PETITION FOR DECLARATORY RULING PURSUANT TO SECTION 204, NEW YORK STATE ADMINISTRATIVE PROCEDURE ACT

In the Matter of the Petition of:

Daniel and Jocelyn McKiernan; Luella Kenny;
JoAnn Abbo-Bradley; Nathan and Elena Korson
of the Love Canal Three Generations of Residents;
Attorney Christen E. Civiletto, Author, SUNY Buffalo Law Adjunct;
Dr. David Carpenter, University of Albany;
Clean Air Coalition of Western New York;
Community Concerned About NL Industries;
Don't Waste New York; NAACP Niagara Falls Branch;
Nuclear Information & Resource Service;
Save Our Backyards Western New York; and
Sierra Club Niagara Group

TO: NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND NEW YORK STATE DEPARTMENT OF HEALTH

IMMEDIATE ACTION TO PROTECT THE HEALTH OF FAMILIES LIVING IN THE LOVE CANAL EMERGENCY DECLARATION AREAS AND ADJACENT NORTH AND WEST STREETS

I. INTRODUCTION.

The Love Canal site is an approximately 70-acre hazardous waste landfill located in a residential area at 805 97th Street in the City of Niagara Falls, Niagara County. It was originally an abandoned excavation project by William T. Love, who, in the early 1890s, planned it as a power canal between the upper and lower sections of

the Niagara River. The site filled with water and was used by residents for swimming, ice skating, and other recreational purposes. From approximately 1942 to 1953, while residents were using the site, Hooker Electrochemical Company disposed of industrial hazardous wastes. The chemical giant estimates that it dumped at least 21,800 tons of toxic wastes into the ground. Those wastes included: naphthalenes, toluene, benzene, benzoyl chlorides, benzene hexachloride (alpha, beta, gamma/Lindane), chlorobenzenes, chlorotoluene, thionyl chloride, DDT, DDE, DDD, PAHs, and trichlorophenol (TCP) containing significant amounts of 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD, or dioxin). In 1953, Hooker sold the Canal site to the Niagara Falls Board of Education. This sale was soon followed by the construction of housing on 97th and 99th streets and the construction of the 99th Street School in 1954. The 99th Street School was built on and adjacent to the middle portion of the now-covered and grassed Canal. Another elementary school, 93rd Street School, was erected less than two blocks away from the site. The neighborhood continued to grow.

These wastes soon began to migrate from the canal, infiltrating homes, yards, and basements. Certain areas were designated an Emergency Declaration Area ("EDA"). After decades of piecemeal remediation and upheaval, including the relocation of more than 900 families, the Love Canal area was rehabitated beginning in 1990, without a full investigation and remediation of the properties in the EDAs and surrounding area.

Today, residents are once again confronting the shocking reality of toxic contamination in and around their homes.

Pursuant to Section 204 of the New York State Administrative Procedure Act (SAPA), the undersigned Petitioners respectfully petition the New York State Department of Environmental Conservation ("DEC") and the New York State Department of Health ("DOH") to undertake immediate actions to protect families living in the Love Canal EDA[1] and surrounding streets from potential or known exposure to contamination from toxic chemicals.

Petitioners include citizens harmed by toxic contamination from Love Canal and other polluted areas in the Niagara Region; residents; scientists; physicians; attorneys; and community, environmental and health organizations concerned about the protection of public health and the environment in New York State.

II. ACTIONS REQUESTED.

Petitioners respectfully request that DEC and DOH immediately take the following actions:

A. Relocate and Protect the McKiernan Family.

DEC and DOH should immediately take all appropriate actions to protect the health of the McKiernan family residing at 1026 99th Street, Niagara Falls, NY, including making a formal request to the United States Environmental Protection Agency ("EPA") to immediately relocate the family from their contaminated property; or, alternatively, authorize an emergency relocation of the family to appropriate housing.

Moreover, the agencies should act promptly to prevent all human exposure to hazardous substances while the property and surrounding area are fully investigated.

B. Conduct Remedial Investigation of Love Canal Emergency Declaration Areas and Surrounding Streets and Investigate Whether Chemical Waste is Migrating from the Love Canal Landfill.

DEC and DOH should immediately initiate and conduct a comprehensive remedial investigation of properties within the Love Canal Emergency Declaration Areas and surrounding streets, up to Cayuga Creek, to determine whether residential properties, yards, soil, groundwater, indoor environments, indoor or outdoor air, storm or sanitary sewers or any other environmental media contain contamination at concentrations that are a significant threat to the environment and human health. In addition, DEC should investigate whether the Love Canal leachate collection system and other environmental controls are operating effectively.

The investigation should determine whether contamination exceeds applicable New York State Superfund Soil Cleanup Objectives, where applicable, and other state health-protective standards and guidance values.[2] The Remedial Investigation should be comprehensive to determine the full scope, nature and extent of contamination pursuant to 6 NYCRR Part 375.

III. TESTIMONIALS IN SUPPORT OF THE ACTIONS.

Lois Gibbs, **former Executive Director of the Center for Health, Environment & Justice (CHEJ)** stated: "Love Canal awoke a community to the unpleasant and unfortunate realization of how toxic wastes affect our lives and destroy our environment. Residents at Love Canal always believed that the government would automatically protect them. They were wrong; in some cases, dead wrong! Residents learned at Love Canal that even low levels of chemical exposure have an effect on the human body, and that the government will protect you from this only when you force them to. We can count only on ourselves to safeguard our families' health through vigilance, knowledge and collective action."

