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## **VIA U.S.P.S. AND EMAIL**

Mr. John Iannotti  
New York State Department of Environmental Conservation  
Division of Solid & Hazardous Materials  
625 Broadway  
Albany, New York 12233-7250  
[hwsiting@gw.dec.state.ny.us](mailto:hwsiting@gw.dec.state.ny.us)

Re: **Comments of the County of Niagara, the Town of Lewiston and the Village of Youngstown, New York on the Final Draft New York State Hazardous Waste Facility Siting Plan and Final Generic Environmental Impact Statement (“GEIS”)**

Dear Mr. Iannotti:

Because public notice of the above-referenced Hazardous Waste Facility Siting Plan (the “Plan”) and associated GEIS was published on October 6, 2010, ten business days are provided for the public to consider the Plan and GEIS. 6 NYCRR § 617.11(a). Accordingly, please consider the following comments on behalf of Niagara County, the Town of Lewiston, the Village of Lewiston and the Village of Youngstown (“the Municipalities”).

The Department is to be commended for producing clear guidance to agencies and future hazardous waste facility siting boards in nearly every area for which guidance is required or desired, a comment we are happy to reiterate from our comments on the second re-draft of the Plan. However, in the final version of the Plan the Department still fails to provide guidance on assessing the equity of new or expanded facilities, contrary to the statutory directive that it do so. ECL § 27-1102.2(f). *Cf.* Plan, 6-12 (“equitable distribution must be assessed”). Without such an assessment, the Plan can provide little or no guidance on how to determine whether new or expanded facilities would be equitably distributed.

The current version of the Plan takes the position that such guidance is not called for:

Given the finding that no new facilities are needed, it follows that there is no need to create a scenario for the equitable distribution of new facilities. . . . There is no provision in the law that requires the Department to assess the issue of burden of past disposal sites. . . . While the Plan is written to guide a Siting Board, a Board is free to consider additional factors, such as “accumulated waste,” in making its own determinations of necessity, public interest and equitable distribution.

Plan, Response to Comments, 1. However, this position misunderstands the legislative mandate. While it may be correct that there is no need for the Department to create a scenario for the equitable distribution of new facilities, a Siting Board must address the effect of new or expanded facilities on equitable distribution and therefore the Plan must provide meaningful guidance to the board to assist in doing so.

The siting statute mandates that the Plan include:

a determination of the number, size, type and location by area of the state of new or expanded industrial hazardous waste treatment, storage and disposal facilities which will be needed for the proper long-term management of hazardous waste consistent with the assurances required pursuant to subdivision one of this section and an equitable geographic distribution of facilities.

ECL § 27-1102.2(f). This provision was added in 1987 when the state siting law was first adopted.

Executive Deputy Commissioner Langdon Marsh, in writing the bill memo in support of the 1987 amendments, stated that the amendments are consistent with recommendations contained in the final report of the Governor's Hazardous Waste Treatment Facilities Task Force. Langdon Marsh, Executive Deputy Commissioner, Memorandum to Evan Davis, Esq., *Re: Assembly 7835-C* (July 24, 1987), 1. The Task Force distinguished on-site disposal facilities, off-site disposal facilities, incineration and energy recovery facilities, both on-site and off-site, onsite and off-site storage facilities, on-site and off-site treatment facilities, and referred to an accompanying chart for more detail. *See* New York State Hazardous Waste Facilities Task Force, Final Report (September 1985), 27-28. The accompanying chart shows storage, treatment, landfill and incinerator facility types are considered separate types of facilities, each with their own column, with rows providing a further breakdown of each type as new or expanded on-site facilities, and new or expanded off-site facilities. *Id.*, 34.

The Task Force also singled out land disposal facilities for special treatment, imposing on this facility type the requirement for siting board review even when landfilling was previously permitted on the site and only an expansion of operations is requested by an application. This change required amending an exemption from siting board review in the previous legislation for these types of applications "because they are considered to be substantially similar to operating units." *Id.*, 31. The amended language thereafter read, and reads today, that facilities exempt from siting board review include "[a]dditional facilities, other than land disposal facilities, to be located at the site of an existing facility." ECL § 27-1105.2(d). The 1987 amendments also made subject to siting board review "any expansion, wherever situated, of the aggregate land disposal capacity of an existing land disposal facility." ECL § 27-1105.1(e).

