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August 3, 2006

## **VIA FEDERAL EXPRESS OVERNIGHT**

Judith Enck  
Deputy Secretary for the Environment  
Office of Governor Eliot Spitzer  
State Capitol  
Room 214  
Albany, NY 12224

Re: A.248/S.5862 Amendment to Hazardous Waste Facility Siting Law,  
ECL § 27-1109

Dear Ms. Enck:

Please accept this letter regarding the above-referenced pending legislation on behalf of Niagara County. The County urges the Governor to sign this legislation into law because it would protect the Great Lakes from discharges from hazardous waste disposal facilities, it would further a policy promoting minimization and recovery of hazardous wastes, and there would be no significant adverse impact on New York hazardous waste generators. In addition, there is no constitutional impediment to this legislation because it is not a state-wide ban and the state has a interest in environmental protection.

### **Great Lakes Policy**

In December 2005, the federal Great Lakes Interagency Task Force, the Council of Great Lakes Governors, the Great Lakes and St. Lawrence Cities Initiative, Great Lakes tribes, and the Great Lakes Congressional Task Force convened the Great Lakes Regional Collaboration (GLRC) to develop a policy to restore and protect the lakes. The *GLRC Strategy to Restore and Protect the Great Lakes* found that past government actions “have not been effective enough to do the job of cleaning up the Great Lakes or preventing further degradation.”<sup>1</sup> Among the 31 most contaminated locations on the Great Lakes identified in the 1978 Great Lakes Water Quality Agreement with Canada,<sup>2</sup> five are located in New York, including the Niagara River, into which CWM Chemical Services at Model City discharges about 20 million gallons of treated wastewaters each fall.

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<sup>1</sup> GLRC STRATEGY TO RESTORE AND PROTECT THE GREAT LAKES, Executive Summary, p. 2, available at <http://www.glrc.us/strategy.html>.

<sup>2</sup> Available at <http://www.epa.gov/glnpo/glwqa/index.html>.

The *GLRC Strategy* recommends four actions to address these locations, among them “promote clean treatment and disposal technologies as well as better beneficial use and disposal options.”<sup>3</sup> “Persistent toxic substances such as mercury and PCBs [also] remain present in fish at levels that warrant advisories and restrict consumption throughout the Basin.”<sup>4</sup>

To address this concern, the *GLRC Strategy* recommends a policy to “prevent new toxic substances from entering the Great Lakes.” In one of four general recommendations to achieve this goal, the GLRC objects to policies that simply relocate contamination, and calls for “innovative approaches to the ultimate disposition of contaminated sediments as an alternative to the current practice of disposing of them in Confined Disposal Facilities (CDFs) or landfills.”<sup>5</sup>

Disposal in a permitted hazardous waste landfill is not an environmentally safe waste management option. EPA’s Great Lakes policy warns against landfilling contaminated sediments within the Great Lakes Basin: “Even where it is possible to remove highly contaminated sediments from harbors, removal can cause problems when sediments are placed in landfills that may later leak and contaminate wetlands and groundwater.”<sup>6</sup> This is consistent with EPA’s repeated finding that even with the best construction and operational controls, all landfills will eventually leak.<sup>7</sup>

Under current state policy, the generation of hazardous wastes should be reduced or eliminated to the maximum extent practical.<sup>8</sup> This legislation would further this policy.

### **Industry trends toward further minimization and reduction should be encouraged**

According to an analysis by the U.S. International Trade Commission, both financial stability and waste minimization or recovery are promoted by internalizing the management of

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<sup>3</sup> GLRC STRATEGY TO RESTORE AND PROTECT THE GREAT LAKES, Executive Summary, p. 3.

<sup>4</sup> Id.

<sup>5</sup> Id., Appendix, Areas of Concern/Sediments, p. 4.

<sup>6</sup> EPA, GREAT LAKES: ENVIRONMENTAL ATLAS AND RESOURCE BOOK, Ch. 4.4 “Pathways of Pollution”, available at <<http://www.epa.gov/glnpo/atlas/index.html>>.

<sup>7</sup> See 46 FR 11126, 11128 (1981); 47 FR 32373 (1982); 53 FR 33314, 33344-33345 (1988). See also citations at M. Gerrard, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING (1994), p. 94.n.184.