Daniel and Jocelyn McKiernan, Third-Generation Love Canal residents, stated, "Governor Hochul and the DEC & DOH Commissioners have disregarded alarming test results of high levels of toxic chemicals and pervasive pollution on our property and disregarded calls from three scientists and the nationally renowned Dr. David Carpenter for emergency relocation. We are in the midst of a life-threatening medical emergency. Our family has been requesting relocation for over 60 days and our oldest son has been without in-home services for 51 days following the July 22, 2026 DEC test results. History must stop repeating itself. Our medical history speaks for itself. Our family should be relocated now."

Four-year- old Emmitt McKiernan stated, "Our house is dangerous and no one will save us." Emmitt and his two brothers and parent's property is polluted with a witch's brew of toxic chemicals from the Love Canal Federal Superfund site, 300 feet away from their home.

Elena and Nate Korson, Second-Generation Love Canal residents, stated: "I am a former resident of the resettled Love Canal neighborhood. Our basement and backyard flooded with sludgy material. Our freshly primed and painted walls oozed a sticky substance that glowed with a black light. The contents of our sump pump would glow. We were constantly ill in that home. Our son who was conceived in that home was born with Mosaic trisomy 5p, a very rare chromosome anomaly. Our dog was covered in multiple tumors. We had our home tested and the results showed our home and backyard were poisoned. Outsiders called us brave or dumb for buying a house so close to the Love Canal. The DEC and EPA called us an acceptable loss. With no help and little support, in 2012, we packed up and abandoned our home. We destroyed our credit, lost friends, but we are now far away from that toxic dump. Today families are still being poisoned. Test results are very similar to what was in and around our home. The government and entities responsible for poisoning these families are offering little to no aid. There are no warning signs for home buyers. I am writing this to say these families are not expendable. The government needs to protect their life, liberty and pursuit of happiness by relocating these families to somewhere safe and habitable."

Luella Kenny, First-Generation Love Canal resident, stated, “Almost 50 years ago DEC and DOH made a serious mistake by resettling these contaminated homes. Initially buyers were informed, but as time went by they tried to hide it by calling it Black Creek village. Signs on the fence just said ‘Private property, no trespassing’. I see stupid explanations today that the agencies will remediate while the family stays there. Tell me if your home is threatened by a flood do you wait until the water is at the door? I spent 50 years working in a lab and the chemicals that were found at the McKiernan family would only be used with a protective fume hood. Yet this family is breathing these fumes inside and outside their house. DEC and DOH predecessors made a huge mistake, and they are compounding that mistake now. It is hard to believe that in 50 years DEC and DOH have gotten worse instead of better in handling this situation. They can start correcting their mistakes by requiring EPA to immediately relocate the McKiernan family. Forty-eight years ago, only a few yards from the McKiernan home, my seven-year-old old son John played in our backyard that -- unknown to us -- was contaminated. He died on October 4. 1978. Medical journals show his immune response disease was caused by exposure to chemicals. This was devastating to me. Please do not repeat this horrible tragedy. Relocate the McKiernan family now. And investigate the entire Love Canal EDA.”

JoAnn Abbo-Bradley, First-Generation Love Canal resident stated, "I am both a child and a parent of the Love Canal legacy, representing the second and third generations of a disaster that did not end when the dump was capped. For my parents’ generation, Love Canal was a sudden, terrifying nightmare of chemical drums, birth defects, and forced evacuations. But for my generation, the second generation, the tragedy was much quieter. Not only did I have to watch my mother die at 34 years old of leukemia, but we grew up carrying the unseen weight of that contamination in our own bodies. We faced unexplained health issues, the kind that took my sister's young life after being undiagnosed. For over 25 years, chronic illnesses, and the constant fear of what might manifest as we grew older. The toxic waste was not just a historical event in a textbook; it became part of our cellular inheritance. Now, as a parent and grandparent, the heartbreak enters its third and fourth generations. Watching my own children face health struggles or wondering if the choices made decades ago are still affecting their DNA is a heavy burden to carry. We were promised that the site was contained and that the danger had passed, yet the health patterns in our families tell a very different story. The intergenerational trauma of toxic exposure is real, and it does not respect fences or official declarations of safety. I share this because our stories are often left out of the history books. Love Canal is not a finished chapter from the 1970s. It is a living, ongoing crisis that affects real families right now. We need long-term health tracking, comprehensive environmental testing, and genuine accountability for multi-generational exposure."

Dr. David Carpenter of the University of Albany, former Director of the DOH Wadsworth Laboratory, **and a nationally renowned environmental health doctor,** stated, “This is Love Canal all over again. There is no question but that the levels of contamination tested by DEC themselves are excessive and pose a human health threat from a number of exposure pathways to Mr. and Mrs. McKiernan and their three young children, who are much more sensitive to toxic chemicals. I call on the state agencies to immediately request the Environmental Protection Agency relocate this family utilizing Federal Superfund monies, and to fully investigate the Love Canal EDAs."

U. S. Congressman Tim Kennedy stated “As a father and an occupational therapist who spent years working with children with disabilities, I am deeply concerned that any family is being left to question whether their home is safe and whether their children’s health is at risk. My message to the McKiernan family, to every impacted resident, and to the EPA and State of New York remains clear: any household seeking relocation because of elevated levels of contamination on their property should be approved immediately. The health and safety of these families must come first while testing, studies, and cleanup efforts continue."

Jeffrey Elder, Minority Leader of the Niagara County Legislature stated, "As a former Love Canal resident, I understand firsthand why strong environmental protections and government accountability matter. The lessons of Love Canal remind us that residents deserve to be heard and that environmental concerns must be taken seriously. I support this administrative petition because our communities deserve transparency, accountability, and a commitment to protecting public health and the environment. We must learn from our past and ensure that

future generations are not left to face the same environmental challenges. As a resident, a veteran, and a public servant, I believe protecting our communities must always remain a priority."

