

Benjamin McPherson
New York State Department of Environmental Conservation
270 Michigan Ave.,
Buffalo, NY 14203

January 17th 2020

**Re: Clean Air Coalition Comments Opposing Brownfield Application for Former Tonawanda Coke Facility by Riverview Innovation and Technology Campus
site ID #C915353**

Dear Mr. McPherson,

The Clean Air Coalition (Clean Air) respectfully submits the following comments regarding the brownfield application for Riverview Innovation & Technology Campus, Inc. for a site known as Riverview Innovation and Technology Campus, site ID #C915353, located at 3875 River Road, Tonawanda, New York 14150.

We request that the New York State Department of Environmental Conservation (NYS DEC) reject the application due to the fact it is incomplete, premature, and not in the interest of the public. If approved as is, the NYSDEC will warp the purpose of the Brownfield Cleanup Program (BCP), originally intended as a pathway to return blighted properties to the tax rolls. This application sets a dangerous precedent, reducing the program to a loophole for legally recognized primary polluters to avoid their financial and environmental responsibility. Clean Air members, and the residents of Western New York deserve a full and comprehensive remediation, which is not what current application seeks.

Given the long history of criminal environmental violations that have occurred on this property, the fact that the property is located in an environmental justice community, is subject to current ongoing removal action by the Environmental Protection Agency (EPA), and there exists a viable Principle Responsible Party (PRP), we request that only after this property has been determined to be found not to be a significant threat to human health or the environment should it be considered for a tax incentive program, such as the Brownfield Cleanup Program (BCP).

Over 10 years ago our members, many who lived with cancers such as leukemia, lung cancer and other rare respiratory illness, organized to hold Tonawanda Coke accountable for environmental violations that put their health at risk.

The media coverage and public pressure generated by Clean Air members have resulted in real change. In December of 2009, the U.S. Department of Justice, the U.S. EPA, NYS DEC and U.S. Coast Guard raided Tonawanda Coke with a federal search warrant. Less than a week later Mark Kamholz, Tonawanda Coke's Environmental Control Manager was arrested.

Our member's advocacy resulted in an EPA enforcement action and criminal trial. In March 2013, Tonawanda Coke was found guilty of breaking 14 federal laws under the Clean Air Act and the Resource Conservation and Recovery Act. Mark Kamholz was found guilty on the same counts plus an additional count of obstruction of justice.

The company was fined \$12.5 million in fines, 5 years of probation, and to pay nearly \$12 million for future health and environmental studies. Mark Kamholz was sentenced to 1 year and 1 day in prison for plus a \$20,000 fine and a supervised release after serving the term.

Since the EPA's enforcement action, air monitors have reported dramatic reductions in benzene. The continuous air monitor at Grand Island Blvd reported a 92% benzene reduction, with a 68% reduction at the air monitor on Brookside Terrace. These reductions, the result of over a decade of work by Clean Air members, represent significant improvements to air quality and public safety.

In May 2018, Clean Air was notified that a waste heat tunnel at Tonawanda Coke collapsed, and publicly called on the DEC and EPA to examine potential toxic emissions being released into the surrounding community. Clean Air members documented black smoke coming from the facility and submitted hundreds of complaints to the DEC and EPA, bringing further attention to the gravity of the situation. In July 2018, DEC and EPA inspections at Tonawanda Coke revealed 176 violations of environmental regulations, and a cease and desist letter was issued.

When court proceedings began in September 2018, Clean Air members filled the court chambers for 2 weeks. We heard the U.S. Government detail multiple instances where the company violated their probation order, including numerous compliance issues brought forth by the NYS DEC and the EPA, specifically citing daily opacity violations, an inspection revealing a giant hole in the company's ammonia tank resulting in a chemical leak, and structural damage at the facility. The U.S. Court ruled the company was in violation of their probation.

In October 2018, Tonawanda Coke revealed that it would close and reorganize under Chapter 11 bankruptcy. Members immediately called for a worker transition plan, and for a site classification for the full property. We submitted 379 petitions the NYS DEC Commissioner to refer the site to the Federal Superfund Program (Appendix 1), and over 20 community and labor organizations also submitted letters of support. (Appendix 2).

Procedural History

On December 4th, 2019 the NYS DEC issued a notice for public comment for the Riverview Innovation and Technology Campus (RITC) Brownfield Cleanup Program Application. The end date for public comment is January 18th, 2020.