Commissioner Marsh understood that "geographic delineations [would be] necessary to achieve the policy underlying this legislation." Memorandum to Evan Davis, Esq., *Re: Assembly*

7835-C, 2. “Furthermore, ECL § 27-1105.2(f) charges the siting board to render a decision consistent with the Plan and not to determine *de novo* its own concept of equitable distribution.” *Id.*

Finally, in his Approval Memorandum, Governor Mario Cuomo noted that the equitable distribution provision in the 1987 amendments requires “a determination of the types and nature of facilities,” which he believed would “be able . . . to avoid the further concentration of disposal facilities in only one part of the state.” *N.Y.S. Legislative Annual - 1987*, 227.

Thus, the drafters of the 1987 changes to the siting plan law and, at the time, the Department and the Governor clearly expected that the Plan would address “geographic distribution” in terms of “number, size, type and location” of facilities because, unlike the current version of the Plan, the Legislature *found* that facilities are *not* equitably distributed as a matter of fact, especially regarding land disposal facilities.

The Plan concludes that “existing distributions are equitable,” (Plan, 8), but does so based on a simple analysis of how “treatment, storage and disposal” facilities, taken as whole, are distributed among the nine DEC regions. Plan, 6-13, 6-14. However, the Legislature in 1987 did not authorize the unitary idea of TSD facilities now utilized in the Plan. Instead, it contemplated a much more refined analysis of geographic equity, and specifically singled out land disposal facilities for their unique burdens. The Plan lacks the kind of refined analysis of this issue mandated by law.

The Plan recognizes “various types of facilities” but anachronistically utilizes the “TSD” concept to lump all such facility types into one category. *Cf.* 6-4 (“No one state has all the *various types of facilities* necessary to treat or dispose of every type of waste generated within its borders.”) (emphases added). *Cf. also* 6-5, Fig. 6-1 (map of landfill facilities nationwide). However, despite recognition of a diversity of facility types, and despite the Legislature’s directive to determine “the number, size, type and location by area of the state” of facility types, and despite the legislative intent to associate a determination of such facility types with the need for a siting board to assess the distributional equity of approving a new facility, the Plan concludes that “[t]he law does not differentiate between types of facilities in this regard.” Plan, 9-4.

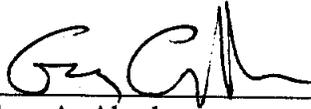
Importantly, the Department believes that because no new or expanded industrial hazardous waste TSD facilities are needed, it need not determine whether various types of facilities are equitably distributed, and therefore no guidance to a siting board need be provided as to how to assess the equity of additional facilities. Plan, 6-12 (“As no new or expanded industrial hazardous waste TSD facilities are needed, there is no required evaluation of the impact of new or expanded facilities on the geographic distribution of facilities to evaluate at this time.”). *See also id.*, Response to Comments, 10 (“The law does not require the Siting Plan to provide guidance to a Siting Board regarding analysis of disproportionate burden.”). However, it is too easy, by neglecting to identify the various types of facilities, to conclude that because “[e]very

area of the State is potentially impacted by the presence of hazardous waste," facilities are in fact equitably distributed. Plan, 6-15. This conclusion is not based on any identification of the various types of facilities, but instead on the gross quantities of hazardous waste received at any facility of any type, broken down by DEC region.

The Department appears to want to address this issue only grudgingly, and only as an afterthought. Plan, 6-12 ("Still, [despite finding no need to do so,] because the Legislature required equitable distribution, to the extent that the Department has an opportunity to direct the placement of facilities, equitable distribution must be assessed.").

If the Department believes the siting law does not require any guidance on whether a new or expanded facility would be inequitable, it should say so clearly in the Plan. If, however, the Department believes an equity analysis is required, notwithstanding the present lack of need for new facilities, the Plan needs to include much more than is provided in Chapter 6. The current version of the Plan provides little if any guidance to a siting board as to whether such analysis is important.

Sincerely,



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Gary A. Abraham



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