

## Create Control - Data Entry

Control Number: OCR-14-000-4371

Alternate Number:

### Citizen Information

Citizen/Originator: 1). (b) (6) Privacy, (b) (7)(C) Enforcement Privacy, New York, NY 10011

Search Citizen

Constituent: Search Constituent

Committee:

Sub-Committee:

### Control Information

Status: Pending \*

Letter Date: Jan 27, 2014

Received Date: Jan 28, 2014

Contact Type: LTR (Letter) \*

Priority Code: Normal \*

Addressee: US/EA Office of Civil Rights (+)

Addressee Org: 1200 Avenue, N.W.

File Code: 108-025-08\_497\_a Discrimination Complaints - External Record Copy \*

Signature: (+)

CC: Search CC

Signature Date: Date

Primary Subject: Civil Rights Complaint Under Title 6

(+)

Secondary Subject:

(+)

Instructions: NRN-No Response Necessary

(+)

Instruction Notes:

General Notes: This control is assigned to title 6 for appropriate action.

\*: Required field

(+): Lookup field, press space bar for complete list

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Continue and Assign

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NATURAL RESOURCES DEFENSE COUNCIL

Helena Wooden-Aguilar  
External Civil Rights - Assistant Director  
Office of Civil Rights (1201A)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

January 27, 2014

Re: Civil Rights Complaint under Title VI of the Civil Rights Act of 1964 and 40 C.F.R. Part 7

Dear Ms. Wooden-Aguilar:

Enclosed is a Title VI complaint regarding the ongoing construction on the North Shore of Staten Island to raise the Bayonne Bridge roadway. The Natural Resources Defense Council (NRDC) files this complaint on behalf of Complainant, the North Shore Waterfront Conservancy of Staten Island and its Executive Director and President, [REDACTED]. In response, the Environmental Protection Agency (EPA) Office of Civil Rights must promptly investigate this complaint to ensure that the Port Authority of New York and New Jersey fully complies with its duties under Title VI of the Civil Rights Act of 1964 and EPA's Title VI implementing regulations.

Complainant would like to meaningfully participate in the Title VI investigation, resolution, and compliance process. Please contact NRDC with any questions. Pursuant to EPA's instructions, this complaint will be submitted by FedEx mail, email, and fax. Thank you for your attention, we look forward to your prompt response.

Sincerely,

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**COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964**  
**42 U.S.C. § 2000d and 40 C.F.R. Part 7**

**I. INTRODUCTION**

This is a civil rights complaint by the North Shore Waterfront Conservancy of Staten Island, Inc. ("NSWC"; "Complainant") under Title VI of the Civil Rights Act of 1964 and 40 C.F.R. Part 7, alleging adverse and discriminatory impacts in connection with the Port Authority of New York and New Jersey ("Port Authority") project to raise the roadway of the Bayonne Bridge ("Project"). The Port Authority is a bi-state agency that is governed by a Board of Commissioners, appointed by the governors of New York and New Jersey. The United States Coast Guard ("Coast Guard") authorized the Project when it issued a Permit Amendment to the Port Authority on or around May 23, 2013.

This Complaint demonstrates that the Port Authority's actions constitute a *prima facie* violation of Title VI under the U.S. Environmental Protection Agency's ("EPA") implementing regulations. The discriminatory action first occurred in September 2013 when Skanska Koch-Kiewit Joint Venture began the pre-construction phase of the Project pursuant to its contract with the Port Authority. Pre-construction activities included surveying, soil boring tests, and paint removal.<sup>1</sup> Primary construction began on Staten Island on November 4, 2013 with the closing of the Trantor Place access ramps and remains ongoing at the time of filing.<sup>2</sup>

The Bayonne Bridge ("Bridge") connects Staten Island, New York and Bayonne, New Jersey. The Bridge crosses the Kill Van Kull, which is the primary shipping channel between the Port of New York and New Jersey ("Port") and several major cargo terminals. More than 2,000 vessels passed beneath the Bridge en route to and from these cargo terminals in 2010, and the Port

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<sup>1</sup> James Yates, Staten Island residents can now watch Bayonne Bridge construction project on webcam, STATEN ISLAND ADVANCE (Sept. 25, 2013, 9:04 AM), [http://www.silive.com/news/index.ssf/2013/09/staten\\_island\\_residents\\_can\\_no.html](http://www.silive.com/news/index.ssf/2013/09/staten_island_residents_can_no.html).

<sup>2</sup> Michael Sedon, Richmond Terrace/Trantor Place on and off ramps to Bayonne Bridge to be closed until 2015, STATEN ISLAND ADVANCE (Oct. 31, 2013, 4:50 PM), [http://www.silive.com/news/index.ssf/2013/10/richmond\\_terracetrantor\\_place.html](http://www.silive.com/news/index.ssf/2013/10/richmond_terracetrantor_place.html).



Authority seeks to raise the vertical clearance of the Bridge to accommodate larger vessels coming from foreign ports.

Construction of the Project is exposing communities of color on the North Shore of Staten Island to a variety of hazardous contaminants. The Project is projected to take at minimum four years to complete, and will occur on properties that have historically been used for industrial purposes. The Coast Guard admits that the construction zone properties on both sides of the Bridge may contain lead, arsenic, asbestos, and polychlorinated biphenyls ("PCBs"), among other contaminants. Construction activities are likely exposing nearby residents to these and other hazardous substances through a variety of pathway media including groundwater and surface water runoff, but most immediately through airborne inhalation and ingestion.

While these exposure pathways are creating adversity in the residential study areas surrounding the construction zones on both the New York and New Jersey sides of the Bridge, the Project further exacerbates existing cumulative adversity borne by the communities of color on the North Shore of Staten Island in conflict with EPA policy that "potential adverse disparate cumulative impacts from stressors should be assessed, and reduced or eliminated wherever possible."<sup>3</sup> These cumulative burdens considered in conjunction with the communities' demographics, when compared to both the Bayonne study area population and the rest of Staten Island, establishes a pattern of racially discriminatory behavior appropriate for remedy under EPA's Title VI regulations.

Around the Bridge, the North Shore of Staten Island consists of densely populated communities of color already overburdened by a disproportionate number of polluting industries and facilities. Approximately 10,100 Staten Island residents comprise the affected population around the Project construction zone, along with several schools and community facilities. In addition to the Project's expansive construction, stretching almost a mile under the Bridge through

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<sup>3</sup> Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39669 (June 27, 2000) [hereinafter Draft Revised Investigating Guidance].

the North Shore, affected residents are surrounded by a radiological site, four factories, a power plant, several contaminated spill sites, and active port terminals.<sup>4</sup> The North Shore of Staten Island is a National Ambient Air Quality Standard (“NAAQS”) nonattainment area for particulate matter 2.5.<sup>5</sup> EPA has recognized the North Shore’s status as an environmental justice community, selecting it as one of ten EPA “Environmental Justice Showcase Communities” in the United States because of the number of children in the community with elevated levels of lead in their blood due to the area’s industrial legacy.<sup>6</sup> Unique to the majority-white, more sparsely populated borough of Staten Island, the people of color living on the densely populated North Shore are more likely than their white counterparts to be affected by Project construction and the array of cumulative burdens already present in their communities.

Commencing and continuing construction with such an adverse, disparate, and unjustified impact on communities of color constitutes a *prima facie* violation of EPA’s Title VI regulations.

## II. JURISDICTION

### A. The Complainant

The North Shore Waterfront Conservancy of Staten Island is a not-for-profit membership corporation organized under the laws of the State of New York. NSWC is a community-based grassroots organization. Its mission is to advance and promote safe and sustainable access to the waterfront; build healthier, greener communities along the Kill Van Kull; and advance public policies and laws that are inclusive of the needs of Staten Island’s North Shore environmental justice communities. NSWC has over 100 members, many of whom are people of color who live

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<sup>4</sup> North Shore of Staten Island – Environmental Justice Profile: Toxic Sites, URBAN STUDIES 252/710: THE CHANGING URBAN ENV’T/ENVTL. POLICY, QUEENS COLLEGE, CITY UNIV. OF N.Y. (last visited Dec. 5, 2013), <http://northshoreprofile.commons.gc.cuny.edu/toxic-sites/>.