Overview of the Site

In 1917, Semet-Solvay Co., a subsidiary of Allied Chemical, began burning coal at the site to extract coke and other elements, such as benzene, xylene and toluene, for manufacturing purposes. Allied Chemical later purchased Honeywell and changed its name. Some sections of the property had been used to dispose of wastes such as coal tar sludge and fly ash before 1978, when Tonawanda Coke purchased the property to continue producing coke. Prior investigations indicated widespread contamination from the disposal of industrial and hazardous waste.

On October 14, 2018, TCC suspended operations and initiated process shutdown to permanently close its facility. On October 15th, 2018, Paul Saffrin and Micheal Dirken of Tonawanda Coke filed for Chapter 11 bankruptcy. At the same time, the EPA took oversight of the property “working under its CERCLA removal authorities” (Superfund).¹

The sale of the property was ordered by the U.S. Bankruptcy Court in September 2019. The bankruptcy court accepted a proposal from Ontario Specialty Construction and Honeywell International, Inc. for the sale of the TCC property to Riverview Innovation and Technology Campus Inc. (RITC) for the redevelopment of the property as a data center.

The Site is approximately 129 acres in size and the nearest residential area is approximately 0.25 miles south of the site, where Clean Air members live. The site is comprised of two parcels of land separated

¹ (USEPA Proof of Claim 2019)

by River Road. The parcel of the east side of River Road, known as the main plant area, is the portion where coke manufacturing formerly occurred. The parcel on the west side of River Road, adjacent to the Niagara River, is known as Site 108 and is designated as a state superfund site, currently “under EPA oversight.”²

Operable Unit #3 (Site 108) comprises the western parcel of the site adjacent to the Niagara River, and was used for transferring coal from the river to the plant facility via conveyor belts. In 1973, the Erie County Health Department granted Allied Chemical (Honeywell) permission to establish a disposal area, which was subsequently filled with refuse, wood, scrap polyethylene and ceramic saddle packing from refining equipment. The disposal of coke/coal, fly-ash cinders, and coal tar sludge has also been documented. Additionally, the site is under a consent order with Honeywell and under enforcement action.³

Operable Unit #2 (Site 109) is located near River Road on the western side of the plant portion of the site. Disposal and handling of industrial waste from the coke production activities at the site have contaminated the soil, groundwater and sediment with semi-volatile organic compounds and metals that are related to coke production. There is a 2008 Record of Decision on this site that requires that Tonawanda Coke restrict access to OU2 and that an environmental easement be filed to control the future use of the area. This easement has not yet been executed.⁴

Operable Unit #1 (Site 110) is located in the northeast corner of the plant portion of the site. Materials such as coal tar sludge, wood shavings impregnated with iron oxide, fly ash, and cinders were reportedly disposed of at OU1. The disposal activities are reported to have occurred prior to 1978. In 2005, SVOCs such as benzo(a)anthracene and benzo(a)pyrene were detected above standards in the surface soil site. The health impacts of Benzo[a]pyrene include genetic defects, cancer, and damage to fertility. The contaminant is also very toxic to aquatic life with long lasting effects and hazards to the aquatic environment over the long-term. Cyanide was consistently detected above the groundwater standards from samples collected in 2005. Human health impacts of Cyanide include organ damage. Cyanide is also extremely toxic to aquatic life with long lasting effects. A 2008 Record of Decision required that

² (USEPA Community Update 2019)

³ (Administrative Settlement Agreement and Order on Consent for a Removal Action 2019)

⁴ (NYSDEC Fact Sheet 2017)

Tonawanda Coke restrict access to OU1 and that an environmental easement be filed to control the future use of the area. This easement has not yet been executed.⁵

1) Application should be rejected because this project is not in the Public Interest.

According to NY Env Cons L § 27-1407 (9), “The department may reject such request for participation if the department determines that the public interest would not be served by granting such request...”

Tonawanda Coke is a massively polluted site with three portions of the property that have been already classified as Class 2 Superfund Sites; meaning they pose a significant threat to human health and the environment. The portion of the property that is included in the application has not yet been classified, and it is where most of the coke manufacturing processes took place: the battery, ovens and coal field. It is extremely reasonable to conclude that this portion of the property also poses a risk to human health, and therefore would go against the public interest if allowed into a voluntary cleanup program.

In paragraph 12 of Tonawanda Coke Corporation’s bankruptcy filing dated October 15, 2018, Tonawanda Coke described their property as follows: “It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.”⁶ This filing, like other bankruptcy filings, declares under penalty of perjury that the information therein is, within reasonable belief, true and correct.

