GUILD LAW CENTER

MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE:

A PROJECT OF THE NATIONAL LAWYERS GUILD

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June 25, 2001

Ann Goode, Director
Office of Civil Rights
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. MC 1201A
Washington, D.C. 20460

VIA FACISMILE AT 202-501-1836
AND U.S. MAIL

RE: <u>Title VI Complaint Concerning S & S Metal Processing Permit to Install</u>

Dear Ms. Goode:

On behalf of Flint-Genesee United for Action, Safety and Environmental Justice (FGUA), the NLG/Maurice and Jane Sugar Law Center (the Guild Law Center or the GLC) files this complaint against the Michigan Department of Environmental Quality (MDEQ). On December 27, 2000, MDEQ issued a Permit to Install to S & S Metal Processing for the installation of scrap metal shredder on its property at 5032 North Dort Highway, Flint, Michigan. FGUA believes that the issuance of this permit and the operation of the proposed metal shredder will have a disparate adverse impact on the disproportionately African-American community surrounding the shredder in violation of 40 C.F.R. §§ 7.35(b)-(c).

STATEMENT OF FACTS

FGUA was formed by, and represents the interests of, residents of the northeastern sections of the City of Flint, Michigan and Genesee Township. FGUA has worked for environmental justice for this community since its formation in 1994. The spokesperson for FGUA is Janice O'Neal. Her contact information is provided at the end of this letter.

MDEQ is the state environmental regulatory agency authorized to review and approve or reject applications for Permits to Install and other air emission permits. Upon information and belief, MDEQ receives federal funds to assist in the operation of its environmental programs and is, therefore, subject to Title VI of the Civil Rights Act of 1964 and its implementing regulations, including 40 C.F.R. §§ 7.35(b)-(c).

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On March 30, 2000, S & S Metal Processing (S & S), located at 5032 North Dort Highway, Flint, Michigan, applied for a Permit to Install a metal shredder in an existing metal salvage yard.[1] The metal shredder would be capable of processing up to 60 tons per hour of vehicles, appliances, and industrial machinery. MDEQ recognized that the emissions of primary concern were particulates, mercury, lead and other toxic air contaminants. It issued a draft permit on September 28, 2000 that included some controls aimed at these contaminants.[2] To control particulates, MDEQ proposed that S & S be required to install a cyclone collector and wet scrubber and to meet a 10% opacity limit on stack emissions. To control toxic air pollutants, MDEQ proposed requiring S & S to remove all gas tanks, batteries, automotive fluids (gas, oil, antifreeze, etc.), mercury switches and freon from vehicles, appliances and industrial machinery prior to shredding these materials.[3]

Public comments were received through November 2, 2000. Comments were filed by FGUA, the GLC and many other concerned members of the Flint/Genesee Township community. As a result of public comments on the draft permit, MDEQ agreed to place specific emission limits on toxic air contaminants and on fugitive emissions from the shredder hood and issued the permit on December 27, 2000.[4] However, FGUA remained unsatisfied by the controls placed on the proposed shredder and MDEQ's inadequate response to many of the concerns raised by the public. Commenters were concerned by MDEQ's conservative estimate of the amount of mercury that might be present in S & S source material and its failure to conduct the same type of area-specific cumulative impact analysis for mercury as was done for lead or to explicitly consider the cumulative impacts of lead and mercury emissions in combination. Most importantly, commenters including FGUA, were concerned about MDEQ's failure to require S & S to produce an enforceable, workable plan for screening its source material as part of the permitting process.