<sup>5</sup> Green Book: Currently Designated Nonattainment Areas for All Criteria Pollutants, U.S. ENVTL. PROT. AGENCY (last visited Dec. 5, 2013), <http://www.epa.gov/oaqps001/greenbk/ancl.html>.

<sup>6</sup> Region 2 EJ Showcase Community: Staten Island NY, U.S. ENVTL. PROT. AGENCY (last updated May 24, 2012), <http://www.epa.gov/environmentaljustice/grants/ej-showcase-r02.html>.



within the affected population.<sup>7</sup> NSWC is a complainant on behalf of its members of color who live, work, and recreate near the Project and who are experiencing the adverse, discriminatory impacts of Project construction.

NSWC has engaged with the Coast Guard and the Port Authority throughout the Project's development, including by submitting comments to the Coast Guard's Draft Environmental Assessment ("Draft EA"), Final Environmental Assessment ("Final EA"), and filing a complaint in coordination with other not-for-profit organizations under the National Environmental Policy Act ("NEPA")<sup>8</sup> for injunctive relief against the Coast Guard.<sup>9</sup>

## **B. Federal Financial Assistance**

The Port Authority must comply with EPA's Title VI implementing regulations because it receives federal financial assistance from the agency.<sup>10</sup> EPA awarded the Port Authority nearly \$12.5 million for its Clean Truck Program between 2009 and 2010.<sup>11</sup> While no additional disbursements have been made, grants for this program are slated to continue through 2013.<sup>12</sup>

Under Title VI of the Civil Rights Act of 1964:

No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.<sup>13</sup>

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<sup>7</sup> See *infra* Part IV.B.1 (defining the "affected population" as those residents living within the quarter-mile perimeter or study area surrounding the mile-long construction zones on both sides of the Bridge).

<sup>8</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>9</sup> EPA has similarly participated in the NEPA process for the Project, expressing written concerns about the Draft EA on Mar. 5, 2013 and about the Final EA on Jun. 27, 2013. See, e.g., Letter from John Filippelli, Director, U.S. EPA Region 2 Clean Air and Sustainability Div., to Gary Kassof, Commander, First Coast Guard Dist., 1 (Mar. 5, 2013) ("As EPA also noted throughout the EA development process, we believe that changes in cargo movement associated with the project could result in some change in community impacts, particularly related to port traffic and air quality. We also have concerns that any such impacts would likely be borne disproportionately by the minority and low-income communities...").

<sup>10</sup> 40 C.F.R. § 7.15.

<sup>11</sup> Prime Award Spending Data for Port Authority of New York and New Jersey for 2008-2013, U.S. OFFICE OF MGMT. & BUDGET (last visited Dec. 5, 2013), <http://usaspending.gov/advanced-search> (search "Recipient DUNS Number" for "001794205\*", 015901770\*, 040766917\*, 118865294\*"; select 2008 through 2013 for "Fiscal Year"; export "Spending Type" as "Assistance").

<sup>12</sup> *Id.*

<sup>13</sup> 42 U.S.C. § 2000d.

While the Project has not been financed directly by EPA, amendments made to Title VI by the Civil Rights Restoration Act of 1987 clarify that discrimination is prohibited across all activities of recipient institutions if any part of that institution receives federal financial assistance.<sup>14</sup> As a recipient institution, the Port Authority has a duty to comply with the requirements of Title VI in all of its decisions.

### **C. Timeliness of the Complaint**

A complaint must be filed within 180 days of the discriminatory act, inclusive of continuing violations as long as action subject to Title VI has occurred within the 180-day period.<sup>15</sup> The construction occurring under contract with the Port Authority constitutes an ongoing discriminatory action. Skanska Koch-Kiewit Joint Venture began pre-construction of the Project, including soil boring and paint removal, in September 2013.<sup>16</sup> Primary construction began on Staten Island on November 4, 2013 and remains ongoing at the time of filing.<sup>17</sup> This Complaint is thus timely filed.

## **III. STATEMENT OF FACTS**

### **A. The Project to Raise the Bayonne Bridge Roadway**

The Panama Canal is currently undergoing construction that will enable larger ships to travel from Asia, through the Canal, to the east coast of the United States. This expansion is expected to be completed in 2015. The larger ships carry more than double the amount of cargo that can be carried by the largest ships that currently travel the Panama Canal to the east coast. The new “post-Panamax” ships are 1,200 feet long and have a keel-to-mast height of 190 feet.

The Port Authority has repeatedly relied on the economic necessity of the Project, representing to federal authorities including President Obama and the U.S. Department of

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<sup>14</sup> S. Rep. No. 100-64, at 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 6.

<sup>15</sup> 40 C.F.R. § 7.120(b)(2); Draft Revised Investigating Guidance, 65 Fed. Reg. at 39672.

<sup>16</sup> Yates, *supra*.

<sup>17</sup> Sedon, *supra*.

Transportation (“DOT”) that the Port Authority will lose business to other ports equipped to handle post-Panamax ships if the Bridge is not raised.<sup>18</sup>

In 2010, the Port Authority submitted a TIGER grant application to DOT, requesting funding to analyze the environmental impacts of modifying the Bridge. The application provided that the Project “is crucial for maintaining and developing the regional economies of New York and New Jersey,” and that failure to raise the roadway “may damage the economies of New York and New Jersey, as shipping companies will divert to ports capable of handling larger, economically efficient vessels.”<sup>19</sup>

This explanation for the Project was maintained in the Final EA’s “Purpose and Need” chapter. It characterizes the increase in vertical clearance of the Bridge roadway as “necessary to adapt to this current trend in the shipping industry and allow these larger vessels to pass beneath the Bridge to the Port of New York and New Jersey.”<sup>20</sup>

## **B. Project Construction**

The Bayonne Bridge is located over the Kill Van Kull, the primary shipping channel between the Port and several major cargo terminals. More than 2,000 vessels passed beneath the Bridge in 2010. The Bridge carries state highway 440 and connects Staten Island, New York and Bayonne, New Jersey. The Project will take nearly four years to complete, and will occur on properties on Staten Island and in Bayonne that have historically been used for industrial activities.

Construction will raise the Bridge by approximately 65 feet at its centerline, build new piers on both sides of the Bridge, and increase the grade of the approaches and interchanges from New

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<sup>18</sup> See Letter from Patrick J. Foye, Executive Director, the Port Auth. of N.Y. & N.J., to the Honorable Janet Napolitano, Secretary, U.S. Dep’t of Homeland Sec. and the Honorable Ray LaHood, Secretary, U.S. Dep’t of Transp., 2 (Mar. 23, 2012); TIGER II Planning Grant Application: Bayonne Bridge Navigational Clearance Program, Prepared for Submission by the Port Auth. of N.Y. and N.J., 3, 5 (2010), *available at* <http://cleanandsafeports.org/wp-content/uploads/2012/07/PANYNJ-TIGER-Application-for-Bayonne-Bridge.pdf> [hereinafter TIGER II Planning Grant Application].

<sup>19</sup> TIGER II Planning Grant Application, *supra*, at 3.

<sup>20</sup> Bayonne Bridge Navigational Assessment Program: Final Environmental Assessment, Prepared by the U.S. Coast Guard in consultation with the Port Auth. of N.Y. and N.J., 1-2 (May 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=USCG-2012-1091-0118> [hereinafter Final EA].



York and New Jersey. Construction will take place on the Bridge and almost a mile in each direction along the roadway into Staten Island and Bayonne. Construction entails demolition of parts of the existing Bridge structure, excavation and removal of soil, and groundwater dewatering.<sup>21</sup>

Pre-construction began in September 2013. Primary construction began on Staten Island on November 4, 2013 with the closing of the Trantor Place access ramps and remains ongoing at the time of filing.

### **C. Permit Issuance and the NEPA Process**

In September 2011, the Coast Guard issued a NEPA Workplan ("Workplan") for the Project. The Workplan provided an overview of the Project, including its purpose, alternatives, and anticipated environmental effects.