Based on this, and on the general characteristics of a site on which a Manufactured Gas Plant is known to have operated for 100 years, and on the urgent efforts by state and federal regulators over the past 10 years to bring this site into regulatory compliance, *there can be no reasonable doubt that the applicant’s site poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.*

Typical brownfield remedial measures, such as capping a site with a layer of clean soil, are woefully inadequate as a safeguard against the threat of imminent and identifiable hazard to public health or safety found at applicant’s site and other large, highly contaminated sites.

We request that the NYSDEC reject the application, unless it clearly states in the vision that a full and comprehensive remediation will be taken. We request that the application include full removal of contamination, where contaminated soil is dug up and trucked to an EPA certified hazardous waste

⁵ (NYSDEC Fact Sheet 2017)

⁶ (Voluntary Petition for Non-Individuals Filing for Bankruptcy 2018)

landfill. We request that the workers conducting this remediation are paid prevailing wage, and the work is put to a public bidding process. We request that clean backfill used after removal takes place.

2. Application should be rejected because the project poses a threat to the drinking water for millions of people.

Any cleanup activity must work to ensure the protection of critical water resources. Lakes Erie, Ontario, and the Niagara River are part of freshwater system that provides drinking water to over 20 million people throughout the United States and Canada.⁷ The Western New York region has a long history of industrial pollution contaminating our shared drinking water resources, and since 2010, nearly 3 billion dollars have been invested in the Great Lakes through the Great Lakes Restoration Initiative.⁸ Because of this investment, our region has begun a resurgence driven by the cleanup a century of pollution that has inflicted serious harm to residents. A project that does not support this major investment in our region is unacceptable.

Contamination on this site continues to negatively impact the directly adjacent Niagara River. The Niagara River is designated as an Area of Concern by the binational Great Lakes Water Quality Agreement of 1987. The river is listed as “highly degraded” due to contamination from industrial and municipal pollution.⁹ Additionally, even as NYS DEC classifies the Niagara River as “Class A-Special,” indicating best uses include it being a drinking water source as well as a resource for swimming, and fishing, it is listed as “impaired” on the NYS DEC Section 303d listing, with its waters having an “elevated susceptibility” to contamination from upstream industrial sources such as Tonawanda Coke.¹⁰

Tonawanda Coke has been shown to actively contribute to degraded water quality, contaminated nearshore sediment, and many of the cataloged contaminants present on, and leaching from the site are directly linked with human health impacts, such as cancer and respiratory disease.

Contaminants in the Niagara River include priority organics (PCBs and PAHs), pesticides, and other compounds found on the Tonawanda Coke site. The University at Buffalo Soil Study has presented data indicating that Tonawanda Coke is a significant source of PAHs to the surrounding environment, and

⁷ (Lake Ontario Partnership 2018) (Alliance for the Great Lakes 2020)

⁸ (Great Lakes Restoration Initiative 2020)

⁹ (EPA 2020)

¹⁰ (NYSDEC WI/PWL Fact Sheet 2008)

coupled with analysis included in the Niagara River Toxins Management Plan that PAH concentrations are higher in upstream areas, it is imperative to properly understand the impact that this site has had on water resources in the Niagara River surrounding communities.¹¹ A cleanup that does not address the full scale of this contamination is, by definition, incomplete, and leaves those who rely on the Niagara River for drinking water at risk.

3. Application Should be Rejected Because the Proposed Soil Cleanup Levels are Inappropriate for this Site.

The applicant's intention to remediate the property to Industrial Soil Cleanup Objectives (SCOs) is inappropriate for a site adjacent to the Niagara River. The Niagara River, a Class A-Special fresh surface water, is near a NYS DOS Significant Coastal Habitat, and habitat for rare, threatened and endangered species, including the Bald Eagle. Due to its Class A-Special designation, the River serves as drinking water source for millions of both New York State and Canadian residents.

Data presented in the application shows that significant concentrations of toxic contamination exist in surface, subsurface, and groundwater, and originate from sources on site. Because of the significant adverse effects that these contaminants have on the River, Ecological Resources Soil Cleanup Objectives (ESCO) must be used to ensure both ecological health and human safety. **Utilizing a lesser SCO, such as industrial, which the application proposes, is extremely inappropriate for this site.**

Additionally, the application presents its potential use to be commercial. Commercial use is defined as “a land use for the primary purpose of buying, selling or trading of merchandise or services. Commercial use includes passive recreational uses, which are public uses with limited potential for soil contact.”¹² The SCOs for commercial land use are typically 50 percent less than the Industrial SCOs. For instance, the Commercial SCO for Benzene, in NYS DEC's Table Part 375-6.8(b) is 44ppm while the Industrial SCO is 89ppm. In addition to the SCOs being inappropriate for the ecology of the surrounding lands, the applicant stipulates its future use as commercial but claims they will clean up to industrial SCOs, most often double the levels required by the NYS DEC.

