

# ***LAW OFFICE OF GARY A. ABRAHAM***

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170 No. Second Street  
Allegany, New York 14706  
716-372-1913; fax is same (please call first)

gabraham44@eznet.net  
www.garyabraham.com

November 7, 2005

Steven V. Metivier, Project Manager  
U.S. Army Corps of Engineers  
Buffalo District  
1776 Niagara Street,  
Buffalo, New York 14207

**Re: C.I.D. Landfill (Waste Management of New York, LLC) (WMNY), Application  
for Permit Under Section 404, No. 96-976-0170(7)**

Dear Mr. Metivier:

Thank you for speaking with me by phone last Thursday. You indicated that Army Corps approval of a Section 404 permit for the above referenced project is imminent. This letter follows up on my email following our conversation, arguing that significant new information on wetlands impacts of the above-referenced project has come to light in NYSDEC's parallel permit review, warranting a second look by the Corps at the project's likely impacts. On behalf of Concerned Citizens of Sardinia (CCS), an unincorporated association of residents in the town that would host the above-referenced project, please accept the following comments and enclosures, attached here and hereby incorporated by reference, discussing this new information.

As a result of an October 14, 2005 redelineation of wetlands in and around the project site by CCS's technical consultant Charles Rosenburg of Northern Ecological Associates, Inc. (NEA), significant new information on likely project impacts to wetlands have come to light.<sup>1</sup> This redelineation was done pursuant to procedures authorized by NYSDEC Administrative Law Judge Molly T. McBride in the context of an issues conference considering the proposed project for permits administered by NYSDEC. The issues conference record is now closed, or will close shortly, and a ruling on issues and party status is expected in the next 30 days. CCS is a petitioner seeking party status in the NYSDEC proceeding, one outcome of which may be issuance of a state water quality certification, a precondition to the Army Corps' issuance of the above-referenced federal permit.

This project is located directly over the federal Cattaraugus Basin Sole Source Aquifer on a

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<sup>1</sup> Two enclosures herein are the work of Mr. Rosenburg: an October 13 memorandum addressing the project's impacts on valuable habitats (under my cover letter of October 14), and an October 24 memorandum addressing wetlands and adding to the discussion of habitats. these are referred to here as "NEA1" and "NEA2", respectively. The enclosures also include a response to both memoranda by WMNY dated October 31, referred to as "WM".

clay fragipan that tapers off at the soil surface to meet underlying sand and gravel deposits around the site perimeter. See WMNY, Chaffee Facility, HYDROGEOLOGICAL REPORT, Figure 7 (enclosed). The project therefore presents substantial risk of contamination to valuable groundwater resources.

Two areas of proposed disturbance of wetlands that would result from the project are particularly problematic. WMNY would excavate an existing fire pond within a proposed soil borrow area (Borrow Area C), immediately north of the site and within 100 feet from federal Wetland 11, to an additional depth of 55 feet, creating an 18 percent downward gradient with respect to Wetland 11. NEA2, p. 3; WM, p. 11. In addition, wetlands in or very close to both the fire pond and the expansion landfill footprint previously determined to be “isolated” and thus non-jurisdictional are hydrologically connected to Casenovia Creek or Hosmer Brook. NEA2, pp. 3, 6, 8.<sup>2</sup>

### **Fire Pond**

Mr. Rosenberg found that the fire pond drains to a tributary of Casenovia Creek and is therefore not hydrologically isolated. See NEA2, Attachment 1, Fig. 4. He also found that the proposed excavation would likely be hydrologically connected to Wetland 11 by virtue of underground sand lenses that transmit perched water. NEA2, pp. 8-9. The fire pond is located in a historical wetland, as indicated by 1951 aerial photos and USGS topographical maps reviewed by Mr. Rosenberg that date before the fire pond. In addition, Wetland 11 is connected by a drainage channel to the large adjacent state-designated Wetland AR-11.