On November 8, 2011, the Port Authority filed an application with the Coast Guard for a Permit Amendment to raise the Bridge pursuant to the Rivers and Harbors Act of 1899.

On January 4, 2013, the Coast Guard issued its Draft EA. Complainant provided oral comments to the Coast Guard on the Draft EA.<sup>22</sup> The comments requested that the Coast Guard complete a full Environmental Impact Statement ("EIS") for the Project rather than the proposed Final EA.<sup>23</sup> Complainant also requested that greater opportunity for participation in the permitting process be afforded to the affected North Shore environmental justice communities, including by providing documents in languages other than English.<sup>24</sup>

On May 16, 2013, the Coast Guard issued a Final EA and a Finding of No Significant Impact. The Final EA largely adopted the conclusions made in the Draft EA. In light of the Final EA, Complainant again submitted comments, expressing similar and ongoing concerns about the

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<sup>21</sup> *Id.* at 16-7, 15-9.

<sup>22</sup> See Oral Comments of [REDACTED] Bayonne Bridge Raising Project Draft Environmental Assessment/Section 106 (Evening Session) Public Meeting Transcript, Issued by the U.S. Coast Guard, 40-43 (Feb. 7, 2013), available at <http://www.regulations.gov/#!documentDetail;D=USCG-2012-1091-0094>.

<sup>23</sup> *Id.* at 40.

<sup>24</sup> *Id.* at 41-42.

Project.<sup>25</sup> As with the Draft EA, Complainant requested that a more thorough EIS be done for the Project and specifically noted that the Final EA ignores the effects of disturbing historically contaminated land in the construction zone and the array of cumulative burdens faced by the North Shore environmental justice communities.<sup>26</sup> Specifically, the comments point to Complainant's experience with historic fill material containing indiscriminately used contaminants, the ongoing problems with high levels of lead exposure among children on the North Shore, and Complainant's interest in using Project construction as an opportunity to consider mitigation approaches to the cumulative adversity borne disproportionately by the communities of color.<sup>27</sup>

Meanwhile, on April 24, 2013, the Port Authority awarded a construction contract for the Project to Skanska Koch-Kiewit Joint Venture. On or about May 23, 2013, the Coast Guard issued the Bridge Permit Amendment to the Port Authority.

On July 31, 2013, Complainant, in coordination with the Natural Resources Defense Council, Elm Park Civic Association, and Coalition for Healthy Ports, filed a complaint against the Coast Guard in U.S. District Court for the Southern District of New York. The Complaint alleges that the Coast Guard failed to prepare an adequate Final EA, failed to provide meaningful public participation by relying on non-public information in preparation of the Final EA, and failed to prepare an EIS in violation of the Administrative Procedure Act ("APA")<sup>28</sup> and NEPA.

Under the constraints of available remedies, the NEPA Complaint asked the District Court to declare that the effects of the Project require a full EIS and failure to prepare one violates the APA and NEPA; order the Coast Guard to prepare an EIS; and stay the effect of the Bridge Permit Amendment granted to the Port Authority until NEPA requirements are fulfilled.

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<sup>25</sup> See Comments on Coast Guard Final Environmental Assessment, Submitted by the Northshore Waterfront Conservancy of Staten Island, Inc. (June 27, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=USCG-2012-1091-0121>.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 7–9.

<sup>28</sup> 5 U.S.C. §§ 701 *et seq.*

Although this Complaint shares a party and factual background with the NEPA Complaint, EPA's Title VI regulations offer substantive remedies not available to Complainant under NEPA. The following Title VI analysis focuses in large part on issues of discriminatory impact not central to the NEPA analysis and unlikely to be reached by the District Court. Therefore, EPA should not dismiss this Title VI Complaint despite the pending NEPA claim.

#### **IV. ARGUMENT**

The Port Authority's decision to award a construction contract to raise the Bridge roadway violates its statutory and regulatory duties under Title VI and EPA's implementing regulations, which prohibit federal funding recipients from making decisions that have a discriminatory effect on people of color.<sup>29</sup> Project construction is likely creating new sources of contamination exposure and exacerbating the existing cumulative burdens borne disparately by communities of color on the North Shore of Staten Island, thereby creating an adverse and discriminatory outcome. Raising the Bridge to provide access to larger foreign vessels may increase the Port's economic competitiveness, but Project benefits will not be felt by the communities of color further burdened to achieve that end. Therefore, the Port Authority's economic justification for the Project does not negate the need for mitigation to overcome the adverse and disparate impact created by its construction.

##### **A. Project Construction Is Causing Significant Adverse Health Impacts**

As discussed in Chapter 14 of the Final EA, contaminated materials are frequently encountered during construction in historically industrial areas that have previously been disturbed through construction, excavation, or fill.<sup>30</sup> The Project is no exception, as the Final EA notes that "the project site and vicinity were historically developed with industrial activities that are known to have caused subsurface contamination."<sup>31</sup> In particular, Project construction requires

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<sup>29</sup> 40 C.F.R. § 7.35(b)-(c).

<sup>30</sup> Final EA, *supra*, at 14-4.

<sup>31</sup> *Id.*



disturbance of structures and soil containing lead, asbestos, and PCBs.<sup>32</sup> Construction entails demolition of parts of the existing Bridge structure, excavation and removal of soil, and groundwater dewatering.<sup>33</sup>

### **1. Project Construction Disturbs Contaminated Materials and Creates Exposure Pathways**

According to the Final EA, PCBs were detected in Bayonne site soils at concentrations above New Jersey Department of Environmental Protection ("NJDEP") soil remediation standards.<sup>34</sup> Arsenic plumes have been identified in both soil and groundwater.<sup>35</sup> Lead was detected above NJDEP remediation standards in at least one location, while found in other varying concentrations at eleven different testing sites.<sup>36</sup>

Similarly on the North Shore, the Final EA reports a test from the 1990s that detected lead at nine locations, with concentrations ranging from 166 mg/kg to 5,810 mg/kg, all above typical New York Soil Cleanup Objectives.<sup>37</sup> Suspect asbestos containing materials exist throughout the Staten Island construction zone in building materials located below the Bridge.<sup>38</sup> Information dating back to 1917 identifies an underground storage tank associated with a former filling station, and the Port Authority has no updated information on the presence or status of the tank.<sup>39</sup> The Richmond Terrace Radiological Site, previously used to store high-grade uranium ore for the Manhattan Project, is located adjacent to the construction zone.<sup>40</sup> Radiological contamination was first identified at the site in 1980 and has since been confirmed by subsequent testing.<sup>41</sup>

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<sup>32</sup> See *id.* at 14-6-14-8.

<sup>33</sup> See *id.* 16-7, 15-9.

<sup>34</sup> *Id.* at 14-6.

<sup>35</sup> *Id.* at 14-7.

<sup>36</sup> Final EA, *supra*, at 14-6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 14-6, 14-7.

<sup>39</sup> *Id.* at 14-7.

<sup>40</sup> *Id.* at 14-8.

<sup>41</sup> *Id.*

At both sites, the Final EA describes soil stockpiles of unknown origin or environmental quality.<sup>42</sup> Known filling events occurred on construction zone lots and “typical historic fill material may contain contaminants, such as metals and polynuclear aromatic hydrocarbons (PAHs).”<sup>43</sup> There are also groundwater monitoring wells of unknown origin that are highly suggestive of preexisting groundwater contamination, which would create problems during the dewatering process, whereby groundwater is pumped from excavations to keep the construction area dry.<sup>44</sup> The Bridge has not been repainted since its construction in 1931, and areas of the Bridge are peeling lead-based paint.<sup>45</sup> Railroad tracks and spurs were historically located at both sites and “railroad bedding material is known to contain a variety of contaminants including metals, PCBs, and pesticides.”<sup>46</sup>

Independent visits to the construction zone and surrounding study area revealed that by November 5, 2013, excavation had begun in areas of known PCB contamination without any precautions in place to contain runoff from the soil piles. Similarly, in areas of known lead contamination, there is evidence of soil disturbance and that excavated materials from the site are being carried onto public sidewalks by construction vehicles. On a construction zone site with recognized lead, PCB, and historic fill conditions, a large roll-off container labeled “Adler” sat next to a soil pile, indicating that the Port Authority has been generating contaminated material requiring off-site disposal.