¹¹ (Gardella 2019) (Niagara River Secretariat 2007)

¹² (NYSDEC Technical Support Document 2006)

4. Application Should be Rejected Because the Project Will Continue to Discharge Contaminated Stormwater.

The High Potential for on-site contamination to continue entering the Niagara River through stormwater management systems is extremely concerning.

Data presented in the application show impacted surface water being conveyed in ditches through the coal yard, which is located in the application project area, before being directly discharged into the Niagara River from Site 108. Additionally, the outfall at site 108 is located within the FEMA 100-year floodplain, and it is likely that floodwaters will spread contaminants to nearby land.

5. Application should be deemed incomplete because it fails to acknowledge site was a Manufactured Gas Plant (MGP).

The Brownfield Cleanup Program (BCP) application should be deemed incomplete because it fails to acknowledge that the site was a manufactured gas plant (MGP), otherwise known as a coal gas plant or coke gas plant.

Section III(4) of the BCP application form requires the applicant to “indicate past land uses” by “check[ing] all that apply.” Applicant has only checked the box for “Manufacturing” and has failed to check “Coal Gas Manufacturing” despite clear evidence that the plant on applicant’s site operated as a manufactured gas plant, otherwise known as a coal gas plant or coke gas plant, in addition to being a former coke manufacturing site that produced coke and coke by-products.¹³

The requirement to “check all that apply” for past land uses is clear and has not been met. There can be no reasonable argument that “Coal Gas Manufacturing” was a secondary activity associated with the production of coke and coke by-products, and therefore needn’t be acknowledged. DEC’s own MGP website describes two of the main types of MGP processes and points out that “Sometimes, the coke was the primary product, and the gas was a by-product, and the facility was called a coke plant.”¹⁴

There is clear evidence that the coke plant on applicant’s site was a major contributor to the regional gas distribution system of Iroquois Gas Company. For many decades, from the 1920s to the 1970s, Iroquois

¹³ (Tonawanda Coke website 2008)

¹⁴ (<https://www.dec.ny.gov/chemical/24911.html>)

Gas Company supplied “mixed gas,” consisting of a mixture of manufactured gas and natural gas, to its Buffalo-area customers. For at least part of this time, the coke plant located on applicant’s site was a major contributor to the Iroquois Gas system. As stated on the website of prior owner Tonawanda Coke Corporation, “Approximately 30 million cubic feet of coke oven gas was also sold daily to Iroquois Gas Company.”¹⁵ The description of site history in the applicant's BCP application, pg. 56, also notes that “The extracted gas is used to fire the subsequent coking operations or *sold as fuel.*”

6. Application should be rejected because by failing to acknowledge site as a former MGP site may result in harm to the public.

DEC’s own MGP website includes a page called “What are the Environmental Impacts Resulting from a Former MGP?”, which reads:

“The most widespread environmental impacts from former MGPs involve groundwater which becomes contaminated by contact with coal tar, tar contaminated soil or purifier waste. The contaminated groundwater can then [sic] move away from the site into other areas.”

Typically, the most significant environmental impacts from MGP sites are related to organisms living on the bottom of nearby surface water bodies such as streams, rivers and lakes. Significant accumulations of tar-impacted sediments have been found near former MGPs. MGPs may have discharged mixtures of tar and water directly into these water bodies when they were operating. The tars settled into the sediments at the bottom of these bodies. In addition, some MGP sites may contain tar seeps, where tar emerges from subsurface soil into water bodies.

In addition to visible tar, lower levels of PAH contamination are often found in sediments near MGPs. Contaminated sediments may be carried by stream flow or tidal action to other areas. Wildlife which lives or feeds in the impacted sediments may be exposed to these MGP contaminants.

PAHs from MGP sites may harm fish and wildlife directly exposed to the contaminants. Based on similarities between coal tar and petroleum, large releases of coal tar directly into surface water may taint nearby fish, making them aesthetically unfit to eat. However, small releases are unlikely to lead to substantial contamination of fish because fish and wildlife generally metabolize PAHs, so that PAHs do

¹⁵ (American Gas Journal 1923) (Federal Power Commission et al. v. Hope Natural Gas Co, 1944) (Doran 1976)

not build up in edible tissues. PAHs are not passed along in the food chain, and do not accumulate in predatory fish and birds.¹⁶

Currently available information shows that tar seeps are present on applicant's site and that PAHs are present in quantities far greater than "small releases." Soil samples conducted by the University at Buffalo show that metals such as arsenic and mercury were found within surface and subsurface samples.