Excavation of the existing fire pond adjacent to Wetland 11 has the potential to draw down shallow groundwater on which the water balance for Wetlands 11 and AR-11 depend. All three water bodies have the same or very close to the same surface water levels, indicating they are probably fed by groundwater. See NEA2, Attachment 1, Fig. 4. WMNY has found that sand lenses exist in the site vicinity and all three water bodies are formed by perched water in predominantly clay till. However, little or no localized groundwater data beyond this is available to support WMNY’s theory that all three water bodies are charged almost entirely and separately by surface water flow. WM, p. 10. This theory is particularly problematic in light of the fact that the area is located in the headwaters of the Casenovia Creek watershed, and thus surface water runoff charging these three water bodies is limited. In any case, the demonstration offered by WMNY, (id.), is also new information on which neither the Corps nor the public have had an opportunity to comment.

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<sup>2</sup> Although Mr. Rosenberg’s October 24 memorandum specially addresses NYSDEC regulations at 6 NYCRR part 360-2.12(c)(8) (restrictions on siting landfills or landfill expansions in federal regulated wetlands), the standards set forth in that provision track closely the applicable federal standards for Section 404 permit review at 40 CFR §230.10(b) and (c), and thus should be considered directly relevant to the Army Corps review.

### **“Isolated” Wetlands**

According to the Army Corps’ May 10, 2005 public notice, (*see* WM, Ex. 1), the Corps determination that Wetlands 1, 3, 5, 7 and 8 and the fire pond are isolated (but Wetlands 2 and 9 are not) was made in May 2002. Mr. Rosenberg has concluded that of these, all but Wetland 5 are in fact not isolated. WMNY’s proposed expansion landfill footprint, located on the watershed divide between these two streams, would thus destroy a number of smaller jurisdictional wetlands.

The new landfill construction would also divert surface runoff from the Casenovia Creek watershed to the Hosmer Brook watershed. WMNY acknowledged that drainage to the state-designated Class I Wetland SD-1, which provides much of the headwaters for Hosmer Brook, would increase by six percent as a result of the project’s diversion of stormwater. WM, p. 9. This is significant because Hosmer Brook hosts a wild trout spawning area, making these waters especially sensitive to increased sedimentation and potentially contaminated runoff from the landfill.

WMNY has also already excavated a large soil borrow area west of the existing landfill, within the proposed expansion landfill footprint that is located within Wetland 8, requiring an after-the-fact Army Corps permit and additional mitigation. NEA2, p. 8.

### **Another Public Comment Period is Called For**

This new information enlarges substantially the extent of wetland loss that would result from the project, justifying a second look by the Corps at WMNY’s ability to avoid, minimize and mitigate impacts. Should the Army Corps determine that reopening is warranted, or should the Corps request more information from WMNY to address these comments, the public should be given an opportunity to comment on any new submissions by the applicant.

### **Alternatives Analysis**

Any new opportunity to comment should also allow the public to address the need for the proposed project. *See* 40 CFR §230.10(a) (requirement to show no “practicable alternative to the proposed discharge” exists). Since landfilling is not a water dependent activity, it must be “clearly demonstrated” no practicable alternative exists. 40 CFR §230.10(a)(3). “A permit cannot be issued . . . in circumstances where an environmentally preferable practicable alternative for the proposed discharge exists . . .” RGL 92-01, Water Dependency and Cranberry Production, 57 FR 32523 (1992).

Under Army Corps regulations requiring compliance with the EPA’s Section 404(b)(1) Guidelines (hereafter “Guidelines”), (33 CFR §323.6; 40 CFR Part 230), whether practicable alternatives exists must be determined “in light of overall project purposes.” 40 CFR §230.10(a)(2). An alternative site is available if it “could reasonably be obtained, utilized,

expanded or managed” by the applicant in order to meet the basic project purpose. Id. Corps guidance states that alternatives located on property not currently owned by the applicant can be excluded from the alternatives analysis only for small business facilities that affect no more than two acres of wetlands. RGL-95-01, 65 FR 12518-12519 (2000). In all cases, the Corps must make a determination independent of the applicant’s statement that reflects both the applicant’s and the public’s perspective. Cf. 33 CFR §325, Appendix B(9)(b)(4).

Although the Corps’ May 10 public notice relies on “[t]he applicant’s stated purpose,” the overall purpose of the project is in reality to expand disposal capacity in the regional market for waste in New York.<sup>3</sup> This purpose can be (and to a large extent is being) met by a number of alternatives. First, Pennsylvania hosts the largest number of MSW landfills in the United States, including a number of landfills operated by WMNY corporate siblings, representing more than twice the disposal capacity currently available in New York. Second, western and central New York host eight regional landfills, representing 60 percent of the state’s landfill disposal capacity.<sup>4</sup> Owing to transportation costs, very little waste is disposed at these facilities from New York City, which sends most of its waste out of state. As a result, landfill tipping fees in western New York have become “dirt cheap,” according to comments of the NYS Association for Reduction, Reuse and Recycling.<sup>5</sup> Third, WMNY operates two other regional landfills nearby.