With respect to the Richmond Terrace Radiological Site, the Final EA cites investigations subsequent to 1980 that have isolated the contaminated area to the northwest corner of the Site’s current property line, and suggests that engineering controls are in place to prevent disturbance of

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<sup>42</sup> Final EA, *supra*, at 14-7.

<sup>43</sup> Bayonne Bridge Navigational Assessment Program: Phase 1 Environmental Site Assessment, Appendix G: Hazardous and Contaminated Materials, prepared by Hatch Mott MacDonald on behalf of the Port Auth. of N.Y. and N.J., 1 (May 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=USCG-2012-1091-0118> [hereinafter Appendix G]; Final EA, *supra*, at 15-9.

<sup>44</sup> Final EA, *supra*, at 14-7.

<sup>45</sup> *Id.* at 14-6.

<sup>46</sup> *Id.* at 14-7.

the known radioactive contamination.<sup>47</sup> Because the Richmond Terrace Radiological Site is not directly disturbed by the Port Authority's construction plans, Appendix G to the Final EA specifies that the radioactive contamination does not pose a threat, "conditioned on the Richmond Terrace Site's engineering controls being maintained and that no disturbance to the impacted area occur."<sup>48</sup> However, there are no published reports that reference the engineering controls relied upon by the Final EA, suggesting none are in place. This is supported by a recent Wall Street Journal site evaluation quoting the current Richmond Terrace Radiological Site occupants and operators as not knowing anything about the presence of nuclear materials on the property.<sup>49</sup>

Further, the current Richmond Terrace Radiological Site is not the full extent of the radioactive contamination's historical footprint.<sup>50</sup> What are now known as three separate sites, the current Richmond Terrace Radiological Site waterfront property ("Parcel 1"), a site which begins at Richmond Terrace and extends south along Nicholas Avenue ("Parcel 2"), and the adjacent Port Authority owned property encompassing the construction zone around the Bridge and a substantial portion of John Street ("Parcel 3"), were originally one property owned by the Archer-Daniels Midland Company when the Belgian Union Minière Du Haut-Katanga Company stored its high-grade uranium ore there from 1939-1942.<sup>51</sup> The ore was stored in thousands of steel drums in a warehouse located at the east foot of the Bridge.<sup>52</sup> An independent investigation revealed that since

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<sup>47</sup> *Id.* at 14-8.

<sup>48</sup> Appendix G, *supra*, at 10.

<sup>49</sup> Waste Lands: America's Forgotten Nuclear Legacy, Staten Island Warehouse, WALL STREET J. (last updated Oct. 29, 2013), <http://projects.wsj.com/waste-lands/site/442-staten-island-warehouse/> ("Sal Mazzio of Apple Towing said he had never heard anything about past work involving nuclear materials at the site. Steve Margarella of Margarella Asphalt said he had heard of the past nuclear work but had been assured when he leased his portion of the site that it didn't have any contamination problems.").

<sup>50</sup> Appendix G, *supra*, at 10.

<sup>51</sup> B. A. Berven & C. Clark, Preliminary Radiological Survey Report of the Former Staten Island Warehouse Site (Archer-Daniels Midland Company) at Port Richmond, New York, the Health & Safety Research Div., Oak Ridge Nat'l Lab., 1 (Oct. 1980); *see id.* at figure 2 (providing the location of the three parcels formerly owned by Archer-Daniels Midland Company); *but see* Appendix G, *supra*, at 10 (classifying the same three parcels as more geographically limited and citing the Belgian Union Minière Du Haut-Katanga Company as owning the original, unified property in conflict with the Berven & Clark survey).

<sup>52</sup> Edmund A. Vierzba, Authority Review for the Former Staten Island Warehouse (Archer-Daniels Midland Company) Port Richmond, New York, the Aerospace Corp., 1 (Aug. 1985).



1980, no further surveys have been conducted to determine whether additional portions of the historical property footprint are contaminated, despite the 1980 survey specifying that the original radiological scan was “very limited and yielded information only about a 2 to 3 [meter] strip around the perimeter” of Parcels 2 and 3.<sup>53</sup> This raises the possibility that the Port Authority owned property being disturbed by Project construction shares the radiological contamination characteristics known to exist on neighboring Parcel 1, the current Richmond Terrace Radiological Site.<sup>54</sup>

Although current data is unavailable for several sources of contamination historically found in the construction zone, scientific understanding of these hazardous materials is strong enough to draw reliable conclusions about the present state of contamination. The normal processes that can decrease pollutants in soil include biodegradation, volatilization, dissolution, and dissipation in ground water. However, PCBs, lead, and arsenic are all persistent contaminants with long half-lives. PCBs are resistant to biodegradation, are water soluble, and are not highly volatile. Lead is poorly dissolved in water. While arsenic can dissolve in water, it would take decades to diminish the concentrations last measured in 2012 in the absence of active remediation efforts.

Since primary construction began, residents living on streets adjacent to the North Shore construction zone, including John Street, Newark Avenue, Lasalle Street, Walker Street, Winant Street, and Forest Avenue, have reported that their vehicles are covered with an unknown dust or particulate matter blowing over from the Port Authority properties. Complainant NSWC has received updates from its member residents that they are experiencing increased coughing, throat irritation, and difficulty breathing. There have been increased asthma attacks in the environmental justice communities. There are also complaints about strong chemical odors permeating the neighborhoods on particular days.

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<sup>53</sup> *Id.* at 2; Berven & Clark, *supra*, at 3.

<sup>54</sup> *See infra* Title VI Administrative Complaint Exhibit A.

This evidence from the affected North Shore residents highlights the likelihood and dangerousness of an inhalation or ingestion pathway for the contaminants made airborne by Project construction. As EPA's publications report, the primary source of early childhood lead exposure is lead-contaminated house dust, due to children's frequent contact with surfaces where dust gathers and hand-to-mouth activity.<sup>55</sup> Two major sources of lead-contaminated house dust are lead-contaminated soil and airborne lead.<sup>56</sup> Direct contact with lead-contaminated soil and inhalation of lead in ambient air also contribute to exposure.<sup>57</sup> Similarly, the presence of PCBs in indoor dust and air constitute an important exposure pathway, particularly for younger children.<sup>58</sup> When asbestos-containing materials are disturbed, they can release hazardous fibers into the air and water, leading to serious lung conditions.<sup>59</sup>

Across the board, these pollutants that originate outdoors can penetrate the indoor environment through cracks and other entry points, with contaminants from public sidewalks and streets often being carried into the home on residents' shoes and clothing.<sup>60</sup> "In areas where groundwater is contaminated, chemicals may enter indoor environments via vapor intrusion."<sup>61</sup> On the North Shore, these exposure pathways are even more likely to reach highly vulnerable children because there are seven schools with outdoor play areas within the affected study area.<sup>62</sup>

Therefore, the ongoing Project construction presents a serious likelihood of exposure for the surrounding communities on both the Bayonne and Staten Island sides of the Bridge. However, the status of the North Shore as a cumulatively burdened Environmental Justice Showcase

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<sup>55</sup> America's Children and the Environment, U.S. Env't'l Prot. Agency, EPA 240-R-13-001, 118 (3d. ed. Jan. 2013), available at [http://www.epa.gov/ace/pdfs/ACE3\\_2013.pdf](http://www.epa.gov/ace/pdfs/ACE3_2013.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 152.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 59.

<sup>61</sup> *Id.*

<sup>62</sup> Final EA, *supra*, at 4-2.

Community means that the additional adversity created by Project construction is being felt even more acutely by the communities of color adjacent to the Staten Island construction zone.