Additionally, the contaminant category classified as "other" in the application lists "constituents associated with a former coke making and by-products facility." This description is misleading and should clearly reference the extent of polycyclic aromatic hydrocarbons (PAHs) found in surface and subsurface soil samples. PAHs are a dangerous class of contaminants produced by coke plants, and contaminants such as Benzo[a]pyrene have been found in high concentration on the TCC site and in surrounding communities.

Typical brownfield remedial measures, such as capping a site with a layer of clean soil, would not address the above-quoted DEC concern that contaminated groundwater can carry contaminants "away from the site into other areas." Overall, this BCP application fails to convey the magnitude of remediation needed for this site, resulting partly from the size of the site and partly from its complex mixture of toxic contaminants.

7. Application should be rejected because it is not supported by sound science.

The application relies heavily on data that is nearly 35 years old and does not present a comprehensive assessment of current conditions on the property. Groundwater data in particular is lacking, as the most recent groundwater sample data referenced in the application is from July 16, 1992: 17 years earlier than the first federal law enforcement raid of the property for its egregious pollution practices, 21 years before the company's criminal conviction under the Clean Air Act and Resource Conservation and Recovery Act, and 28 years before the company was found to be in violation of its probation by continuing to pollute with toxic substances. Due to the long history of extreme pollution and violations at this site, determinations about the site's current conditions should not be made with decades-old data.

¹⁶ (NYSDEC 2020)

Pursuant to NYCRR Part 375-3.3(a)(4)(ii), in determining eligibility of site for the BCP, NYS DEC may request the “performance of a subsurface investigation,” also known as a Phase II investigation.

According to an October 2018 NYSDEC press release, Commissioner Basil Seggos said, "For too long, Tonawanda Coke has been a mismanaged blight on this community, and its owners will be held accountable for any damage to this community and the environment. We are directing the company to open their doors and take all appropriate steps to protect this community during their shutdown. DEC experts will be a constant, on-site presence to ensure public safety, and we demand TCC provide all information necessary to fully secure the site. After the plant is safely shuttered a comprehensive investigation of any potential contamination will be launched to safeguard the Tonawanda community."¹⁷

While not included within the brownfield application boundary, adjacent portions of the property have been listed on New York’s Inactive Waste registry since 1979. Through investigations that span 25 years, all referenced by the applicant, a determination was reached in December of 2004 to focus on the Operable Units, which are referred to as Sites 108, 109 and 110. In March 2008, a Record of Decision was issued by NYS DEC identifying the remedies for Sites 109 and 110. The ROD states that the sites use institutional and engineering controls to prevent contamination to the environment. Site 108 is actively being cleaned up by Honeywell Inc as the primary responsible party identified on the property.¹⁸

The studies referenced by the applicant were studies initiated by the NYS DEC and initially focused on the entire property until 1990. It was only then that the studies were pared down to the current breakdown of the site as currently listed. The Operable Units were arbitrarily defined by a dotted line on a map. The reasoning for these segments was based on the operating status of areas on the site. **These dotted lines are artificial boundaries that do not prevent pollution migration through the soil.**

Site 109 and Site 110’s record of decision requires the following environmental easement that requires:

¹⁷ (NYSDEC Press Release 2018)

¹⁸ (Administrative Settlement Agreement and Order on Consent for a Removal Action 2019)

- limiting the use and development of the property to industrial uses;
- *evaluate the need for remediation of the site if the future use of the site is industrial but the manufacturing activities are different from the current coke production activities;*
- compliance with the approved site management plan;
- restricting the use of groundwater as a source of potable or process water, without necessary water quality treatment as determined by NYS DOH; and
- the property owner to complete and submit to the Department a periodic certification of institutional and engineering controls.¹⁹

Within this ROD, NYS DEC found that “the groundwater at the site is contaminated with site-related chemicals but the contamination marginally exceeds the SCGs and therefore does not warrant remediation.” Significant to this is that the soils were NOT remediated.²⁰ The non-remediation approach was undertaken because access to the sites were restricted with a fence. This was prior to the waste heat tunnel collapse and the coking production running at less than optimal conditions (stack opacity violations). Groundwater concerns exceedances on a non-operational section of land can only mean exceedances upstream, within the confines of the Brownfield applications property.