Lexi Hawk, Save Our Backyards WNY stated, "It is a disgrace that Governor Hochul and her DEC and DOH are neglecting their public duty, and blatantly ignoring an obvious medical emergency. There is an 85.7% match to Love Canal chemicals in and around the McKiernan home. Enough is enough. The Governor needs to request that the Federal Government step in, and use Superfund money to relocate the McKiernan family, just like they did for my family and three other families with high levels of radiation on our properties in the Town of Niagara. We are truly horrified at our state's negligence to their own people - especially considering where our own Governor is from."

Kelly Cloyd, Retired DEC hazardous waste geologist stated, "The McKiernan family bought their home in Niagara Falls hoping to live the American Dream. What they got instead was pain and suffering because their property was used for the disposal of industrial waste. Many Love Canal-related chemicals were found on their property in addition to identifiable industrial waste. Their family suffered numerous health impacts while living in the home. They must be relocated immediately to eliminate their exposure. This is the broken American dream and it's a shame that there is more than one generation. Yes, we were naïve in the beginning but we're not naïve now. We should know better."

Ed Miles, Retired DEC hazardous waste geologist who discovered the footprint of the Love Canal landfill in 1978 stated, "The McKiernan family should be relocated now. The state is prolonging the family's agony by refusing to move them. We've done this before, so it's no surprise what we need to do. I don't know why we're lollygagging around. There is no excuse for fumbling around when it comes to this family. No excuse."

Attorney Christen Civiletto, author of *Thundering Waters: The Toxic Legacy of Niagara Falls* (Princeton University Press/Island Press Imprint), and SUNY Buffalo Law adjunct, stated, "What is happening to the McKiernan family is not only shameful, but it was also preventable. New York has learned nothing from Love Canal. Not in 1978 and not in 2011. In 2011, New York was advised that Love Canal contamination was resurfacing. At that time, a second generation of Love Canal families began sending New York, federal agencies, and political leaders alarming test results showing indoor and outdoor contamination of homes in the EDA and surrounding streets. Those results were supported by pictures, videos, and medical records. Citing acceptable risk numbers, the authorities refused to relocate those families or complete a comprehensive investigation. The exact same poisons are now confirmed to be surfacing at the McKiernan property. The chemicals are visible. The odors are palpable. The health impacts to the McKiernan family are undeniable. They include tachycardia, bradycardia, bleeding, rashes, tumors, constant headaches and a seizure disorder. They've suffered five miscarriages. Enough is enough. The McKiernans are the third generation to raise the alarm. The time to act is now."

Charles Guzzetta, a regional manager with Whitestone Associates, wrote in a September 2026 letter to the McKiernan family that he identified layers overlying industrial fill containing ash, slag, sludge and carbon rods. "The identification of multiple buried clay layers suggests that the materials may have been covered/capped in the past," Guzzetta said in the letter. He also raised concerns about several swales that crossed the Love Canal area and appeared in a 1951 aerial photograph. According to Guzzetta, those swales drained into Black Creek, part of which bordered the southern edge of the McKiernan's' property.

Renae Kimble, President of NAACP Niagara Falls Branch, stated "The NAACP Niagara Falls Branch fiercely condemns the DEC and DOH's egregious failure to relocate the McKiernan family from their home, a refusal that constitutes a stark act of environmental injustice against working class, disabled, and marginalized people by forcing human beings to reside atop of acute hazardous waste that poses a significant threat to the public health and environment; while bureaucratic red tape prioritizes fiscal containment over human survival. This refusal to fund the relocation of the McKiernan family is arbitrary, capricious, and an abuse of administrative discretion of the DEC and the DOH. It is a direct violation of civil rights and environmental

justice demands an immediate release and relocation of funding for the McKiernan's , as justice delayed is justice denied.

Equally important is the need for the state agencies to fully test the properties in the Love Canal EDA, properties that were never fully investigated or remediated before people were moved back in. In 1990, the Natural Resource and Defense Council stated in a letter to the EPA Administrator, 'NRDC has serious concerns about who will purchase homes in the EDA if they become available, and the impact of contamination on those purchasers...The Love Canal Revitalization Agency informs us that a significant percentage of the prospective purchasers are persons of color with limited economic means…The disparate impact of hazardous waste sites on minorities has been documented repeatedly; EPA should be sensitive to this problem.'"

Chris Murawski, Executive Director of Clean Air Coalition of Western New York, stated, "Since August 6, 2026, Clean Air, at the request of the McKiernan family began to work with them along with other members of a growing coalition to assist in navigating the process to determine the extent of pollution on their property and ultimately support their request for immediate relocation from their property. Clean Air worked with Thomas J. Morahan, P.G. of NYS Professional Geological Services PLLC to develop comments on the Investigation Work Plan to NYDEC Spill No. 2603668 for the McKiernan property. Based on what we have learned though workplan review, the historical documents obtained by the coalition, and many meetings and communication with the family, we urge the immediate permanent relocation of the McKiernan family and will continue to support their efforts on behalf of Clean Air Members until their request is granted. Equally important is the need for the state agencies to fully investigate the Love Canal EDA and finally remediate any toxic contamination that may well be found."