## **2. Project Construction Exacerbates Cumulative Adversity on the North Shore**

As highlighted by EPA in the preamble to its 2000 Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (“Draft Revised Investigating Guidance”), Title VI concerns are often raised because communities are suffering from adverse effects caused by multiple sources, and they seek to use modification of an existing permit to focus attention on the cumulative impacts stemming from a long-term pattern of discriminatory decisions.<sup>63</sup> Earlier iterations of EPA policy for investigating Title VI administrative complaints anticipate this use of Title VI, noting that “[EPA] will entertain cases only in which the permitted facility at issue is one of several facilities, which together present a cumulative burden or which reflect a pattern of disparate impact.”<sup>64</sup>

One of EPA’s newest Title VI Draft White Papers, Adversity and Compliance with Environmental Health-Based Thresholds, strengthens the position of Title VI complainants generally by eliminating the rebuttable presumption that attainment of health-based environmental standards like NAAQS means no adverse impacts exist for the relevant pollutants.<sup>65</sup> Even under the stricter standard, however, Project construction would not benefit from the presumption because the North Shore of Staten Island is a NAAQS nonattainment area for particulate matter 2.5.<sup>66</sup> Although this Complaint targets construction exposure rather than the anticipated increase in operational emissions associated with eventually opening the Port to larger

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<sup>63</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39653.

<sup>64</sup> Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, Issued by the U.S. Env’tl. Prot. Agency, 9 (Feb. 1998), *available at* [http://www.environmentalandenergylawblog.com/uploads/file/Interim%20Guidance\(1\).pdf](http://www.environmentalandenergylawblog.com/uploads/file/Interim%20Guidance(1).pdf) [hereinafter Interim Guidance].

<sup>65</sup> Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Health-Based Thresholds, 78 Fed. Reg. 24741 (Apr. 26, 2013).

<sup>66</sup> Green Book: Currently Designated Nonattainment Areas for All Criteria Pollutants, *supra*.



and more cargo traffic, the lack of attainment for health-based environmental standards underscores the severity of the cumulative burdens borne by these communities of color.

Beyond the historic industrial uses found within the construction zone and described in Part IV.A.1., study area residents are surrounded by a variety of modern sources of pollution including four factories, a power plant, several contaminated spill sites, and the active port terminals.<sup>67</sup> In 2012, EPA recognized the North Shore's environmental justice status, selecting it as one of ten EPA "Environmental Justice Showcase Communities" in the United States because of the number of children in the area with elevated levels of lead in their blood.<sup>68</sup> As the funding committed to alleviate this problem winds down nearly two years later, Project construction may once again expose the children of these communities of color to hazardous lead.<sup>69</sup>

These historic and ongoing sources of contaminant exposure are exacerbated by the density and residential nature of the surrounding communities. The Project's expansive construction stretches almost a mile under the Bridge through an area of the North Shore that consists of densely populated communities of color. Approximately 10,100 Staten Island residents live within the quarter-mile perimeter surrounding the North Shore construction zone, along with seven schools with outdoor playgrounds and other community facilities.<sup>70</sup> The Final EA's "Indirect and Cumulative Effects" chapter does not take into consideration any of these preexisting North Shore realities, instead limiting the analysis for the construction period to future planned projects that might overlap with Project construction.<sup>71</sup>

Because older soil tests revealed extensive contamination and so little updated information is available for many likely sources of ongoing contamination, including the underground storage tanks, soil stockpiles, groundwater contamination, and historic railroad bedding, there is

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<sup>67</sup> North Shore of Staten Island – Environmental Justice Profile, *supra*.

<sup>68</sup> Region 2 EJ Showcase Community: Staten Island, NY, *supra*.

<sup>69</sup> *See supra* Part IV.A.1.

<sup>70</sup> Final EA, *supra*, at 4-3, 4-2; *see infra* Title VI Administrative Complaint Exhibit B.

<sup>71</sup> *Id.* at 18-23–18-26.

insufficient information to protect Complainant from airborne, ingestion, groundwater, and surface water exposure pathways. Adding the risk of hazardous contaminant exposure during Project construction to the preexisting cumulative burdens faced daily by the North Shore study area communities demonstrates adversity under EPA's Title VI regulations.

## **B. Project Construction Disproportionately Impacts People of Color on the North Shore**

As established in the preceding section, the population of the North Shore of Staten Island is experiencing Project construction as an Environmental Justice Showcase Community, already extensively burdened by exposure to cumulative impacts. While Project construction creates adversity and therefore an affected population on both the New York and New Jersey sides of the Bridge, the Project exacerbates existing conditions on the North Shore of Staten Island. These cumulative burdens considered in conjunction with the communities' demographics, when compared to both the Bayonne study area population and the rest of Staten Island, establishes a longstanding pattern of racially discriminatory behavior in violation of Title VI.

### **1. The Affected Population: Residents of Staten Island, NY and Bayonne, NJ living within a quarter-mile of the Project construction zone**

According to the Draft Revised Investigating Guidance, the affected population is "that which suffers the adverse impacts of the stressors from assessed sources" dependent upon the sources or pathways of the adverse impacts.<sup>72</sup> In the absence of detailed models or samples for pollution like plumes that may travel from a construction site, proximity to the impact of concern is "a reasonable indicator of where impacts are concentrated."<sup>73</sup>

The Coast Guard's Final EA identified the relevant study area for land use and social conditions as the quarter-mile perimeter surrounding the limit of the construction work zone.<sup>74</sup> Following EPA's guidance and relying on the Coast Guard's approach, for the purposes of this Complaint the affected population is the "study area population," those residents living within the

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<sup>72</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39681.

<sup>73</sup> Interim Guidance, *supra*, at 8; Draft Revised Investigating Guidance, 65 Fed. Reg. at 39681.

<sup>74</sup> Final EA, *supra*, at 4-1.



quarter-mile perimeter surrounding the mile-long Project construction zone on both sides of the Bridge. Due to their proximity to the Project and historic sources of contamination, these residents are most likely to be exposed to the hazardous materials disturbed by construction.

On Staten Island, the affected population extends north to the Kill Van Kull waterfront; south to Forest Avenue, Monsey Place, and Riegelmann Street; east to Treadwell Avenue, Port Richmond and Decker Avenue; and west to Simonson Avenue.<sup>75</sup> In Bayonne, the affected population extends north to 10th Street; South to the Kill Van Kull waterfront; east to Avenue C; and west to the Newark Bay waterfront.<sup>76</sup>

## **2. Threshold Risk Ratio: The probability of being affected by Project construction is higher for people of color**

The discriminatory nature of the adversity faced by the North Shore study area communities is made apparent by examining the two most relevant demographic factors across the entire affected population: population density and population of color percentage. The threshold risk ratio, used as part of EPA's formula to make a *prima facie* finding that a Title VI violation occurred in *Angelita C.*, asks whether there is a greater probability of members in a Title VI protected population group being affected than members of an unprotected group.<sup>77</sup> Across the affected populations in Bayonne and Staten Island, the probability of being affected as a protected resident of color is higher than the probability of being affected as an unprotected white resident.

As determined by the Coast Guard's Final EA, the Staten Island affected population has 10,100 residents with 3,065 households.<sup>78</sup> Approximately 22 percent of that population is white.<sup>79</sup> The study area is predominantly residential, with six zoning districts in the quarter-mile perimeter

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<sup>75</sup> *Id.* at 4-1, 4-2.

<sup>76</sup> *Id.* at 4-7.

<sup>77</sup> Jonathan Cohen & Arlene Rosenbaum, ICF INT'L, INC., Exposure Assessment and Disparity Analysis for Administrative Complaint 16R-99-R9, 30 (Apr. 21, 2011), available at <http://www.epa.gov/civilrights/TitleVICases/exposure-disparity-analysis-20110421.pdf>.

<sup>78</sup> Final EA, *supra*, at 4-3.