It is premature for NYS DEC to consider a property for a tax credit program when it has not yet determined the level of contamination for that property. ***We request that the DEC promptly require additional subsurface sampling to characterize current conditions at the site is performed before any determination of brownfield eligibility is reached.*** Any delays may have significant impacts on the health of the community.

- 8. Application should be rejected because it is not supported by the best available science, for example, the integrity of the underlying clay aquitard is claimed but has not been demonstrated.**

The applicant's BCP application refers to red-brown clay, with some silt and gravel lenses, that underlies the entire site. The thickness of this unit is unknown, since the prior on-Site investigative boreholes did not extend to the bottom of the unit, but data from investigations conducted at adjacent sites indicate that

¹⁹ (NYSDEC Record of Decision Tonawanda Coke Corporation Site Operable Unit Nos. 1 and 2 2008)

²⁰ (NYSDEC Record of Decision Tonawanda Coke Corporation Site Operable Unit Nos. 1 and 2 2008)

the clay averages more than 50-feet thick. The clay unit is a regional feature and extends throughout this area of Tonawanda.

The groundwater on the property has been reported to occur as a shallow unit, typically within 5-feet of the ground surface. The groundwater is perched atop the undulating surface of the top of the clay layer. The clay layer is an aquitard, limiting the vertical migration potential of the groundwater.

The conclusion that the “clay layer is an aquitard, limiting the vertical migration potential of the groundwater” is unsupported in two respects. First, the presence of “some silt and gravel lenses” may provide interconnected pathways through the clay layer, thus allowing downward migration of contaminated groundwater into deeper geologic units. This cannot be determined without site-specific investigation. Second, coke ovens are typically supported by steel pilings that may penetrate the clay layer and provide multiple pathways through which contaminated groundwater may migrate downward into deeper geologic units. This cannot be determined without site-specific investigation. The unknown integrity of the aquitard is another example of the applicant’s poor portrayal of the magnitude of remediation needed for this site.

Impacted groundwater flows from the property to the Niagara River. Data in the application derived from groundwater monitoring wells on the site show groundwater contamination on the site. Due to a shallow clay layer, contaminated groundwater remains under the influence of surficial contamination as it flows to the Niagara River. Contamination discharged into the Niagara River, either through permitted and up permitted wastewater discharges or contaminated groundwater, have the potential to affect downstream Public Water Supplies with nearby downstream water intakes: North Tonawanda (PWS NY3100572 and Lockport, NY (PWS NY3100564).

Additionally, the proposed cleanup area includes 41.3 acres of NYS DEC jurisdictional wetlands in the southern extent of the property. The site’s topography places the wetlands down-gradient of the plant and coal yard, and they receive a large quantity of polluted surface runoff during rain events. These wetlands serve as rare critical natural habitat in this industrial corridor and should be fully remediated and protected from future development.

9. NYSDEC must require applicant to include comprehensive science and sampling in this application

Due to the lack of any comprehensive science or sampling plan included in the application, we request that the NYSDEC require the applicant to include a robust sampling plan of the property, with the intent of identifying hotspots. Due to the level of contamination on this site, the sampling plan must include samples from multiple locations; specifically a variety of locations from the byproducts area, coal field, the batteries, the baghouse, retention ponds, by products area, any breakthroughs inside the waste heat tunnel, and areas that the EPA or NYS DEC have identified where tanks have spilled or leaked.

Baseline sampling should be taken from the highest topographical location, and also from the lowest gradient of the property. Sampling needs to occur at varying and comprehensive depths. We are especially concerned about leaching that likely has occurred through the collapse heat tunnel. The lack of heat in the tunnel allows for the collection of contaminated groundwaters that likely will permeate the tunnels barriers.

Several samples must be taken from contaminant ditch north and south of the coalfield located adjacent to Site 109. Multiple samples must be required at the boundaries of both site Class 2 Superfund sites #109 and site #110. Site #109 should also be re-sampled due to the fact the site was never remediated and the data included in the application is outdated.

NYS DEC must require no composite sampling and no averaging in order to identify the extent of contamination and hotspots of contamination.

10. Application should be rejected because it is premature, due to the presence of a Potentially Responsible Party (PRP).

Honeywell (Allied Chemical) is known to be the PRP of the site. Being a Fortune 500 company, they should be held for their culpability and lack of stewardship. They are currently working under an enforcement consent order on adjacent superfund properties which is not part of the applicant property but cited to be leveraged as a dependent use for the proposed data center. NYSDEC must reject this application unless Honeywell enters into this application as a participant, and is required to pay cost recovery.

