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Most Reverend. Thomas J. Paprocki, President
Edward Grossman, Executive Director
Marta C. Bukata, Deputy Director *
Keith I. Harley
Bess Schenkier
Greta Doumanian

Downtown Office
205 W. Monroe, 4th Floor
Chicago, IL 60606

Phone (312) 726-2938
Fax (312) 726-5206
TDD (773) 731-3477

* Also admitted in Indiana

May 5, 2010

Helena Wooden-Aguilar
Acting Assistant Director
External Compliance and Complaints Program
U.S. EPA Office of Civil Rights
1200 Pennsylvania Ave.
Washington, D.C. 20460

RE: Geneva Energy
OCR # 03R-06-05

Dear Ms. Wooden-Aguilar:

I am writing this letter in response to your request of March 26, 2010 for information about the environmental justice implications of two recent permit modifications approved by the Illinois EPA ("IL EPA") at the Geneva Energy facility in Ford Heights, IL. As you are aware, I represent South Suburban Citizens Opposed to Polluting Our Environment (SS-COPE) in the above-referenced Title VI Complaint. This Complaint was filed on April 19, 2006 and initially focused on the IL EPA's issuance of a construction permit to the Geneva Energy tire-burning facility in October 2005. Once the facility began operation and experienced frequent permit violations and equipment breakdowns, SS-COPE supplemented its original Title VI complaint with information documenting continuing environmental justice concerns directly related to and arising from the matters raised in the original Complaint.

As you know, once a Complaint is accepted, your investigation of the recipient of federal funds is not limited to the specific matter in the Complaint, especially in cases where there is evidence of a pattern of conduct that does not comply with Title VI. On behalf of SS-COPE, I am submitting this letter to supplement the investigation triggered by our original Complaint. In combination with other information now in OCR's possession, the information in this letter is further evidence that IL EPA is not complying with Title VI. This letter focuses on a series of decisions made by IL EPA to avoid public participation in permitting matters relating to the Geneva Energy facility.

One of the key goals of Title VI, as articulated in Executive Order 12898, is to provide enhanced public participation when environmental justice concerns have been raised. 59 F. R. 7629 (1994). U. S. EPA's environmental justice guidance to recipients of federal funds emphasizes the importance of "informing, consulting, and working with potentially affected and affected communities at various stages of the permitting process to address their concerns." 71 F. R. 14207, 14210 (2006). "Public involvement should be an integral part of the permit decision-making process to help the public understand and assess how issues affect their communities." *Id.*

In carrying out its responsibilities under Title VI and Executive Order 12898, IL EPA has pledged to "strengthen the public's involvement in environmental decision-making, including permitting and regulation . . . ." IL EPA Environmental Justice Policy. The IL EPA's EJ Policy was developed in 2005 as the result of the settlement of a previous EJ grievance against IL EPA. [Robbins Resource Recovery Facility, OCR File No. 14R-97-R5.] The IL EPA's Policy is accompanied by a "Participation Policy" that applies in environmental justice communities, *e.g.*, a "community with a low-income and/or minority population greater than twice the statewide average." (*See* www.epa.state.il.us/environmental-justice/policy.html.) Ford Heights, with a 41 % low-income population and an 82 % minority population compared to a statewide average of 10 % low-income and 15 % minority, is an EJ community.

At the same time that IL EPA was subject to investigation by OCR, it approved two permits that changed the operations at the Geneva facility without providing any public outreach, notice, review or opportunity for comment. IL EPA will undoubtedly point out that it was not legally required by federal or state regulation to provide for any public involvement in making its decisions about these changes. For SS-COPE, this is precisely the point. Faced with discretionary decisions not once but twice, IL EPA chose not to provide for public participation. It made these decisions despite an active OCR investigation of its compliance with Title VI, its public commitments to environmental justice, its commitments to U.S. EPA regarding Title VI compliance and its post-Robbins commitments to reform its activities. It made these decisions at the same time it had every reason to know of SS-COPE's active, 10-year participation and ongoing significant interest in permitting matters regarding this facility and that the public living in the vicinity of this facility is protected by Title VI and IL EPA's own environmental justice policies by virtue of its racial composition. It made decisions allowing changes at the same time it was in the process of issuing four Notices of Violation to Geneva for its *existing* operations, asserting hundreds of violations of its *existing* permit terms and conditions. It made these two decisions to avoid public participation against the backdrop of allowing this facility – both as New Heights and Geneva – to operate over ten years without an operating permit, which would have triggered mandatory public participation opportunities that the IL EPA has deftly avoided. Over the past five years, IL EPA has watched Geneva replace its turbine, its stack (which fell over) and many of its pollution control monitoring devices; it has watched as the company had prolonged outages when process- and boiler-related components were replaced or repaired; it allowed the addition of a zinc processing unit and it is now allowing fuel switching.

In IL EPA's view of its obligations under Title VI, nothing cited in the previous, lengthy paragraph triggered any responsibility on its part for any public participation whatsoever. In SS-COPE's view, IL EPA's avoidance of public participation under these circumstances is, once

again, clear evidence of a federally-funded agency operating as Title VI renegade, demonstrated throughout its activities related to the Geneva facility. Simply put, IL EPA still does not "get it" when it comes to Title VI, and it will not until it is held accountable by the agency that is providing it with federal funds.