<sup>79</sup> *Id.* at 4-4.



designated as strictly residential or mixed commercial and residential.<sup>80</sup> Community facilities include four public schools at the high, intermediate, and elementary levels; three private schools including one for children with special needs; a senior housing facility; and three places of worship.<sup>81</sup>

In contrast, the affected population in Bayonne is approximately 69 percent white, and has only 7,000 residents with 2,764 households.<sup>82</sup> There are also fewer community facilities in Bayonne, with four schools and three places of worship.<sup>83</sup> While the unprotected class that makes up the vast majority of Bayonne's population is also experiencing the adversity described in Part IV.A.1 of this Complaint, the significantly lesser residential density renders exposure less probable than on the North Shore where protected residents of color make up most of the population.<sup>84</sup>

Therefore, due to the dramatic differences in population density and the corresponding population of color percentages across the affected area, the probability of being affected as a protected resident of color is higher than the probability of being affected as an unprotected resident. The threshold risk ratio indicates a violation of EPA's Title VI regulations.

### **3. Demographic Ratio: People of color comprise a substantially greater proportion of the affected population than the general population**

The other ratio relied upon by EPA in *Angelita C.* is the demographic ratio, which asks whether members of the protected class comprise a substantially greater proportion of the affected population than of the unaffected, general population.<sup>85</sup> As established by the Draft Revised Investigating Guidance, a comparison population should be drawn from a relevant reference area, such as a political jurisdiction.<sup>86</sup> The Draft Revised Investigating Guidance anticipates that a reliable

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<sup>80</sup> *Id.* at 4-2, 4-3.

<sup>81</sup> *Id.* at 4-2; *see infra* Title VI Administrative Complaint Exhibit B.

<sup>82</sup> *Id.* at 4-8, 4-9.

<sup>83</sup> *Id.* at 4-7.

<sup>84</sup> *See infra*, Title VI Administrative Complaint Exhibit C.

<sup>85</sup> Cohen & Rosenbaum, *supra*.

<sup>86</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39681.

comparison population will be larger than the affected population, and may include the general population of the jurisdiction reference area, inclusive of the affected population.<sup>87</sup>

The affected North Shore communities are demographically distinguishable from the entirety of Staten Island. The population of color percentage of the affected North Shore communities is significantly higher than the population of color percentage across Richmond County, the Staten Island Borough.<sup>88</sup> As determined by the Final EA, the North Shore affected population of 10,100 residents within the quarter-mile radius of the mile-long construction site is approximately 22 percent white.<sup>89</sup>

In contrast, the Staten Island Borough, inclusive of the affected North Shore population, is approximately 78 percent white with an overall population density of approximately 8,030 persons per square mile.<sup>90</sup> The Borough is a reliable comparison because it is larger than the affected population, includes an entire political jurisdiction, and consists of the general population, inclusive of the affected population.

These statistics indicate that there are comparatively more people per square mile within the affected population and that the vast majority of them are people of color in comparison to the predominantly white, less dense, general population of Staten Island. Therefore, members of the protected class comprise a substantially greater proportion of the affected population than of the unaffected, general population. The demographic ratio indicates a violation of EPA's Title VI regulations.

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<sup>87</sup> *Id.*

<sup>88</sup> See *infra* Title VI Administrative Complaint Exhibit C.

<sup>89</sup> Final EA, *supra*, at 4-3, 4-4.

<sup>90</sup> State and County QuickFacts: Richmond County (Staten Island Borough), New York, U.S. CENSUS BUREAU (June 27, 2013), <http://quickfacts.census.gov/qfd/states/36/36085.html>.

**C. Justification Offered for the Project Does Not Negate the Need for Mitigation to Achieve a Less Discriminatory Outcome**

**1. The Project's Economic Development Justification Does Not Directly Benefit the North Shore Affected Population**

Under EPA's Draft Revised Investigating Guidance, justification is defined largely by the legitimacy of the permitted action given the recipient's mission.<sup>91</sup> Economic development is included as an acceptable justification "if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission."<sup>92</sup> The guidance makes clear that EPA will consider the views of the affected community when determining whether economic benefits will be delivered directly.<sup>93</sup>

Created in consultation with the Port Authority, the Final EA describes the Port Authority as "a bi-state governmental entity created by a compact between New York and New Jersey to maintain and modernize interstate transportation facilities such as bridges, and to sustain the Port of New York and New Jersey as modern, efficient, and competitive."<sup>94</sup> The Final EA legitimately characterizes the increase in vertical clearance of the Bridge roadway as "necessary to adapt to this current trend in the shipping industry and allow these larger vessels to pass beneath the Bridge to the Port of New York and New Jersey."<sup>95</sup> This reflects a longstanding position held by the Port Authority that the Project "is crucial for maintaining and developing the regional economies of New York and New Jersey," and that failure to raise the roadway "may damage the economies of New York and New Jersey, as shipping companies will divert to ports capable of handling larger, economically efficient vessels."<sup>96</sup> However, this economic development justification falls short

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<sup>91</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39683.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Final EA, *supra*, at 1-1.

<sup>95</sup> *Id.* at 1-2.

<sup>96</sup> TIGER II Planning Grant Application, *supra*, at 3.



under EPA's guidance, which gives substantial consideration to whether the economic benefits are directly delivered to the affected population.<sup>97</sup>

In contrast to the studies used to demonstrate the Project's projected national economic development benefits, the Final EA merely assumes regional benefits will follow.<sup>98</sup> Economic benefits directed toward the local, affected communities are neither discussed nor demonstrated in the Final EA. According to the Final EA, increasing the vertical clearance of the Bridge roadway will have national economic benefits in terms of reduced shipping costs.<sup>99</sup> Relying on a 2009 U.S. Army Corps of Engineers analysis, these national benefits are projected to be more than \$3 billion over the life of the Project.<sup>100</sup> The primary beneficiaries will be shippers with reduced costs from using larger vessels to increase carrying capacity. The Final EA suggests that some portion of these savings could be passed on to the region served by the Port, but acknowledges that the "percentage cannot be determined because it is subject to the shipper's discretion."<sup>101</sup> No analysis is considered for the low-income communities of color adjacent to the North Shore construction zone apart from a vague reference to "temporary jobs for construction workers."<sup>102</sup>

Therefore, EPA should weigh the economic benefits of the project according to the benefits delivered to the affected population, inclusive of the communities' input. According to the Draft Revised Investigating Guidance, the Port Authority's justification, however legitimate and mission appropriate, falls short of providing grounds to move forward with the Project construction absent mitigation measures to achieve a less discriminatory outcome.

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<sup>97</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39683.

<sup>98</sup> Final EA, *supra*, at 1-2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 16-11.

## **2. Practicable Mitigation Measures Exist As Less Discriminatory Alternatives**

The Draft Revised Investigating Guidance demonstrates a willingness by EPA to consider practicable mitigation measures as less discriminatory alternatives.<sup>103</sup> These mitigation measures should be designed to reduce or eliminate impacts that are tailored to contributing sources, including the particular permit at issue.<sup>104</sup> Specifically, measures may include changes in policies or procedures, pollution control and prevention, or offsets.<sup>105</sup> The Draft Revised Investigating Guidance indicates EPA openness to broader approaches that address cumulative impacts, developed in consultation with the affected communities during either informal resolution prior to a Finding of Noncompliance or voluntary compliance after such a finding is made.<sup>106</sup>

### **i. Alternative Dispute Resolution**

This specific case would benefit from EPA supported and mediated alternative dispute resolution (“ADR”) to open a constructive dialogue between Complainant and the Port Authority in order to prevent Project construction from unleashing any further hazardous burdens on the affected North Shore communities. Although the Port Authority is not responsible for each source of historic contamination surrounding the Bridge, the permitted Project provides an important opportunity for these environmental justice communities to address longstanding dangers in a safe, comprehensive manner. For Complainant, important outcomes of this informal resolution ADR mechanism would include the Port Authority adopting more comprehensive monitoring and sampling procedures for Project construction. Recent data is unavailable for much of the contamination described in Part IV.A.1., including the underground storage tanks, soil stockpiles, groundwater contamination, and historic railroad bedding. This raises serious concerns about the Port Authority having sufficient information to effectively remediate the construction zone and

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<sup>103</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39683.

<sup>104</sup> *Id.*

<sup>105</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39674.

<sup>106</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39674, 39683.

protect Complainant from demonstrated airborne, ingestion, groundwater, and surface water exposure pathways.