Janet Lenichek, Chair of Sierra Club Niagara Group stated, "We call on the DEC and DOH to formally request the EPA to immediately relocate the McKiernan family. This family cannot even get in-home services for their child who requires it because medical personnel refuse to visit their toxic home. This is completely unacceptable. There is no question that this family needs to relocate from their polluted property. They cannot depend on couch surfing with friends or family for months on end. Equally important is for DEC and DOH to fully test the entire Love Canal EDA to determine if any families are also living on polluted land in excess of the state standards and guidance."

Diane D'Arrigo of Nuclear Information & Resource Service, stated, "the Niagara Frontier has more Manhattan Project radioactive sites from building nuclear weapons than anywhere else in the country and whereas the energy intensive private and government industries generated untold amounts of long-lasting radioactive toxic slag and wastes which they dumped throughout the region and upon which homes and businesses have been built, and whereas these carcinogens have multiple, additive, synergistic and cumulative health effects at low continuous doses especially when combined, Nuclear Information and Resource Service calls for full testing for both radioactive and hazardous materials and immediate removal, compensation, health monitoring and care for residents of contaminated property."

Anne Rabe of Don't Waste New York, formerly with Citizens' Environmental Coalition and the Center for Health, Environment & Justice, stated "The state agencies should repair the broken public trust caused by the 1988 habitability decision to resettle the Love Canal Emergency Declaration Areas (EDA). The decision was based not on science and protecting public health, but on a precedent-setting economically motivated unscientific comparison to similarly polluted areas in the Niagara region. The end result was that the government basically legitimized unsafe levels of contamination.

Families were sold homes in the Love Canal EDA with the assurance that they were 'habitable' but not safe. Now, test results show the McKiernan family property in EDA 4 is polluted with an array of toxic chemicals left over 30 years ago by DEC. This is just the tip of the toxic iceberg. The history of Love Canal is riddled with injustices and raises urgent issues directly related to the DEC and DOH responsibility to implement the State

Superfund law by conducting a full remedial investigation of the entire Love Canal EDA 1 – 7, and adjacent areas, and investigating whether the landfill is leaking."

IV. BASIS FOR PETITION.

A. DEC and DOH Deliberately Left Chemical Contamination on McKiernan Property.

The McKiernans purchased their property in 2020. It comprises 1026 99th Street and half of a neighboring lot, 9903 Black Creek Drive. The home at 9903 Black Creek was razed as part of the Love Canal remediation effort. Half was apportioned to 1026 99th Street and half to 9909 Black Creek Drive. The 1988 Love Canal Federal Superfund site habitability study confirms that these homes, which are approximately 300 feet north of the Love Canal site,[3] were contaminated. They were designated as EDA 4.

Documents from 1991 and 1993 confirm that 1026 99th Street, the extra lot they own as part of their backyard (9903 Black Creek Dr.), and other nearby lots were heavily contaminated with BHC and mercury. In 1993, the DEC, on the recommendation of the Department of Health, conducted a "limited" remediation of a portion of what is now the McKiernan's lot, deliberately leaving behind both hazardous waste and hazardous substances. Subsequent testing confirmed elevated levels of hazardous waste and substances at 9903 and 9909 Black Creek Drive and 1044 100th Street.[4] Only a portion of the 9903 Black Creek lot was remediated. The 99th Street portion of their yard was never remediated.

In mid-July 2026, the McKiernans installed an above-ground pool in their backyard. The shallow excavation work unearthed a large amount of industrial waste, ash-like material, and dark-stained soil. Preliminary DEC sampling revealed significant heavy metal contamination. After first instructing the McKiernans to cover it, DEC eventually delivered 17 tons of sand and gravel and covered a small portion of the yard with a temporary plastic liner. A portion of the sand "cap" is curling up and washing away. Portions of the yard sank four inches overnight after a rain. A secondary dump appears to be present.

To this day, industrial waste, ash-like materials, and dark-stained soils are visible at surface underneath their deck and in other parts of the yard. There are strong chemical odors. Chemical odors are also present near the inside drains. Moreover, there are non-aqueous phase liquid-like (NAPL) substances infiltrating their basement and sump. The drain odors are noxious. An upstairs faucet has strong odors and visible foam in the water pooling in the sink. They need relocation now.

The McKiernan property is one of many examples of pollution in the Love Canal EDA that was apparently concealed, minimized, or ignored by government agencies.

Testing conducted this year by DEC and an environmental company hired by the McKiernans, with consulting by Whitestone Associates, shows pervasive toxic pollution on the McKiernan's property. Many of these chemicals exceed the DEC Soil Cleanup Objectives, where applicable, or other state health-protective standards and guidance values. The Remedial Investigation should be comprehensive to determine the full scope, nature and extent of any contamination. Contamination is both inside and outside the home. Dan and Jocelyn, seven-year-old Wyatt, three-year-old Emmitt, and one-year-old Benjamin have all experienced significant chemical exposure-related health impacts. The impacts are both acute and chronic.