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<sup>3</sup> The Corps should reject the narrow geographical description of the project’s purpose given by the applicant, which limits purposes to those available at the Chaffee, NY site. For example, the Corps rejected an applicant’s defined project purpose as “to construct and operate a thoroughbred horse racing tract in Auburn, Washington, to replace the former Longacres Park in Renton, Washington,” and instead redefined the project purpose as, “To develop and operate an economically viable thoroughbred horse racing facility in Western Washington to meet the long-term needs of Washington’s thoroughbred horse racing industry.” *Citizens Alliance v. Wynn*, 908 F.Supp. 825 (W.D.Wash. 1995). Properly defined, WMNY’s project purpose is to develop and operate a regional landfill to meet the long-term waste disposal needs of New York. New York City has sufficient disposal capacity outside Pennsylvania and New York. See EVALUATION OF WASTE DISPOSAL CAPACITY POTENTIALLY AVAILABLE TO NEW YORK CITY (March 2004), p. 1 and Table 3.3-1, available at <[www.nyc.gov/html/dsny/downloads/pdf/guides/cwms/cwms-ces/v4-ewdc.pdf](http://www.nyc.gov/html/dsny/downloads/pdf/guides/cwms/cwms-ces/v4-ewdc.pdf)>. WMNY’s project purpose is therefore properly defined as meeting upstate New York needs for long-term waste disposal.

<sup>4</sup> See NYSEC, 2003 DISPOSAL CAPACITY CHART, available at <<http://www.dec.state.ny.us/website/dshm/sldwaste/capacity.pdf>>. In addition, neighboring Chautauqua County’s publicly owned and operated landfill proposes to expand. See NYSDEC, CAPACITY DATA FOR SOLID WASTE MANAGEMENT FACILITIES (July 21, 2005), available at <<ftp://www.dec.state.ny.us/dshm/Capacity Chart 2004 Active MSW Landfills and WTE Facilities.pdf>>.

<sup>5</sup> These comments are enclosed; they were submitted to NYSDEC in opposition to another landfill proposal made by Integrated Waste Systems of Lockport, NY, proposed to be

WMNY owns and operates the High Acres Landfill nearby in Monroe County, which fell short of reaching its permitted capacity by approximately 20 percent in 2003.<sup>6</sup> Recently, WMNY took over operation of the Mill Seat Landfill for Monroe County under a lease arrangement. These landfills compete with others in the region to secure market share. It is this, not any public benefit, that drives WMNY's landfill expansion proposal. *Cf.* 33 CFR §320.4(a) (requirement to balance public benefit against foreseeable detriments). Far from having no alternative to added disposal capacity in the region, there is in fact substantial excess capacity and no need for a new landfill at this location.

None of the existing landfills in the region involve the degree of wetland destruction this project would involve. However, by limiting the project's purpose to the existing facility when the project is clearly part of the applicant's regional commercial goals, WMNY has failed to provide to the Corps the required demonstration.

The Corps' alternatives analysis "should reflect the significance and complexity of the discharge activity." 40 CFR §230.6(b). Because this is not a "routine" project that can be expected to "have little, if any potential for significant degradation of the aquatic environment," the Corps' alternatives analysis must apply heightened scrutiny to this project. 40 CFR §230.6(a).<sup>7</sup>

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sited near WMNY's C.I.D. Landfill, in Farmersville, NY. The assertion is confirmed by NYSDEC data, available at <[ftp://www.dec.state.ny.us/dshm/swmf/MSW Landfill Tipfee.pdf](ftp://www.dec.state.ny.us/dshm/swmf/MSW_Landfill_Tipfee.pdf)>. Of New York's 27 landfills, 23 reported tipping fees averaging about \$46 per ton in 2002. *Id.* However, commercial landfills in central and western New York only (Mill Seat, High Acres, CID, Hyland Modern) reported an average tipping fee of under \$38 per ton. *Id.* According to figures compiled by Cheshire County, NH, New York's average tipping fee in 1997 was over \$76 per ton. By making landfilling more economically desirable, continued expansion of landfilling in New York therefore conflicts with the state's policy to discourage landfilling except as a last resort. N.Y. Env'tl. Conserv. L. § 27-0106.