It is our assertion that the approval of this Brownfield application will prevent and delay a thorough and expedited cleanup of the Tonawanda Coke facility, given the fact there is a PRP available, and ongoing removal action is currently taking place. The approval of this application will increase the disproportionate burden on the already overburdened Environmental Justice community.

11. Application should be rejected because it is premature given ongoing enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

According to 6 CRR-NY 375-3.3 regarding a site's eligibility for the Brownfield Cleanup Program, ineligible sites include any real property which is subject to any ongoing State or Federal environmental enforcement action related to contamination at the site.

EPA deployed an Environmental Response Team (ERT) to the site on October 14th, 2018 to secure the site and begin 24-hour, real-time air monitoring around the community surrounding the plant. The EPA gained control of the site on October 17th, 2018, when it assumed control of the boiler and byproducts operations and conducted measures to control for accidental releases and emergencies. To date, EPA has provided 5 community updates, including a presentation to first responders in December of 2018. Included in this presentation was information on abandoned ponds, tanks and chemical lakes, none of which are referenced in the brownfield application. A sample of pictures documenting these issues are included in attachment 3.

EPA is currently on site conducting a removal action under their removal authority granted through CERCLA. In its 2019 proof of claim to Tonawanda Coke, EPA included claim costs for removal actions taken on Site 108 along with their ERT actions. Point 15 stipulates that, "EPA has also performed removal actions under CERCLA under a portion of the TCC site known as Site 108." EPA continues on to list three "near-term conditions of concern" including: above-ground storage tanks, a compromised earthen berm and a broken pipe and fittings near the storage tanks."²¹

Furthermore, the claim states that there "have been actual or threatened releases of hazardous substances at and from the TCC Site into the environment that pose a threat to public health or welfare of the environment." The use of removal funding on Site 108 and the Tonawanda Coke main facility constitute

²¹ (USEPA Proof of Claim 2019)

enforcement actions taken against this facility. According to their December 2019 factsheet report to citizens, EPA “continues its presence on site.”²²

12. The applicant’s track record from previous brownfield projects has a history of delaying cleanup efforts, missing remediation timelines and failing to meet the cleanup standards of the DEC.

Jon Williams is a Buffalo-area business owner and real estate developer who has applied for the brownfield program multiple times in our community. Williams founded Riverview Innovation and Technology Campus in August of 2019, shortly before he purchased this property for \$1.00. We do not want clean up driven by any potential financial limitations of this company. Williams’ track record shows a history of delaying timelines, benchmarks and shirking responsibility.

The American Axle site is located at 1001 East Delevan Ave. Buffalo, NY 14125. This site is located in a NYS DEC Potential Environmental Justice Zone,²³ and the Delevan Grider community where Clean Air members live. NYS DEC records confirmed that the site contains hazardous oil, grease, and PCBs that have leached into the surrounding sewer system. PCBs, toxins banned in 1979, are known to cause cancer as well as a variety of adverse health effects. Despite the NYS DEC issuing an Order of Consent on the site in 2006, remediation was never initiated.

Through his business East Delevan Properties (EDP), Williams took ownership of the property containing the American Axle Site on October 3, 2008. At the time the site was purchased, there were 110,000 gallons of toxic sludge under the facility.²⁴ Negotiations between General Motors (GM), the NYS DEC, and Williams took place between 2008 and 2017, without any start to remediation, despite the fact that General Motors paid New York State \$10.4M to begin.

After years of organizing by Clean Air members in the community, the introduction of a Buffalo Common Council resolution urging for remediation, and multiple news stories on this issue, Williams finally submitted a Brownfield Cleanup Program Application for the property on 3/9/2016. This 8 year

²² (USEPA Community Update 2019)

²³ (NYSDEC Region 9 EJ Maps 2020)

²⁴ (Investigative Post 2017)

delay highlights the applicant's fundamental misunderstanding of and disregard for the immediate health risks posed by Hazardous Waste Sites.

Williams then took an additional year (2/17/2017) to submit a Preliminary Work Plan for the Site.

Despite this significant length of time, the DEC proceeded to reject the applicant's Preliminary Work Plan and referred a portion of the Site to the New York State Superfund Program on 5/1/2017.