B. Unscientific and Unsafe Habitability Decision Led to History Repeating Itself.

In 1988, the Love Canal habitability study concluded that portions of the EDA were "as habitable as other areas of Niagara Falls."[5] EDA 4 to 7 were declared habitable for residential use, and EDA 1, 2, and 3 were determined to be suitable only for commercial and/or light industrial use rather than residential living. DOH Commissioner David Axelrod stated that: "The final habitability criteria focused upon a combination of (a) the application of environmental and health standards, criteria and guidelines and (b) a comparison of environmental data from the EDA with similar data from comparable residential areas."[6]

Dr. Axelrod noted that, "Both the criteria and the ultimate decision are also bound by the limits of scientific knowledge about the impact of toxic exposures upon the health of our citizens. Although this scientific knowledge is greater than it was in the 1940's and 1950's when the Love Canal was used as a hazardous waste disposal site, this scientific knowledge is not now and never will be complete or absolute, so that any public health judgment necessarily involves the assessment of an inherent level of uncertainty. Nevertheless, government has a responsibility to exercise public health judgments on behalf of its citizens. In the specific case of Love Canal, this responsibility follows directly from the potential of adverse consequences to human health posed by the pollution of a residential community with toxic chemicals, and government's own decision to limit risks to public health by the evacuation and relocation of local residents."[7]

A groundswell of organizations, from the national Natural Resources Defense Council (NRDC) to the statewide Citizens' Environmental Coalition (CEC) to the local Love Canal Homeowners Association (LCHA) strongly opposed the decision. They pointed out that the state had based the decision on a comparison of Love Canal's contaminated soil "background" levels to those in Tonawanda and Cheektowaga communities, both heavily industrialized for decades. Since people were living in those other communities with these levels of contamination, the rationale was that Love Canal did not need a cleanup; it was "habitable" as is. This ruling allowed the Love Canal Area Revitalization Agency to redevelop sectors into the renamed Black Creek Village.

The Natural Resources & Defense Council (NRDC) wrote EPA Administrator Reilly "We understand that you are going to decide very soon whether or not to approve the proposed rehabitation of the Love Canal EDA, and we are writing this letter to reiterate NRDC's strong continuing opposition to the proposal. Indeed, the more closely we have examined the history of the proposal and considered its future implications, the more unconscionable it appears on legal, scientific and ethical grounds."[8] NRDC noted that the habitability study specifically stated: "This approach purposely does not assess the health impacts of the Love Canal [site] on the EDA." They quoted DOH Commissioner David Axelrod's October 17, 1988 letter to the New York Environmental Institute, "[t]here is nothing in my [Habitability] decision which addresses the element of risk." NRDC then stated,

> "Because health impacts on residents are ignored, nearly any area could be deemed habitable…Thus the Comparison Approach in the Habitability Study effectively translates into a 'no worse than' test pursuant to which it is deemed acceptable for people to move back into an area that is found to be no worse with regard to toxic contamination than another where people presently live…The 'no worse than" test as applied in the Niagara Frontier devolves into a "just as contaminated" test. Indeed, the fundamental flaw in using background values to help ascertain habitability was graphically illustrated by the discovery of contaminated fill in one of the comparison areas. The danger of using background values inheres in the possibility, turned reality here, that the background itself may have unacceptable levels of contaminants…
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> The lack of an adequate understanding of the human health and safety ramifications of resettling the EDA is directly contrary to the requirements of CERCLA Section 312, which directs EPA 'to conduct or cause to be conducted" a risk assessment for each of the potential uses of the EDA, including rehabitation…Despite the language and express legislative intent of Section 312, those working on the Habitability Study…neglected Congress' explicit directive in 1986 that a risk assessment be performed for the proposed rehabitation.

> NRDC has serious concerns about who will purchase homes in the EDA if they become available, and the impact of contamination on those purchasers...The Love Canal Revitalization Agency informs us that a significant percentage of the prospective purchasers are persons of color with limited economic means…The disparate impact of hazardous waste sites on minorities has been documented repeatedly; EPA should be sensitive to this problem...
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> The lure of inexpensive housing is also likely to draw relatively young families with children and women of child-bearing age. These groups should be considered especially sensitive to the effects of toxic chemical exposures. Persons considering buying homes in the EDA are entitled to rely on representations made by the government and expert agencies as to the risks associated with living in those homes. Yet, adequate assurances regarding present and future risks cannot be given them, nor to our knowledge have steps been taken to accurately communicate to prospective purchasers the history and current status of the Love Canal hazardous waste site. For all of these reasons, NRDC has urged both EPA and New York State to refrain from inviting people to resettle the Love Canal EDA."[9]

Citizens' Environmental Coalition wrote to the DOH:

> "CEC is a statewide coalition of 80 community, environmental and labor groups which has strongly opposed the resettlement of Love Canal for years and continues to do so…The comparison approach to other contaminated areas is not a public health protective approach. Hexachlorobenzene, for instance 'has been shown to cause cancer in mice and hamsters and is a suspect human carcinogen.' (DOH Chemical Fact Sheet). A remedial plan should be established with the goal to clean up to background levels (before wastes were deposited there). It is our understanding that DOH is working with the Departments of Law and Environmental Conservation on a Cleanup Level Task Force which has decided on a goal of cleaning up to background levels. The Environmental Conservation Law states that remediation of inactive hazardous waste should be to 'eliminate' any 'significant threats.' A comparison approach undermines any preventative health policy on toxic substances and legitimizes certain levels of contamination."[10]

Federal authorities assured families that Love Canal was safe. EPA Administrator William K. Reilly, stated: "There is no undue health risk to buying homes and raising children."[11] Michael Basile**,** EPA spokesperson stated: "The entire area is probably one of the most tested pieces of property on this planet…It's probably one of the safest places to live." [12] Michael Podd, DEC Public Information Office, stated: "[There is] no environmental reason *not* to buy a house at Love Canal." [13]

However, the habitability decision was not based on science. Lois Gibbs, Executive Director of the national Center for Health, Environment and Justice, and a member of the Love Canal Homeowners Association, wrote a guide on Love Canal with this tragically prophetic statement: "In the case of Love Canal, history will most likely repeat itself."