<sup>6</sup> CCS offers to provide additional documentation showing this shortfall is persistent over at least the last five years.

<sup>7</sup> Applicable guidance allows the Corps to dispense with a stringent alternatives analysis only for projects with "minor impacts." Regulatory Guidance Letter 93-02, para. 3(a) (August 23, 1993), available at <<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rgls/rgl93-02.htm>> ("Minor impacts are associated with activities that generally would have little potential to degrade the aquatic environment and include one, and frequently more, of the following characteristics: are located in aquatic resources of limited natural function; are small in size and cause little direct impact; have little potential for secondary or cumulative impacts; or cause only temporary impacts."). Because it has not been superseded, even though it expired on December 31, 1998, this guidance remains applicable. See 65 Fed.Reg. 12518 (March 9, 2000) ("unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance

Under the Guidelines and the Buffalo District's Mitigation and Monitoring Guidelines, mitigation plans should address "*unavoidable* aquatic resource losses." Buffalo Dist. Guidelines, p. 1.<sup>8</sup> However, WMNY's ability to expand other landfills it operates in the region, reduce waste receipts at the Chaffee facility to extend its operational lifetime, acquire alternative sites, or take no action at all makes wetland losses at the Chaffee location avoidable.

The impacts discussed in this letter and enclosures prepared on behalf of CCS, which WMNY continues to contest, were disregarded in the baseline impacts information so far submitted to the Corps for this project. See *id.*, Compensatory Mitigation Plan Checklist. In light of this new information, the ability of WMNY to create "ecologically self-sustaining wetlands," (*id.*, p. 1), around the project site in the wake of these impacts is therefore highly questionable.

Respectfully,

Gary A. Abraham  
*Attorney for Concerned Citizens of Sardinia*

gaa/encs.

cc: Daniel Montella, USEPA Region 2 (w/encs.)

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provided in RGLs generally remains valid after the expiration date").

<sup>8</sup> Available at <[http://www.lrb.usace.army.mil/orgs/reg/notices/200400250\\_0.pdf](http://www.lrb.usace.army.mil/orgs/reg/notices/200400250_0.pdf)> (December 15, 2003).

## LIST OF ENCLOSURES

1. Waste Management of New York, LLC, Chaffee Facility, Hydrogeological Report, Figure 4.
2. Charles Rosenberg resume.
3. Charles Rosenberg Memorandum to Gary A. Abraham, October 13, 2005, under cover letter from Gary A. Abraham to Hon. Holly T. McBride, October 14, 2005.
4. Charles Rosenberg Memorandum to Gary A. Abraham, October 24, 2005, including:

Attachment 1: Miscellaneous Figures:

- Figure 1: Site Location Map for Chaffee Landfill
- Figure 2: USDA Soils for Map for Chaffee Landfill
- Figure 3: NYSDEC Freshwater Wetlands Map for Chaffee Landfill
- Figure 4: Observations North of Hand Road, October 14, 2005
- Figure 5: Observations South of Hand Road, October 14, 2005
- Figure 6: Observations North of Allen Road, October 14, 2005

Attachment 2: Field Data Forms (October 14, 2005 wetlands delineation)

5. Daniel M. Darragh, Letter to Hon. Holly T. McBride, October 31, 2005, including:

Exhibit 1: U.S. Army Corps of Engineers, Buffalo District, Public Notice of Application of C.I.D. Landfill, Inc., for Permit under Authority of Section 404 of the Clean Water Act, May 10, 2005.

Exhibit 2: Miscellaneous Plan Sheets for Chaffee Facility:

- Borrow Area C, Fig. A-1
- Borrow Area C, Fig. A-2
- W-11 and AR-11 Drainage Areas, Fig. B-1
- W-11 and AR-11 Drainage Areas, Fig. C-1

6. New York State Association for Reduction, Reuse and Recycling, Inc. (Lyons, NY), Letter to Kenneth C. Taft, NYSDEC, December 29, 2003 (comments on need for new landfill facility in Farmersville, NY).