Under the terms of the permit issued to S & S, emission limits of mercury, lead and other air toxins are almost entirely dependent on the effectiveness of the source material screening and cleaning procedures that S & S is required to implement. However, S & S was not required to develop an implementation plan as part of its permit application. Instead, MDEQ is allowing S & S to develop a Waste Management Compliance Plan after issuance of the Permit to Install. This Plan, which would include a section on source material screening and cleaning procedures, as well as provisions for proper disposal of the removed material, will be reviewed only by MDEQ staff and will not be open to public review and comment. MDEQ, in fact, specifically rejected FGUA's request to allow public review and comment on the Waste Management Compliance Plan.[5]

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[1] Air Use Permit Application, included in Public Participation Documents for S & S Metal processing, Permit Application No. 92-00, September 28, 2000, attached as Exhibit 1.
[2] Public Participation Documents, Exh. 1, p. 2.
[3] *Id.*, Special Condition Nos. 1, 10-13.
[4] Permit No. 92-00, issued December 27, 2000, included in Letter of December 27, 2000 from Dennis Drake to Interested Party, attached as Exhibit 2.
[5] Letter of March 16, 2001 from Alma Lowry, GLC, to Dennis Drake, MDEQ, attached as Exhibit 3;

Because S & S has not yet submitted its Waste Management Compliance Plan to MDEQ, FGUA cannot make a full evaluation of the likely adverse impact of the proposed metal shredder on its community. However, given the time limitations on filing complaints under 40 C.F.R. §§ 7.35(b) and (c), FGUA files this initial complaint outlining its concerns and reserves the right to supplement the complaint at a later time when the full effect of the shredder can be assessed, in light of its source material screening and cleaning provisions.

ARGUMENT

The United States Environmental Protection Agency (EPA) regulations implementing Title VI of the Civil Rights Act of 1964 are found at 40 C.F.R. §§ 7.35(b), (c). These regulations require all recipients of federal funds to ensure that their programs do not have the effect of discriminating on the basis of race. 40 C.F.R §§ 7.35 (b), (c). This requirement has been interpreted to prohibit adverse disparate impacts that are distributed on the basis of race. MDEQ's decision to issue a Permit to Install to S & S, which will allow emissions of an unknown amount of mercury into a community already overburdened with similar toxins creates just such a prohibited disparate adverse impact.

I. THE PROPOSED METAL SHREDDER WILL AFFECT A POPULATION THAT IS DISPROPORTIONATELY MINORITY.

S &S is located approximately one and one half miles south of GPS. The community affected by the proposed S & S metal shredder is largely the same as that affected by the operation of the Genesee Power Station (GPS). As in the GPS case, this population is disproportionately minority. According to the most recent data available from the United States Census Bureau, the population living within an approximate one-mile radius of the proposed metal shredder is 63% African-American, almost four times as high as the percentage of African-Americans within the state of Michigan (14.2%).[6]

II. THE PROPOSED METAL SHREDDER WILL ADVERSELY IMPACT THIS POPULATION.

While the proposed metal shredder does not qualify as a major source of air pollution, such facilities are anything but innocuous. Metal shredders are known to create significant amounts of smoke and particulate emissions, as the metal being ripped into small pieces becomes overheated and metal pieces flake off from the shredded materials. Many such facilities generate significant noise problems, not only

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Letter of April 4, 2001 from Dennis Drake, MDEQ, to Alma Lowry, GLC, attached as Exhibit 4.

[6] United States Census Bureau, Data on Race, Hispanic or Latino and Age: 2000, downloaded from attached as Exhibit 5.

from the shredding itself, but from minor explosions as overlooked gas tanks and other fuel containers are crushed. Most importantly, however, fugitive emissions of air toxins, such as mercury and lead, can be very high and the permit, as issued, does not guarantee that these emissions will be adequately controlled. These emissions will be particularly devastating to the affected community, because it is already overburdened with such toxic contaminants.

A. The Permit Does Not Provide Adequate Controls for Mercury.

As noted in the Statement of Facts, there is significant disagreement regarding the amount of mercury likely to be found in the shredder source material and, potentially, released from the proposed metal shredder, either through the stack or the hood, and from waste piles of non-metallic shredded materials ("fluff"). MDEQ based its assumptions regarding the amounts of mercury likely to be present in S & S source material on a survey of only four salvage yards which sampled five cars per yard and did not consider other appliances or machinery that might be processed by a typical metal shredder. Based on this survey, MDEQ presumed that there would be an average of 0.43 mercury switches per car, and assuming significant levels of control by the cyclone/wet scrubber system, calculated a total potential emission of 16 to 21 pounds per year of mercury.[7]