The first permit authorized the construction of a new zinc sulfate processing unit at the Geneva Energy facility in July, 2009. The facility is operated by Midwest Micronutrients, and it is designed to derive zinc sulfate from the fly ash generated by Geneva and other facilities. According to its permit application, the Midwest Micronutrients unit is designed to process "off-site tire-derived fly ash which may be deemed a hazardous secondary material." If public notice and an opportunity for comment had been provided, the community would have had an opportunity to raise questions about the addition of this entirely new unit at the plant and its potential impact on the public health and environment in Ford Heights, Illinois, including issues related to transportation, storage and processing. Failure to offer any public participation constitutes an actual procedural harm to the community which was excluded from an opportunity to address these concerns. With respect to the zinc sulfate process facility, the IL EPA's decision to skip public notice avoided public notice on, *inter alia,* this new unit's ability to test, analyze and limit hazardous constituents that are characteristic of this unit's emissions, including arsenic, cadmium, chromium, lead, mercury and dioxin. SS-COPE's concerns about the lack of public participation for this unit were expressed in an e-mail of September 11, 2009 from Keith Harley to Brittany Martinez (OCR) and Alan Walts (External Compliance, Region 5). To avoid repetition, this e-mail is attached and incorporated by reference to this letter.

The February 26, 2010 permit allows Geneva Energy to proceed with a trial burn of wood biomass products including shredded salvage wood. Under this permit, Geneva Energy is allowed to burn 1,000 tons of wood biomass along with its tire fuel on a trial basis. Despite the limited scope of the permit, the burning of salvage wood can be problematic if the wood is contaminated with toxics or metals. A 2006 study of wood-burning boilers focused on the need for strict standards for wood fuel and concluded that "requirements for comprehensive testing and sampling of the fuel at both the processing facility and the location of the end user will assure that the fuel quality is maintained." Northeast States for Coordinated Air Use Management ("NESCAUM" Report, "Emissions from Burning Wood Fuels Derived from Construction and Demolition Debris" (2006). *See,* also, Public Comments of Chicago Legal Clinic on the Robbins Community Power construction permit (Permit # 07060081, Public Hearing April 8, 2008), www.epa.state.il.us. Public notice of the permit would have allowed community representatives to voice their concerns and have their questions answered about whether these provisions will adequately protect their health and environment on issues like the transport of wood waste through their community, the storage of wood waste including emergency preparedness for a nearby Head Start, school and for nearby residences in the event of a fire, the suppression of vectors, a description of important factors in firing wood alone or in combination with tires including any changes in combustion and emission characteristics that could create short-term impacts, and any operating history Geneva or affiliated corporations have in preparing, storing or combusting wood waste, especially in light of a fire at a facility in Strong, Maine. Again, failure to offer any public participation constitutes an actual procedural harm to the community which was excluded from an opportunity to address these concerns.

For ten years, IL EPA has avoided another opportunity for public and comment, in this case mandatory: issuance of a Draft Title V Operating Permit for the Geneva Energy facility. Initially, it must be stated that U.S. EPA's delegation of the Title V permitting program to Illinois cannot have contemplated that a facility could operate for ten years without an operating permit; this issue alone warrants inquiry as to whether IL EPA's activities in relationship to this facility are consistent with its execution of this federally-delegated program generally in Illinois.

The construction permit for Geneva Energy was issued in October of 2005, but IL EPA has yet to issue a Draft Title V permit. Indeed, despite operation of the facility over the last ten years -- by Geneva Energy since 2005 and its predecessor New Heights Recovery from 1999 to 2004 -- IL EPA has never proposed or issued an operating permit for the plant.

Illinois' Clean Air Act Permit Program ("CAAPP") states that the IL EPA "shall" issue CAAPP permits to applicable sources, which include sources subject to standards or requirements under Section 111 ("NSPS"). 415 ILCS 5/39.5(2). Geneva Energy's construction permit indicates on its face that Geneva Energy is an NSPS source; thus Geneva Energy is subject to CAAPP permitting. Indeed, Geneva Energy's construction permit itself references a future operating permit in at least four different provisions, Section 1.1, Section 1.8.3, Section 1.9 and Section 2.1.11.

During the course of the Clinic's discussions with IL EPA about operations at Geneva Energy, we have asked several times about the status of an operating permit for Geneva. In February of 2007, an IL EPA official stated that "There is no current time frame as to the issuance of an operating permit." When asked again about the operating permit status in May of 2008, IL EPA stated that "Geneva submitted an updated Title V application on May 1, 2008, and the permit section has begun its preliminary review. However, the Illinois EPA is not in a position to estimate when the permit will issue."

The issuance of a draft operating permit creates a mandatory opportunity for public comment, which has been avoided in this case over a ten year period. The Illinois Administrative Code provides for public notice and comment on all CAAPP permits. 35 Ill. Admin. Code 252.102. But this opportunity for public notice and comment has been avoided by IL EPA's decision to delay indefinitely the development of an operating permit. Notably, unlike the more narrow modifications for the zinc processing unit and for the combustion of wood waste, the CAAPP/Title 5 permitting process allows for an omnibus review of every aspect of a facility's operations including its compliance status. Notably, this provides an opportunity for review not only for all interested members of the public, but also for U.S. EPA which must be given an opportunity for review by the issuing state. Allowing this facility to operate over ten years without an operating permit not only avoids public review, it also avoids review by your Agency as well.

Thank you for attention to these comments and for incorporating these into your investigation file OCR # 03R-06-05. As always, my clients and I welcome the opportunity to speak with you concerning this matter.

Sincerely,

Keith Harley
Attorney-at-Law

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