> "It was not until October of 1980 that a total evacuation of the community was ordered by President Jimmy Carter. Everyone who lived at the Love Canal had the option of moving away, with the government purchasing their homes at fair market value. It is unfortunate that everything done at Love Canal, from health studies to evacuation, was done for political reasons. None of the decisions were based on scientific evidence. If it had not been for the large, strong citizen organization, families would still be living at Love Canal with the health authorities saying there were no health problems.
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> For these same reasons, in 1988, portions of the Love Canal area were declared 'habitable' by DOH. The 239 homes closest to the canal have been demolished and the remaining homes sold to new families. The homes that will be reinhabited are still contaminated, still unsafe. There have been no cleanup measures taken around the homes, which were found to have several toxic chemicals in their yards. Only the creek and sewer systems were cleaned. In the case of Love Canal, history will most likely repeat

itself. In conclusion, it is important to add that Canal families didn't know that they were being exposed to poisonous chemicals, nor were they aware that chemical wastes were being dumped in our rivers, soil, and air."[14]

Critics and many organizations stated that even the Love Canal EDA lines were politically determined for economic reasons and omitted contaminated areas on adjacent streets. This was confirmed decades later when Nate and Elena Korson discovered their property on 92nd Street in Niagara Falls was polluted. Their property was adjacent to but outside the EDA area. Elena stated,

> "We were constantly ill in that home. Our son who was conceived in that home was born with Mosaic trisomy 5p, a very rare chromosome anomaly. Our dog was covered in multiple tumors. We had our home tested and the results showed our home and backyard were poisoned. Outsiders called us brave or dumb for buying a house so close to the Love Canal. The DEC and EPA called us an acceptable loss. With no help and little support, in 2012, we packed up and abandoned our home. We destroyed our credit, lost friends, but we are now far away from that toxic dump."

C. 1983 Congressional Report Warned of Health Threats If Toxic Hot Spots Ignored.

The Congressional Office of Technology Assessment (OTA) issued a seminal report[15] that stated: "There are four areas of uncertainty that can affect projections of the long-term integrity of the remedial technology:

1. Remedial action in the EDA.
2. Leak detection systems for the barrier wall and leachate collection system.
3. Long-term monitoring programs.
4. Institutional mechanisms for long-term protection of EDA residents."[16]

OTA stated: "it is imperative that any decision of habitability consider them and their consequences for continued protection of the residences in the EDA."[17] OTA stated that: "Both EPA and NYS/DEC officials have based their analysis of the need (or lack thereof) for remedial action in the EDA, beyond that required for the storm sewer system, solely on the results of the 1980 monitoring study… If hot spots do exist and remain untreated, the area will continue to pose a threat to the health of the residents."[18]

D. OTA, NRDC and EPA Information Highlights Need to Investigate Whether the Love Canal Landfill Toxic Leachate is Migrating.

There are multiple reasons that mandate an investigation into whether Love Canal is migrating.

The Aging Liner: The Love Canal wastes are covered by a clay layer (in part) and a synthetic, 40 mil high-density polyethylene (HDPE) cap liner. The HDPE liner was installed in late 1984 and 1985.

All liners eventually fail as they disintegrate, tear, develop holes or decompose. In 1992, a 30-foot by 60-foot liner section of the 40-mil Love Canal cap liner failed ("integrity compromised"), when the cap liner was only eight years old. It was replaced, welded and patched and 18 inches of soil were placed on top of the liner. Three hundred feet of sewer lines near the cap had to be removed because they were filled with various Love Canal chemicals.

The OTA's assessment indicates that "[t]he synthetic membrane cap has an estimated lifetime of 20 years…". The Love Canal liner cap is now 42 years old.

Based on resident observations and an independent scientific assessment, there is reason to believe that pieces of the disintegrated cap liner are surfacing in residential drains and area sewers.

Barrier Drain System is Designed for Aqueous Phase Chemicals Only, Not Non-Aqueous Chemicals. According to a DOH website summary,

> "The Department of Environmental Conservation's concern over the Love Canal situation dates back to September 1976, when DEC engineers first visited the site to investigate the suspected discharge of Mirex by Hooker Chemical and Plastics Corporation…The City of Niagara Falls, under emergency order by the State of New York, initiated efforts preliminary to remedial construction work in the southern portion of the Love Canal in spring 1978. A barrier drain and capping system was designed for the southern section by the consulting engineering firm of Conestoga-Rovers and Associates, in an effort to prevent more water from soaking into the chemical waste disposal area and to intercept contaminated groundwater migrating from the landfill. Remedial work commenced on the southern end of the canal on October 10, 1978, and was completed in October, 1979. By November, 1978, DEC personnel were engaged in negotiations with Conestoga-Rovers and Associates for development of a proposal and contract for continuation of remedial work in the central and northern sectors of the canal and later for the development of performance specifications for an on-site leachate treatment plant. Construction operations under this proposal began May 29, 1979 and were substantially completed on December 10, 1979, with opening of the permanent leachate treatment facility at the Love Canal site.
>
> The barrier drain extends 12-20 feet below the surface into a clay substrata where perforated drain tile has been installed and backfilled with a permeable material. Due to the slope of the drainage system, the aqueous phase leachate migrating outward from the canal is gravity fed to several underground pumping chambers. This engineering design not only serves to lower the water table within the landfill, but also helps to achieve a reverse flow of underground water in the overburden immediately outside of the barrier drain system. All of the collected leachate is then pumped to an underground storage tank that acts as a reservoir for the on-site leachate treatment facility…During the placement of the barrier drains, a series of lateral drains also was constructed in the landfill to hasten the dewatering process."[19]

There is no “bottom” liner under the 22,000 tons of hazardous waste at Love Canal and there are no sides along the landfill. Basically, the landfill's containment is in large part based on the liner cap, and the leachate collection system, comprised of the above-described barrier drain with ceramic tiles that rings the landfill, with the intent to capture escaping polluted groundwater.