Industry estimates of the number of mercury switches sold to the auto industry per year, however, suggest that there would be more than double the number of mercury switches per vehicle assumed by MDEQ. In addition, the cyclone/wet scrubber air emission control system is designed to control particulate emissions, not elemental mercury and, according to MDEQ's own staff, the majority of mercury released from the shredder will be in a form not readily controllable by a wet scrubber/cyclone system.[8] Using these mercury switch sales estimates and taking into account the ineffectiveness of cyclone/wet scrubber systems in controlling elemental mercury emissions, one commenter, the Ecology Center of Ann Arbor, estimated that the shredder might emit up to 140 pounds of mercury per year from crushed vehicles alone. Other materials often processed by metal shredders, such as industrial equipment and white goods, may also include mercury-containing switches, gauges and other devices, raising the potential yearly mercury emissions even higher.

MDEQ appears to have responded to concerns about mercury emissions in three ways: by imposing limits on the volume of materials processed each year, including monitoring requirements on stack emissions, and requiring S & S to remove mercury-containing devices from its source material. Because the first two provisions are unlikely to be effective, control of mercury emissions rests almost entirely on the source material screening requirement.

While limits on the hours of operation could be helpful, the terms drafted by MDEQ, in combination with the emissions limits imposed, do not guarantee that

[7] E-mail of September 5, 200 from Julie Brunner to Robert Sills, attached as Exhibit 6.
[8] E-mail of September 7, 2000 from Joy Taylor to Robert Sills, attached as Exhibit 7.

mercury emissions will be reduced to a safe level. Rather than imposing strict limits on the hours of operation, MDEQ chose to limit the total amount of material that can be processed per hour, per day and per year. Assuming that S & S operates at close to its hourly maximum whenever the shredder is in operation, it would be permitted to operate only 1200 hours per year. Given the hourly emission limit on mercury, this operation schedule would translate into a maximum emission of 36 pounds of mercury per year. MDEQ assumed that this would, in fact, be the annual limit on mercury emissions.[9] However, because of the way the permit terms were drafted, S & S could operate at less efficient hourly processing rates (i.e., less than 60 tons per hour), resulting in more hours of operation per year. Because the hourly mercury emission limit would remain unchanged, this could produce higher levels of mercury emissions per year.

In addition to the reasons explained above, the hourly mercury emission limits do not adequately control mercury releases because of the way these emission limits are measured. The limits apply only to mercury released from the shredder stack and do not address emissions from the shredder hood and the piles of fluff waiting to be removed from the site. MDEQ did not even bother to respond to comments from the public regarding these other potential sources of fugitive emissions. If, as suggested by some studies of metal shredders, fugitive emissions from the shredder hood or fluff piles are significant, stack monitoring alone will not ensure that the facility is meeting its emission limits. In addition, annual, or even quarterly, monitoring will not provide an accurate picture of the daily emissions from the facility, because the emissions from S & S will vary dramatically as the composition of the materials shredded varies from day to day.

Given that neither the annual limits on the amount of material processed or the hourly limits on mercury emissions from the shredder stack are adequate to ensure that mercury emissions remain within a safe range, the waste management compliance plan, which sets out the source material screening and cleaning procedures to be followed by S & S, is absolutely critical to controlling mercury and other air toxic emissions. Unfortunately, as noted earlier, this plan has not been developed yet and, after it is developed, will not be subject to public scrutiny. FGUA cannot be assured that the plan will create enforceable, monitorable, and verifiable limits on the amount of mercury entering the shredder and, potentially, being dispersed into the surrounding community. Accordingly, as drafted, the permit cannot ensure that mercury emissions will be adequately controlled.

B. MDEQ Did Not Conduct an Adequate Cumulative Impact Analysis for Mercury Emissions.

Because of its experiences with the Genesee Power Station case, MDEQ recognized that it must consider the affected community's total lead exposure to determine whether the additional lead emissions from the proposed metal shredder

[9] Exh. 2, p. 5.

would create an adverse impact. Accordingly, MDEQ determined the proposed metal shredder's contribution to lead exposure in the community based on both ambient air levels and long-term depositional impacts to soils. MDEQ then considered whether this additional impact would be detrimental in light of existing background lead exposures via air, soil, food and drinking water and current levels of blood lead poisoning within the affected population.[10] While FGUA does not fully agree with MDEQ's determination that the additional lead emissions generated by the proposed metal shredder would have a negligible and, therefore, acceptable impact on lead levels in the affected community, its analysis at least represents an effort to calculate the actual impacts of additional lead emissions on this particular community.