## **ii. Sampling and Monitoring**

Similar to the remedy developed by EPA and the funding recipient in *Angelita C.*, sampling and monitoring policies are important mitigation tools.<sup>107</sup> Maintenance of comprehensive monitoring techniques throughout Project construction will minimize the risk of adding to cumulative burdens on the North Shore, while also providing updated information about the contaminants in the communities and important exposure pathway data that can be relied upon in subsequent remediation efforts.

The Final EA does include a monitoring scheme for construction, in the form of procedures for addressing existing structure contamination and a Construction Health and Safety Plan (“CHASP”) for surface and subsurface disturbance.<sup>108</sup> The standards required of the Port Authority and Skanska Koch-Kiewit Joint Venture by the CHASP are difficult to discern, however, because the Final EA speaks in terms of what the CHASP is expected to include, but is otherwise vague about virtually all aspects of the plan: responsible personnel, monitoring or mitigation schedules including frequency and scope, procedures for evaluating known and suspected contamination, and actions to be taken if exposure occurs.<sup>109</sup> The only facet of construction that gets a more thorough treatment in the publicly available Final EA is dust control, with options for limiting airborne emissions described as “water spray, dust retardant, and/or truck wheel wash.”<sup>110</sup> The CHASP has never been released to the public.

Beyond these immediate gaps in executing a monitoring strategy, the CHASP only superficially accounts for construction induced contaminant exposure on the North Shore because

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<sup>107</sup> Title VI Settlements: Angelita C. Settlement, U.S. ENV'TL PROT. AGENCY (last updated Nov. 4, 2013), <http://www.epa.gov/ocrpage1/TitleVIcases/index.html#angelita>.

<sup>108</sup> Final EA, *supra*, at 16-77–16-78.

<sup>109</sup> *Id.* at 16-78–16-80.

<sup>110</sup> *Id.* at 16-79.



the plan fails to meaningfully address cumulative adversity. By itemizing existing air quality as distinct from likely contaminant exposure and background pollutant concentrations as distinct from cumulative effects, the plan at the center of Project construction fails to account for the tremendous burden created by any additional adversity on the North Shore.<sup>111</sup> The Final EA's conclusion that the only significant long-term impact of the Project will be the effect on the historic Bridge is followed by the summation that "while localized adverse effects would occur in the study area during the construction phase of the project, these effects would be temporary and would end once construction is complete."<sup>112</sup> This makes apparent that the long-term risks associated with cumulative contaminant exposure for the highly vulnerable communities of color on the North Shore is being minimized and ineffectively dealt with by the current monitoring plan.<sup>113</sup>

Further, as discussed in Part IV.A.1, study area visits and accounts from affected North Shore residents make clear that any protective measures provided for by the CHASP are being insufficiently implemented. Soil from areas of likely lead and PCB contamination has been carried as airborne dust onto residents' cars and onto public sidewalks where it's easily tracked into homes.<sup>114</sup> There are also concerning discrepancies about the integrity of the controls on the radiological contamination adjacent to the construction zone and whether that contamination extends into property owned by the Port Authority.<sup>115</sup>

### **iii. Meaningful Complainant Involvement**

In contrast to *Angelita C.*, however, and pursuant to EPA's recently published Draft White Paper, Role of Complainants in the Title VI Complaints and Resolution Process ("Role of Complainants White Paper"), EPA should meaningfully include Complainant in each stage of the

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<sup>111</sup> See *id.* at ch. 11, 14 and 18-23-18-26.

<sup>112</sup> *Id.* at 17-6.

<sup>113</sup> *Id.*

<sup>114</sup> See *infra* pp. 12-13.

<sup>115</sup> See *infra* pp. 11-12.

resolution and compliance process.<sup>116</sup> This includes soliciting Complainant input on potential remedies and facilitating Complainant inclusion in any ADR, settlement negotiations, or other resolution mechanisms. Project construction offers an important opportunity for EPA and Complainant to work with the Port Authority, a major landowner on the North Shore, to achieve mitigation measures that address the cumulative adversity that disparately impacts communities of color.

## **V. REMEDIES**

EPA regulations require a funding recipient who has discriminated on the basis of race to take affirmative action to provide remedies to those injured.<sup>117</sup> As clarified by the Draft Revised Investigating Guidance, “EPA believes it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit at issue will not necessarily be an appropriate solution. Efforts that focus on all contributions to the disparate impact...will likely yield the most effective long-term solutions.”<sup>118</sup>

To that end and in order to provide effective remedies for the discriminatory adversity set forth in this Complaint, EPA should require as a condition of continuing to provide federal financial assistance that the Port Authority:

- (1) Adopt less discriminatory alternatives to achieve the economic development goals articulated for the Project, including the mitigation measures i-iii described in Part IV.C.2.

To facilitate compliance with its regulatory requirements, EPA should:

- (1) Sue to compel compliance with Title VI, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;
- (2) Provide Complainant with copies of all documents related to the investigation, including but not limited to all correspondence to or from the Port Authority throughout the course of the investigation, deliberation, and disposition of this Complaint; and

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<sup>116</sup> See Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaints and Resolution Process, 78 Fed. Reg. 24742 (Apr. 26, 2013).

<sup>117</sup> 40 C.F.R. § 7.35(a)(7).

<sup>118</sup> Draft Revised Investigating Guidance, 65 Fed. Reg. at 39674.

- (3) Pursuant to EPA's Role of Complainants White Paper, notify Complainant of, and meaningfully include Complainant in, any resolution mechanism including ADR, settlement negotiations, or voluntary compliance negotiations with the Port Authority.

## VI. CONCLUSION

The ongoing construction to raise the roadway of the Bayonne Bridge under contract with the Port Authority of New York and New Jersey inflicts a significant adverse and disparate impact on the affected communities of color on the North Shore of Staten Island. This violates Title VI and EPA's implementing regulations.

DATE: January 27, 2014

Respectfully submitted,

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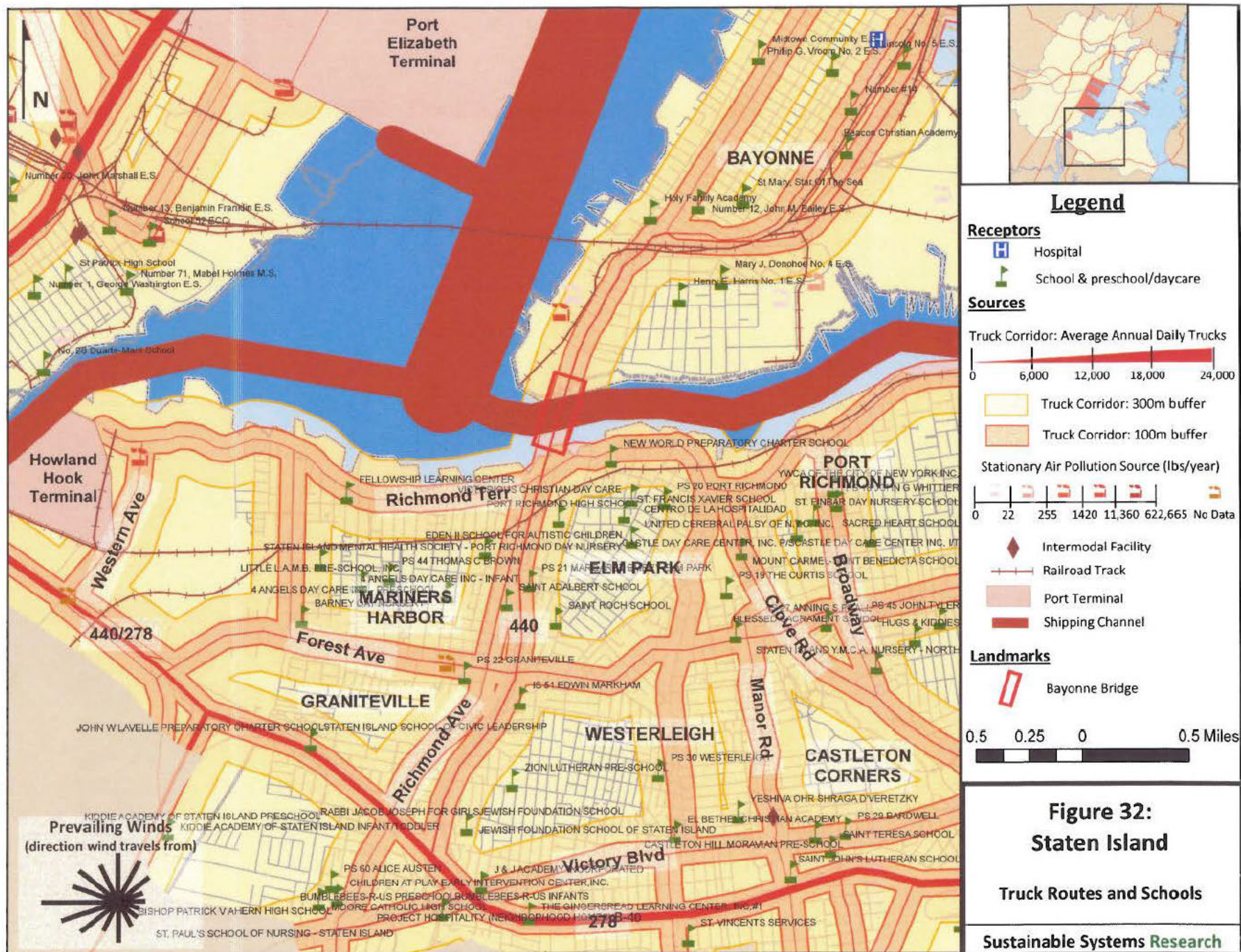