<sup>8</sup> ECL § 27-0105(a).

hazardous waste (“that is, firms generating the waste are likely to dispose of the waste on-site”).<sup>9</sup> This trend toward internalization reflects a decline of hazardous waste management firms, whose revenues “fell from about \$6.5 billion in 1992 to \$2.7 billion in 2001 (not adjusting for inflation) and likely will continue to decline . . . [and] total production of hazardous waste in weight terms has declined 80 percent in the United States from 1995-99.”<sup>10</sup>

In this instance, industry consolidation can be expected to further the internalization of hazardous waste management, and the progressive reduction in waste generated for disposal associated with internalization.<sup>11</sup> This is a trend the Governor can encourage with this legislation.

### **Ample hazardous waste disposal capacity exists for New York generators**

Both EPA and NYSDEC recognize that the market for hazardous waste disposal is national in nature.<sup>12</sup> In the U.S., there are ample alternative hazardous waste management facilities to manage residual hazardous waste. Currently, there are over 20 hazardous waste disposal facilities, including facilities operating in Ohio, Pennsylvania, Michigan, and Illinois; the Michigan facility is permitted under TSCA to manage PCB wastes, like CWM at Model City.<sup>13</sup>

Last year, in connection with nearly identical legislation, I met by phone conference with EPA Region 2 head of Environmental Planning and Protection Walter Mugdan and other Region 2 officials who indicated a marginal reduction of hazardous waste land disposal capacity that may result from this legislation would result in no adverse effect on the regional or state market for hazardous waste disposal services, since alternative service providers are available.

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<sup>9</sup> U.S. International Trade Commission, SOLID AND HAZARDOUS WASTE SERVICES: AN EXAMINATION OF U.S. AND FOREIGN MARKETS, pp. 2-12 to 2-13 (April 2004), available at <<http://hotdocs.usitc.gov/docs/pubs/332/PUB3679.pdf>>.

<sup>10</sup> Id., p. 2-13.

<sup>11</sup> Based on reporting to EPA, the U.S. International Trade Commission found that *none* of the three largest firms in hazardous waste disposal, including subsidiaries of Waste Management, Inc., are among the 50 entities managing the largest volumes of hazardous waste in the U.S. Id., p. 2-13.n.53.

<sup>12</sup> EPA, NATIONAL CAPACITY ASSESSMENT REPORT: CAPACITY PLANNING PURSUANT TO CERCLA SECTION 104(C)(9), EPA530-R-95-016 (November 1994), available at <<http://www.epa.gov/epaoswer/hazwaste/tsds/capacity/index.htm>> (“EPA CAP REPORT”); NYSDEC, NEW YORK STATE HAZARDOUS WASTE FACILITY SITING PLAN (2004 DRAFT), p. 6-1, available at <<http://www.dec.state.ny.us/website/dshm/hzwtstman/hazsiteplan.htm>>.

<sup>13</sup> EPA, RCRAInfo search query (attached hereto), available at <[http://www.epa.gov/enviro/html/rcris/rcris\\_query\\_java.html](http://www.epa.gov/enviro/html/rcris/rcris_query_java.html)>.

### **Constitutional concerns**

The Commerce Clause of the U.S. Constitution restricts regulatory discrimination against inter-state commerce. Discrimination is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>14</sup> If a state law restricting the flow of interstate commerce is discriminatory in its purpose or effect, it may be found “per se invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local [state] interest.”<sup>15</sup>

Neither the purpose or effect of this legislation is discriminatory because it seeks to protect Great Lakes water quality and it subjects in-state generators to the same burden as out-of-state generators. Indeed, no restriction on interstate commerce in waste is effected because over half the state would remain available for hazardous waste disposal sites.

If a state law does not discriminate against interstate commerce, but regulates evenhandedly to achieve a legitimate state interest, a more deferential standard applies. Under the Pike balancing test, the state law will be upheld unless the burden placed on interstate commerce is clearly excessive in relation to the asserted public benefits.<sup>16</sup> Here, because environmental protection benefits are clearly implicated, and the incidental burden on out-of-state commercial interests if any (over half the state would remain available for hazardous waste disposal sites) is not substantial, the balancing test clearly tips in favor of this legislation, eliminating any Commerce Clause concern.

The Equal Protection Clause of the U.S. Constitution restricts the ability of a state to treat some persons more harshly than similarly situated persons. When differential treatment is not on the basis of a protected characteristic (e.g., race, gender, national origin), it will be upheld where there is a rational relationship between the legislation and a legitimate state interest.<sup>17</sup>

The Second Circuit applied this analysis to the claim by CECOS International and Niagara Recycling that New York’s siting law, enacted while CECOS’ application for expansion of its hazardous waste landfill was pending before DEC, “changed the rules in the middle of the

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<sup>14</sup> *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345 (1994).