The concern is that the barrier drain collection system is not designed to capture non-aqueous phase chemicals, or NAPL.

On January 11, 2011, a group of contractors doing sewer remediation work on Colvin Boulevard, less than 250 feet from the McKiernan's home opened up a sewer trench and discovered what was later confirmed to be Love Canal waste, including NAPL. Crews responded by power-flushing the brown-black viscous liquid—NAPL—into the downgradient sewers. A substantial amount of contaminated soil was placed on numerous roll-off containers and disposed of elsewhere. A subsequent investigation concluded that the waste was “isolated, “and “pre-existing,” or leftover from the original Love Canal disaster. At least one Department of Health representative, Matthew Forcucci, disagreed with that assessment.

A lawsuit followed, led by a second generation of Love Canal residents raising concerns and demanding relocation and damages. They submitted testing, pictures, videos, and more, but no thorough investigation was conducted. State and Federal authorities refused to relocate them.

In response to the lawsuits, and at District Judge John Curtin’s request, DEC and EPA submitted a detailed letter to Judge Curtin confirming that the Love Canal containment system was functioning as expected. The letter, dated April 24, 2013, included the following statement: “In 1980, a 22-acre clay cap, which is a minimum of

three-feet thick, was installed over the entire former disposal area after a barrier drain collection system was installed to intercept and to collect any chemicals that were migrating from the Love Canal Site. In 1985, a second and expanded engineered cap (40-acre) consisting of a 40-mil high density polyethylene was installed over the already existing clay cap." [20]

DEC and EPA represented to Judge Curtin that the barrier drain collection system was designed to capture all chemicals, which is not accurate. It is designed to intercept contaminated groundwater, or aqueous phase chemicals, not non-aqueous phase chemicals (NAPLs).

Occidental Chemical's subsidiary, Glenn Springs Holding, has been monitoring a well at the Love Canal landfill that has high concentrations of toxic chemicals in excess of groundwater standards, according to the EPA Five Year Review Report of 2024. The report stated:

> "Currently, there are 153 active monitoring wells for the Site (132 overburden and 21 bedrock)… Groundwater in MW-10135, which is installed in the southwestern portion of the Site in an area of known impacts, had concentrations of VOCs, SVOCs, and pesticides that exceeded the NYSDEC Class GA Groundwater Standards. In 2022, 29 compounds were detected in this well. Some of the highest contaminant exceedances reported during this FYR period include toluene at 25,000 µg/L (2021), benzene at 6,800 µg/L (2021), chlorobenzene at 2,600 µg/L (2022), and napthalene at 2,000 µg/L (2022).[21]

MW-10135 is outside the barrier drain trenches. Glenn Springs assumes – based on gradients that apply to groundwater, not NAPL -- that these wastes are not migrating off-site because they are being pulled back into the barrier drain collection system. Glenn Springs states:

> "Historically, as discussed above, MW-10135 is the most contaminated of the long-term monitoring wells located within the Love Canal containment area. Although located outside the barrier drain, MW-10135 is within the influence of the barrier drain based on hydraulic monitoring conducted at the adjacent nested-piezometer string 1160, as indicated in the previous (2019) FYR Report. Based on the inward gradient, impacts identified at MW-10135 are being captured by the barrier drain. MW-10135 is also sampled as a representative control well and is used as a comparison well to confirm any potential presence of low levels of contamination that may be found in other monitoring wells."[22]

The contaminants from this well, however, may not hydraulically be pulled into the barrier drain collection system.

OTA stated in its 1983 assessment that a leak detection system was absolutely essential.

> "Leak Detection Systems: Any analysis of the effectiveness of the remedial action must include some consideration of the capability to detect failure at some time after the system is complete. A major limitation of environmental control systems, however, is that there are few methods to test their continued integrity. Any cracks that develop in the wall could serve as possible routes for migration of chemicals. If the leachate collection system is working properly, such cracks should not pose a threat for outward migration of contaminants. If the system does not operate properly, however, pooling of ground water could occur near subsurface structures. if it lasts twice the expected lifetime, cracks can be expected…The synthetic membrane cap has an estimated lifetime of 20 years… A final area of uncertainty concerns long-term monitoring strategies. The monitoring effort that is planned may not provide sufficient warning about migration and accumulation of chemicals outside the barrier wall…Because the strategy of environment control does not remove sources of contamination, it is necessary to include safeguards that increase the likelihood of long-term integrity of containment and reduce effects of failure should it occur. Well-developed environmental monitoring programs are essential safeguards. Monitoring should include all environmental media: water, air, soil, and biota. Moreover, some sort of leak detection system is necessary to warn of possible release of contaminants through the natural or synthetic barriers of the containment structure."[23]

NRDC stated in their 1990 letter to EPA Administrator Rucklehaus, that the proposed resettlement of Love Canal was a "bad idea" and it was a "certainty" that there would be remedy failure in the future created by the inherent limitations of technologies.[24]

> "Future Liability: Another consideration in evaluating the prudence of rehabitating the Love Canal EDA concerns potential future liability. Aa all such remedies must, the cap and containment system at Love Canal will eventually fail. The resulting toxic breakout could seriously adversely affect the health of those who resettle the EDA. Even without such a breakout, it is certain that health problems will occur at Love Canal. Whether there are due to the 21,800 tons of hazardous waste still buried on site, or some other agent, the first suspect by default will be Love Canal. In large measure, proposed rehabitation is problematic because of the certainty of remedy failure in the future, and the unavoidable uncertainties created by the inherent limitations of current technologies and available knowledge concerning hazardous waste remediation. Rather than dealing with future health problems and complaints, the attendant bad publicity, attempts to ascertain the cause of those health problems, and questions of liability, EPA should withhold its imprimatur from the proposed rehabitation. The proposed rehabitation of the Love Canal EDA is an extremely bad idea…"[25]

EPA contends that contamination is being captured by the leachate collection system, but there is no confirmation that this is happening. Indeed, observations, pictures, videos, and strong chemical odors suggest that chemicals are migrating from the Love Canal site.