Unfortunately, MDEQ did not conduct a similar analysis for mercury. Instead, MDEQ relied on generic exposure levels or "health-based screening levels." Even had it been willing to do so, MDEQ could not have performed an adequate cumulative impact analysis for mercury, given that it has no mercury monitoring stations in the area to measure current background levels of mercury.[11] MDEQ also made no effort to consider the impacts of additional mercury exposure in this area given the already elevated lead levels and the similarity of lead and mercury impacts. This issue is discussed in more detail below.

C. The Population Affected by the Proposed Metal Shredder Is Already Disproportionately Burdened with Toxics.

In general, Genesee County and the city of Flint are disproportionately burdened with toxic pollutants. Genesee County ranks among the worst 20% counties in the country in terms of noncancer hazards from hazardous air pollutants, among the worst ix counties in the state of Michigan in terms of added cancer risks from hazardous air pollutants and among the worst seven counties in the state of Michigan in terms of added noncancer hazards from hazardous air pollutants. Genesee County also ranks third worst in the state in terms of health risks from criteria air pollutants.[12] In light of these air emissions levels, over 400,000 people within Genesee County have a cancer risk that exceeds the Clean Air Act's cancer risk goal by more than 100 times. Genesee County also has significantly more Superfund sites and Toxics Release Inventory Sites per square mile than other areas in Michigan.[13] In submissions to the EPA's Office of Civil Rights with respect to the Genesee Power Station (GPS) complaint, FGUA showed that a significant number of hazardous and polluting facilities are located in the area surrounding GPS and S & S, subjecting this particular community to greater environmental hazards than Genesee County as a whole.

The data from this area also shows that families of color and low-income families are more adversely affected by environmental hazards than non-minority,

[10] E-mail of August 30, 2000 from Robert Sills to Julie Brunner, attached as Exhibit 8.
[11] Exhibit 2, Response to Comments Document, December 27, 2000, p. 5.
[12] Information taken from the Environmental Defense Scorecard, located at www.scorecard.org, on June 25, 2001.
[13] *Id.*

middle and upper income families. Within Genesee county, people of color are exposed to 1.93 times more toxic chemical releases, their risk of cancer from hazardous air pollutants is 1.72 times higher and they live 2.25 times nearer to facilities emitting criteria air pollutants than whites. The same pattern is seen for income.[14]

The affected population may be overly burdened with mercury exposure in particular for two reasons. First, recent findings suggest that a significant percentage of people throughout the country have higher mercury body burdens than expected. Second, one major source of mercury exposure in Michigan is through consumption of sport-caught fish and consumption levels of such fish are generally higher in low-income communities and communities of color, like northeast Flint.

In March 2001, the Centers for Disease Control, as part of its National Health and Nutrition Examination Survey, released a study estimating that approximately 10% of women in the United States have mercury body burdens within one-tenth of potentially hazardous levels.[15] The CDC noted, however, that this study could not provide estimates of mercury body burdens for highly exposed groups, such as subsistence fishers or others who eat large amounts of fish.

Studies conducted in Michigan have shown that low-income and minority communities, like the community affected by the S & S metal shredder, are likely to eat significantly higher levels of sport-caught fish than the average Michigan resident. This study focused on the consumption patterns of white and minority anglers who fished in the Detroit River. Survey participants were asked to recall their fish consumption patterns over the prior year. The survey results showed that minorities in low to moderate income levels were more likely to eat sport-caught fish than non-minorities. Looking at survey results related to four different species caught in the Detroit River, the study found that minorities, on average, consumed two and a half times as much sport-caught fish as non-minorities.[16] This pattern was repeated in state-wide surveys, although the difference in consumption was not as significant.[17] This is particularly significant in light of the fact that Michigan has issued fish consumption advisories for all of its inland lakes and reservoirs and many of its rivers and streams due to high levels of mercury contamination in these water bodies. Given that the residents of northeastern Flint and Genesee Township can, due to their ethnic and class composition, be expected to consume higher than average amounts of sport-caught fish from these lakes and streams, this population should be assumed to have a higher than average exposure to mercury.

