.

[65] Exh. 2; Declaration of Lula Donald.

[66] Exh. 3: Environmental Maps E-MAPS <http://198.102.62.140/emaps/index.asp?minx=-76.180605&maxx=-76.120605&miny=43.072793&maxy=43.012793> (accessed April 3, 2004).

[67] Exh. 3: EPA Envirofacts Warehouse – Quick Start <http://oaspub.epa.gov/enviro/ef_home3.html?p_zipcode=13202&p_type=zip> (accessed on April 2, 2004).

[68] *"Lawsuit Challenges Onondaga's County's CSO Abatement Project"* Atlantic States Legal Foundation, Inc., Newsletter; Summer 2000, p.1; included as exhibit #19.

[69] Id. at 4.

[70] *"Group Protests Fancy Toilet," Syracuse Post-Standard*, April 17, 2000, p.1; excerpt included as exhibit #20.

[71] Exh. 5: Defending Our Place: Protest on the Southside of Syracuse, May 2003.

[72] Exh. 8: Midland Avenue Facilities Plan Amendment, Appendix 9, p. 4.

[73] U.S. 2000 Census, U.S. Census Bureau at < *http://www.factfinder.census.gov/*> searched by zip code (accessed on April 8, 2004).

[74] Exh. 11 Onondaga County Department of Water Environment Protection/Lake Improvement Project Office, *CSO Disinfection Workshop*, October 15, 2002, p. 6.

[75] Exh. 23: Id.

[76] Agency for Toxic Substances and Disease Registry, *ToxFacts: Toluene* searched by <www.atsdr.cdc.gov/tfacts56.html> (accessed on April 3, 2004).

[77] U.S. National Library of Medicine: TOXNET <http://toxnet.nlm.nih.gov/ > (accessed on April 3, 2004).

[78] Id., ATSDR, *ToxFacts: Chloroform*<(www.atsdr.cdc.gov/tfacts6.html>(accessed on April 3, 2004).

[79] U.S. National Library of Medicine: TOXNET <http://toxnet.nlm.nih.gov/ > (accessed on November 25, 2003).

[80] Id.

[81] ATSDR, *ToxFacts: Formaldehyde* <www.atsdr.cdc.gov/tfacts111.html> (accessed on April 3,2004).

[82] Exh. 3: EPA Envirofacts Warehouse – Quick Start <http://oaspub.epa.gov/enviro/ef_home3.html?p_zipcode=13202&p_type=zip> (accessed on April 2, 2004).

[83] *"Does Bad Indoor Air Cause Asthma in Newborns?"* Syracuse Post Standard, Sunday July 21, 2003, p A-15; included as exhibit #21.

[84] *NYSDOH Statewide Planning and Research Cooperative System: Asthma Hospitalization Rates, Children 0-12 years by Zip code for Onondaga County, New York 1998-2000* <http://www.health.state.ny.us/nysdoh/sparcs/sparcs.htm> (accessed on March 30, 2004).

[85] Id.

[86] Id.

[87] Exh. 11: *CSO Program Evaluation Report* (May 2001), p.5-3.

[88] U.S. 2000 Census, U.S. Census Bureau at < *http://www.factfinder.census.gov/*> searched by zip code (accessed on April 8, 2004).