**Title VI Administrative Complaint  
Exhibit A**



**Title VI Administrative Complaint  
Exhibit B**





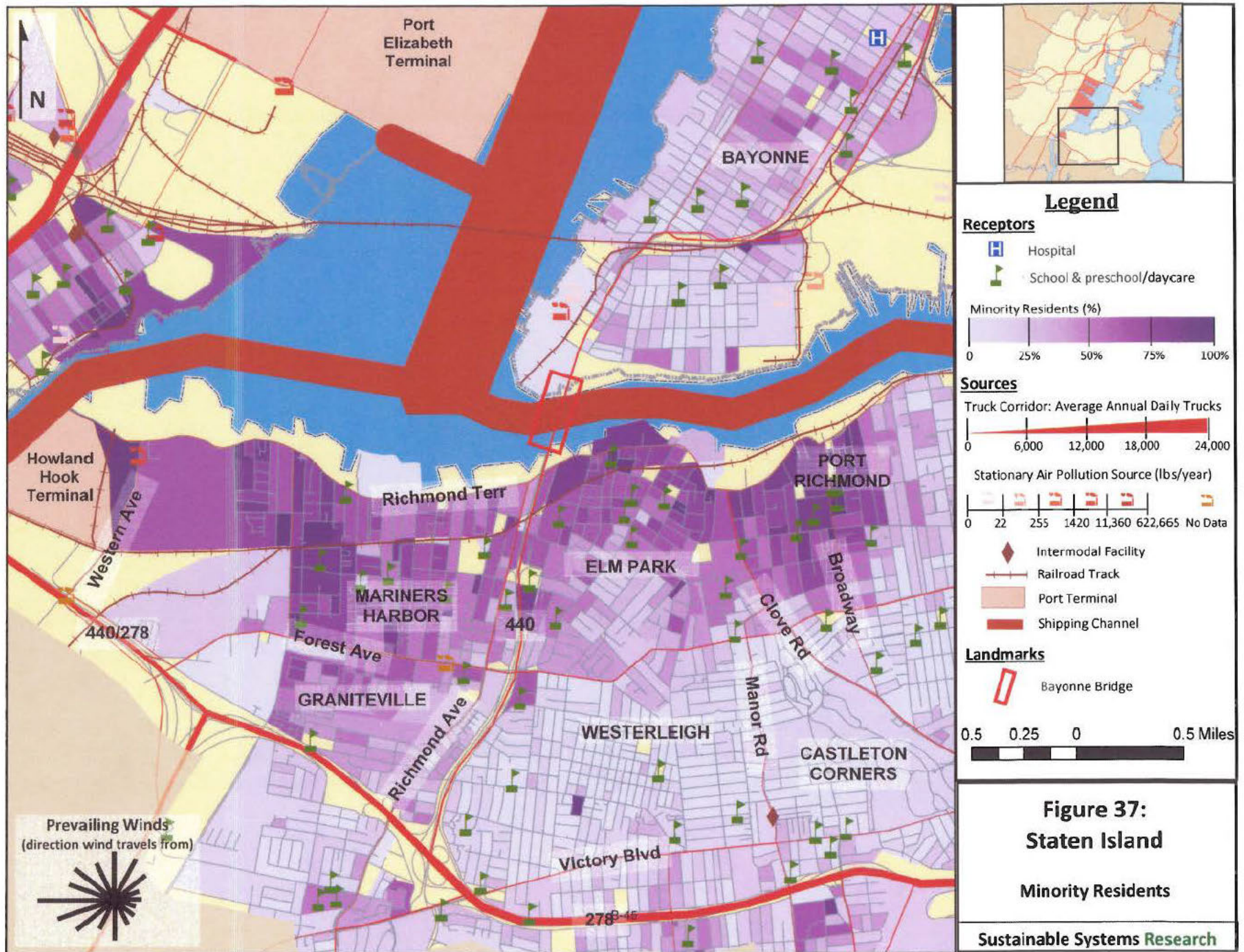
**Figure 32:  
Staten Island**

**Truck Routes and Schools**

**Sustainable Systems Research**

**Title VI Administrative Complaint  
Exhibit C**







001071  
00500

**FedEx** Package  
Express US Airbill

FedEx  
Tracking  
Number

8041 4492 9573

**1 From**

Date

Sender's  
Name

Phone 212 717-2700

Company

NATURAL RESOURCE DEFENSE CNCL

Address

40 W 20TH ST FL 11

City

NEW YORK

State

NY

ZIP

10011-4231

**2 Your Internal Billing Reference**

**3 To**

Recipient's  
Name

Phone

Company

Address

We cannot deliver to PO boxes or PO ZIP codes.

Dept./Room/Suite/Room

Address

Use this line for the IGLO location address or for destination of your shipping address.

City

State

ZIP

HOLD (Weekdays)  
We will not deliver  
EP to a ZIP code for  
which we are not  
licensed to deliver.  
HOLD Saturday  
We will not deliver  
EP to a ZIP code for  
which we are not  
licensed to deliver.  
HOLD Sunday  
We will not deliver  
EP to a ZIP code for  
which we are not  
licensed to deliver.



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**4 Exp**

NOTE

Not

FedEx First Overnight  
Estimated business morning delivery to select  
locations. Friday delivery to select locations.  
Monday service only.

**FedEx**  
Express

EXCEPTION / SEND A

Customer's Package/Shipment was delayed

**FOR IN STATION USE ONLY**

☐ Package Researched Date: Initial:

Comments:

RM 2450

☐ Address is correct/Recipient no longer at this address

☒ Incorrect recipient address/Incomplete recipient address

☒ Need apartment or suite number

☐ Recipient moved and left no forwarding address or phone number

☐ Not in / Business closed / Not authorized to leave ship without a signature

☐ 1st Attempt ☐ 2nd Attempt ☐ 3rd Attempt

☐ Signature required, please contact shipper for disposition

☐ Holiday - Closed

☐ Package not attempted (reason):

☐ Refused (reason):

☐ Future delivery. Reattempt on (date):

☐ Recipient requested hold for pickup

☐ Collect on Delivery. Payment not available. Reattempt made on (date):

☐ Bill recipient shipment. Payment not available. Reattempt be made on (date):

☐ Other:

Date:

Employee #:

POD MUST BE OBTAINED WHEN DELIVERY IS COMPLETED

**\*\*UPDATE ALL INFORMATION AND  
POD INTO COSMOS\*\***