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[14] Data taken from Environmental Defense Scorecard, found at www.scorecard.org, on June 25, 2001.

[15] Blood and Hair Mercury Levels in Young Children and Women of Childbearing Age – United States, 1999, *in* MMWR Weekly, March 2, 2001, attached as Exhibit 9.

[16] Patrick C. West, "Toxic Fish Consumption from the Detroit River," *in* Race and the Incidence of Environmental Hazards (Bunyan Bryant and Paul Mohai, eds., 1992).

[17] West, "Minority Anglers and Toxic Fish Consumption: Evidence from a Statewide Survey of Michigan," *in* Race and the Incidence of Environmental Hazards (Bunyan Bryant and Paul Mohai, eds., 1992).

The affected community is also exposed to higher than average lead levels and a significant portion of the area's children suffer from blood lead poisoning.[18] This is especially significant because lead and mercury have similar effects on the body, primarily attacking the neurological system and the kidneys.[19] People who are already carrying a heavy body burden of lead are likely to be more vulnerable to mercury exposure. Accordingly, the significance of any increase in mercury exposure should be considered in light of the existing overexposure to lead in this community.

III. MDEQ DID NOT PROVIDE FOR PUBLIC PARTICIPATION IN DEVELOPING CRITICAL TERMS OF THE PERMIT.

Although the S & S permit includes some emission controls on the shredder stack and limits on hours of operation, as noted above, these measures will not provide effective control for mercury in and of themselves. Rather, effective control of mercury and other air toxics rests on the development of an enforceable, monitorable and verifiable system for screening source materials to ensure that components containing mercury or other toxics are removed prior to shredding. This critical compliance component, however, has been removed from public scrutiny and shielded from public comment.[20]

MDEQ itself has given little guidance to S & S for development of this plan. The permit only request that the plan "address identifying, handling, storing, disposing, recycling and record keeping of the materials and how the applicant will coordinate with other suppliers for responsible removal of waste items."[21] This extremely loose set of criterion for evaluating the waste management plan, which is to include the provisions for source material screening, provides no assurances to the community that this plan will provide an verifiable and enforceable method of removing all or most mercury switches from cars and other appliances processed by the facility. By shielding this plan from public review and comment, MDEQ is preventing public participation in negotiating the most critical terms of this permit. Such a decision has an extremely adverse impact on this disproportionately minority and low-income community that will be affected by excess mercury and other air toxic emissions from the proposed metal shredder.

CONCLUSION

For the reasons given above, FGUA believes that MDEQ's decision to issue a permit to S & S Metal Processing for operation of a metal shredder in the same northeast Flint community in which GPS is sited and Select Steel was proposed and to

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[18] FGUA refers the EPA to information regarding lead exposure rates in the Genesee Township area provided in the Genesee Power Station Complaint and Supplemental Complaint filed on behalf of FGUA and the St. Francis Prayer Center.

[19] Agency for Toxic Substances and Disease Registry (ATSDR), ToxFAQS: Mercury; ATSDR, ToxFAQS: Lead, attached as Exhibit 10.

[20] See Exhs. 3, 4.

[21] Exh. 2, Permit No. 92-00, Special Condition No. 22.

shield the most crucial piece of that permit from public review creates an adverse disparate impact on the basis of race and, therefore, is a violation of 40 C.F.R. §§ 7.35(b), (c). FGUA requests that the EPA's Office of Civil Rights conduct an investigation of this decision to determine if the regulations have, in fact, been violated.

Sincerely,
NLG/Maurice and Jane Sugar Law Center for Social and Economic Justice

Alma L. Lowry
Environmental Justice Staff Attorney

Enc.

Complainant Contact Information:
Janice O'Neal
[redacted]