<sup>15</sup> *A. Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 114 S.Ct. 1677 (1994).

<sup>16</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844 (1970).

<sup>17</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249 (1985).

game.”<sup>18</sup> The court found notwithstanding some “not-in-my-backyard rhetoric” in the Assembly in connection with the passage of the law, the state’s interest in restricting the siting of hazardous waste landfill expansions was legitimate.<sup>19</sup> The state law therefore did not violate the Equal Protection Clause.

This legislation is also supported by a legitimate state interest in reducing the risk of water pollution and waste minimization, eliminating any Equal Protection Clause concern.

### **Niagara County’s interest in A.248/S.5862**

Niagara County currently hosts CWM Chemical Services at Model City, New York’s only hazardous waste landfill. This facility is an example of why hazardous waste landfills should be restricted if they have the potential to discharge into the Great Lakes Basin. NYSDEC has found CWM discharged excessive PCBs and VOCs in stormwater from 2001 to 2005.<sup>20</sup> As a result, the agency has required CWM to investigate the source of the exceedences and remediate those sources.<sup>21</sup> Despite over five years of knowing about this problem, CWM has failed to implement any cleanup actions.

CWM has recently asserted that “Niagara and Erie Counties account for nearly one-third of

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<sup>18</sup> *CECOS Intl., Inc. v. Jorling*, 895 F.2d 66, 72 (2nd Cir. 1990).

<sup>19</sup> *Id.* at 73 (“The state noted first that commercial facilities are more likely to expand because their profits are based upon the number of operating facilities whereas non-commercial facilities, sited on the premises of the waste generator, lack a profit motive. Second, the state suggested that there are greater risks associated with commercial facilities because hazardous wastes must be transported to the off-site commercial facility. Third, it proposed that siting board review would prevent a particular area of the state from housing too many commercial facilities, thereby receiving a disproportionately large share of the state's hazardous wastes. Fourth, it believed that the gravity of the problem of expanding hazardous waste facilities merited review by both the DEC and the siting board . . .”).

<sup>20</sup> NYSDEC, 2005 CWM HAZARDOUS WASTE PERMIT RENEWAL - RESPONSIVENESS SUMMARY, II, pp. 175-177 (Response to Comment 94), available at <<http://www.dec.state.ny.us/website/dshm/hzwstman/cwmmodelcity.html>>. CWM’s current discharge permit prohibits discharge of PCBs in excess of 0.001 ng/L, but the detection limit is 65 ng/L. The company’s exceedences have been over the latter limit, so these are substantial exceedences.

<sup>21</sup> *Cf.* December 21, 2005 comments by NYSDEC on CWM’s draft investigation plan reiterating the agency’s findings, Comment 3.

the total tonnage” of hazardous waste produced in New York State.<sup>22</sup> However, CWM generated most of that volume, and most of that it imported from out of state. CWM’s generation rate includes substantial transfers off site and out of state of liquid hazardous waste for incineration, and solid hazardous waste too toxic or reactive for land disposal off site and out of state. In reality, New York hosts one of about 20 national facilities. As the decline and consolidation of the hazardous waste industry continues, New York must decide whether the Great Lakes Basin will continue to be home to a substantial portion of the nation’s residual hazardous waste.

Protecting CWM’s plans for expansion serves neither Niagara County nor the state’s waste generators. Doing so would create a substantial disincentive for minimization and recovery of hazardous wastes for years to come. The existing landfill at Model City will eventually compromise Great Lakes water quality. Restricting expansion and further siting of such facilities is good policy for the Great Lakes.

Sincerely yours,

/s/

Gary A. Abraham  
*Special Environmental Counsel to Niagara County*

gaa/enc. –RCRAInfo. query results (permitted and operating RCRA-C landfills)

cc: Hon. Clyde Burmaster, Niagara County Legislature Chair  
Hon. John Ceretto, Niagara County Legislator  
Daniel Stapleton, Niagara County Health Department  
Claude Jeorg, Esq., Niagara County Attorney

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<sup>22</sup> CWM Chemical Services, LLC, DRAFT PUBLIC SCOPING DOCUMENT FOR THE RMU-2 LANDFILL PROPOSAL (May 2006), p. 50, available at <http://www.dec.state.ny.us/website/dshm/hzwstman/cwmmu2.html>.