According to the DEC, the applicant's Proposed Work Plan was rejected because "it is clear that active sources at the Site have not been eliminated and the Site has not been adequately managed."²⁵

In addition, the Site size requested in the Brownfield Application (3.36 acres) was less than 70 percent of the full Site size (5 acres) determined by the DEC to require an additional Remedial Investigation and Feasibility Study to accurately understand the contamination risks posed by the Site. It follows that the applicant would have left over 30 percent of the Site unremediated if the DEC had not intervened.

Further, the applicant's inability to properly manage the full 5 acres of the American Axle Site is deeply concerning, considering this amount of land is less than 4 percent of the size of the 129-acre Tonawanda Coke Site.

Also according to the DEC, a portion of the Site was referred to the NYS Superfund Program, in light of the public interest to avoid delay in addressing the significant threat posed by the Site. Most significantly, the DEC did not begin remediation efforts at the Site until 5/14/2019. Given the fact that the DEC acknowledged the substantial risks posed by the Site, we find it deeply concerning that the applicant's intervention in cleanup efforts at the Site (10/3/2008) delayed proper remediation for over a decade (5/14/2019).²⁶

Williams' delaying the cleanup process, coupled with his mismanagement of the site, as it was characterized by the NYS DEC in 2017, caused grave harm to the surrounding community. Residents living in the neighborhood surrounding American Axle have spent over 10 years living with the consequences of his indifference to their health, safety, and well-being. The full extent of a decade of active leaching of PCBs and other toxic substances into the sewers, air, and soil of a residential

²⁵ (NYSDEC Response Letter 2017)

²⁶ (WGRZ-TV 2019)

neighborhood have yet to be comprehensively understood, but cancer, lupus, and other illnesses linked to PCBs have already robbed residents of their lives and livelihoods. Neighbors of the American Axle site describe frustration, exhaustion, and fear, unable to plant food in their yards because they still don't know what the soil contains or how it will impact their health. The true impacts of Williams' neglect will be felt for generations in Delevan Grider.

It is imperative that this negligence and indifference to human health be accounted for. The NYS DEC must not allow Williams to continue to profit off the suffering of human beings.

13. This project's brownfield process must include a robust public input process

According to NY Env Cons L § 27-1417, the NYSDEC is responsible for providing opportunities for citizen participation throughout the brownfield program. The fact that the NYSDEC denied a long-standing community organization's right to a public hearing has resulted in little faith that the department has the ability to include and integrate the public's vision and expertise in this process.

The purpose of the brownfield program is community economic development. We request a full citizen participation process. Including multiple public hearings at every stage of the process, accessible disclosure and sharing of information by the department shall be provided, including the provision of technical data and the assumptions upon which the analyses are based. We also request that the department involve the public before decisions are made, not after the fact. We request to be full partners in this process. We request that the NYSDEC set up a community decision making team whether or not the NYSDEC accepts the project into the program. This team will work alongside of NYSDEC decision makers. Clean Air members, and other members of the public who have been impacted by this site should be decision makers from the beginning, not after decisions that impact our lives have already been made.

Conclusion

In summary, we request the following:

- The NYSDEC should reject the application.
- NYSDEC and EPA should move forward with all available enforcement actions to ensure there is no threat to human health and the environment.
- NYSDEC require the applicant to include a robust sampling plan of the property, with the intent of identifying hotspots. The sampling plan must include samples from multiple locations; specifically from the byproducts area, coal field, the batteries, the baghouse, retention ponds, by products area, any breakthroughs inside the waste heat tunnel, and where tanks have leadked. Baseline sampling should be taken from the highest topographical location, and also from the lowest gradient of the property. Sampling needs to occur at varying and comprehensive depths. Several samples must be taken from contaminant ditch north and south of the coalfield located adjacent to Site 109. Multiple samples must be required at the boundaries of both site Class 2 Superfund sites #109 and site #110. Site #109 should also be re-sampled due to the fact the site was never remediated and the data included in the application is outdated.
- NYS DEC must require no composite sampling and no averaging in order to identify the extent of contamination and hotspots of contamination.
- Clean Air requests an opportunity to provide commenting on any draft remediation investigation plan prior to its approval.
- We request an opportunity to comment on any remediation plan prior to approval.
- We request that to be involved in any future public participation plan.
- We request that any future remediation work that occurs on site by put to a public bid process and require prevailing wage.

Respectfully,

Rebecca Newberry, Executive Director

Linnea Brett, Community Organizer

Gary Schulenberg, Member

Maria Tisby, Member

Emily Terrana, Member

And Members of Clean Air Technical Team

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Attachments:

A: Petition Signatures

B: Letters of Support

C.EPA Presentation December 2018 Photos