There is overwhelming evidence that a full investigation needs to be conducted to ascertain if chemicals are migrating from the Love Canal landfill.

E. No Time to Lose: Investigate Love Canal EDA and Adjacent Areas for Exceedances.

In 2003, Governor George Pataki signed the State Superfund and Brownfield Cleanup Program law, a landmark statute created the most health-protective soil cleanup standards in the nation. Soil cleanup guidance for toxic chemicals was based on protecting sensitive populations, such as children, and drinking water protection.[26] The law required other major improvements including the addition of "hazardous substance" sites.[27] DEC and DOH promulgated the health-protective soil cleanup objectives in 2006.

The agencies never revisited the Love Canal Emergency Declaration Areas, including the McKiernan family property, to ascertain if any of the hazardous waste and hazardous substance contamination violates the NYCRR Part 375 Soil Cleanup Objectives (SCO).[28] For instance, the McKiernan property is polluted with lead in excess of the residential SCO for lead.

It is incumbent on the DEC and DOH to finally apply the State Superfund SCOs to the neglected EDA and adjacent areas as hundreds of families with babies, young children, immune-system disorder people and the elderly may be unknowingly exposed to hazardous chemicals that threaten their health. Similarly, DEC and DOH must assess the EDA and adjacent areas under the most up-to-date state guidance values for air, surface water, or any other metric.

V. AUTHORITY TO SEEK ACTION FROM THE DEPARTMENTS OF ENVIRONMENTAL CONSERVATION AND HEALTH.

This administrative petition is respectfully submitted under the authority of Section 204 of the New York State Administrative Procedure Act which states:

“On petition of any person, an agency may issue a declaratory ruling with respect to…whether any action by it should be taken pursuant to a rule.” And further, “Within thirty days of receipt of a petition with respect to paragraph (ii) of subdivision one of this section, an agency shall issue either a declaratory ruling or a statement declining to issue a declaratory ruling, unless the agency's rules provide for a different time period not to exceed sixty days from receipt of such petition.”

Dated: October 2, 2026

Respectfully submitted,

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Luella Kenny, Former Love Canal Resident

JoAnn Abba-Bradley, Former Love Canal Resident

Elena Korson, Former Love Canal Resident

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Dr. David Carpenter, University of Albany, Former DOH Wadsworth Laboratory Director

Clean Air Coalition of Western New York

Community Concerned About NL Industries

Don’t Waste New York

NAACP Niagara Falls Branch

Nuclear Information & Resource Service

Save Our Backyards Western New York

Sierra Club Niagara Group

Sources for Administrative Petition

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[1] Map of EDA 1-7 https://digital.lib.buffalo.edu/items/show/16702
[2] New York State Soil Cleanup Objectives, 6 NYCRR Part 375
[3] *Final Report Vol. 1*, September 1993, DEC Superfund Standby Contract, Love Canal Units B9 and 18.
[4] Sampling prior to 1989 established that EDA 4 lots 9903 and 9909 Black Creek Drive and 1044 100th Street were contaminated with benzene hexachloride (BHC). *Status of Remedial Activities, Love Canal Remediation Action Project to Love Canal Technical Review Committee*, DEC, 1991. A sample was taken from the then-property line between 9903 Black Creek and 1026 99th Street, which confirmed elevated levels of BHC. The sample was in excess of 1,000 parts per billion. A drum of "black viscous liquid" and black ash layer was discovered at 9903 Black Creek Drive (1993 Final Report, 2-14, Appendix J, p. 27, and 1-4), as well as elevated levels of mercury which a consultant report noted was not waste regulated under the Resource, Conservation & Recovery Act (RCRA). Despite the presence of waste at 1026 99th St., no remediation or removal of any type was conducted. (1993 Final Report, 2-2, 2-11). The 1993 Final Report confirms that the DEC failed to identify accurate remediation boundaries, failed to follow testing data that confirmed both ash and BHC on 1026, and never remediated known BHC contamination on 1026 99th Street and 9903 Black Creek.
[5] Love Canal Fact Packet, Center for Health, Environment & Justice, 2009.
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[23] *Habitability of the Love Canal Area: An Analysis of the Technical Basis for the Division on the Habitability of the Emergency Declaration Area-A Technical Memorandum* (U.S. Congress, Office of Technology Assessment, OTA-TM-M-I3, June 1983). Appendix A.
[24] Jaqueline Warren, Senior Staff Attorney, NRDC letter to EPA Administrator William Rucklehaus. May 3, 1990.
[25] Ibid.
[26] The State Superfund and Brownfield Cleanup Program 2003 law required major improvements in cleanup requirements, Article 27 Title 13 and Title 14 of the NYS Environmental Conservation Law.
[27] The State Superfund and Brownfield Cleanup Program 2003 law expanded the programs to include sites polluted with hazardous substances which are not regulated under RCRA.
[28] Part 375 Regulations pursuant to Article 27, Title 13 and Title 14.