LAW OFFICE OF GARY A. ABRAHAM

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

gabraham44@eznet.net
www.garyabraham.com

May 25, 2006

VIA E-MAIL & OVERNIGHT MAIL
U.S. Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, New York 14207-3199

Attn: Scott L. Schlueter

Re: Comments on Application of CWM Chemical Services for a Wetland Fill Permit, Porter, Niagara County, NY

Dear Mr. Schlueter:

In accordance with Public Notice 2000-01534(6), I am submitting comments on behalf of Niagara County (the "County") on the Application of CWM Chemical Services ("CWM" or the "Applicant") for a Wetland Fill Permit, dated November 14, 2003 (the "Application").

The County has significant objections to the Application, which this letter discusses in detail below. In brief, the Applicant has failed to rebut the presumption that practicable alternatives to the proposed activities exist, has submitted an inadequate mitigation proposal, has failed to account for all the projected wetland loss, has not minimized the impacts of the activities, has not completed any meaningful environmental analysis, and has submitted an inadequate application for the required Water Quality Certification. Once the Application is complete, we request that the Army Corps provide further opportunities for public comment and conduct a public hearing regarding this permit. We expect that as the Applicant provides more information, additional issues will emerge, but please regard this letter as a preliminary statement of the issues that we would raise in such a hearing.

On May 5, 2006, , I accompanied the County's wetlands specialist Charles Rosenburg on a site visit of the CWM property. Technical comments from Mr. Rosenburg addressing, among other things, the adequacy of CWM's mitigation plans, the flow regime of jurisdictional ditches and the potential for adverse impacts to those ditches will follow. Some observations on the current condition of the CWM site below are my own.

1. The Proposed Activities Are Interlinked

Project 1. The Application divides the proposed activities into three projects. Proposed project 1 involves relocation of the entrance road, truck scales, and scale house from within the proposed footprint of RMU-2, a proposed new hazardous waste landfill. Application, p. 3,

Figures 2, 4, and 5a.

On May 5, 2006, I observed that the truck scales have already been relocated to the proposed area. Thus, it appears that what remains of Project 1 is the proposed realignment of the entrance road, a short distance to the west of the existing alignment.

According to a recent draft scoping document for RMU-2 prepared by CWM, the land disposal capacity for RMU-1, the existing operating landfill on site, will be exhausted "in about 5-6 years based on current waste receipt rates."[1] Thus, the road realignment cannot be necessary to operate RMU-1, because the existing road network has adequate capacity for current needs. The only reasonable conclusion is that the realigned entrance road is designed to accommodate the construction of RMU-2.

Project 2. Project 2 involves relocation of the Drum Management Building from within the proposed footprint of RMU-2. Application, p. 3, Figure 2, Figure 4. According to the Application "this relocation is necessary because the existing Drum Management Building is over 20 years old and in need of several upgrades." Id. However, the Applicant has provided no analysis of whether the proposed upgrades could be completed without relocating the building. In addition, it is unlikely that the Applicant would upgrade the existing facilities when the landfill they serve is very close to capacity and operating at a reduced flow rate. The only reasonable conclusion is that the new Drum Management Building is designed to serve RMU-2.

Project 3. Project 3 is the construction of RMU-2 itself. Id. It appears that the Applicant has split the three projects by timing rather than by purpose, because a single purpose is given for all three projects, "to provide continuing hazardous waste treatment and disposal facilities . . ." Id. If RMU-1 is still operating this purpose can only be met if Projects 1 and 2 are completed before construction of RMU-2 commences. However, any use that RMU-1 makes of the new facilities would be incidental. In the absence of the proposal for RMU-2, the Applicant would not undertake projects 1 and 2, because it already has adequate facilities on the site, which would not need to be replaced. Thus, these projects have no independent utility without the development of RMU-2. In other words, all proposed filling of wetlands is tied to the development of RMU-2.

2. Application Is Incomplete

The Application is not a complete permit application. Among other deficiencies, it fails to describe the need for the proposed activity in violation of 33 C.F.R. § 325.1(d)(1). As discussed in detail below, the regulations create a presumption that "unless clearly demonstrated otherwise," there are practicable alternatives to filling wetlands to enable landfills to be

---

[1] CWM, DRAFT PUBLIC SCOPING DOCUMENT FOR PROPOSED DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR RESIDUALS MANAGEMENT UNIT NO. 2, revised March 2006, p. 47 (hereafter, "DRAFT PUBLIC SCOPING DOCUMENT"). The relevant excerpts from this document cited here and below are attached hereto.

expanded. Thus, where, as here, an applicant fails to demonstrate a need for the activity, the Army Corps must presume there is no need for the activity and reject the application.

In addition, the Application lacks any meaningful mitigation proposal. The mitigation proposed involves donation of funds to a non-profit entity. However, this proposal fails to specify how the funds will be used, and fails to provide any assurance that the donee has been notified and would accept the proposed donation.

The original publication notice recognized that the applicant's mitigation proposal is inadequate, stating that "alternate mitigation options are currently being discussed with the applicant. For the remainder of the impacts the Corps will require 1.5:1 wetland mitigation either on-site or off-site. The donation alternative alone does not currently replace the lost functions and values of the proposed impacts." Because the public has the right to comment on complete applications, including mitigation proposals, the Army Corps should deny the current Application and initiate a second round of public comment on any revised application.

In addition, the application fails to even mention that the RMU-2 expansion involves expanding facultative ponds ("Fac Ponds") 1 and 2. *See* Application, Figure 2. Fac Ponds 1 and 2 are actually a single wastewater treatment pond at present. In addition to Fac Ponds 1 and 2, CWM utilizes Fac Pond 3 for wastewater treatment. CWM recently removed Fac Pond 8 from service. That pond is now drained in preparation for construction of RMU-2. Approximately one-half of Fac Pond 3 would be lost to the RMU-2 footprint, the remaining half would be converted to a clean stormwater retention basin. *See* CWM, 6 NYCRR Part 361 Permit Application, Residuals Management Unit 2 (April 2003), Section 1.8.[2] "In order to compensate for the treated wastewater volume reduction due to the removal of Fac Ponds 3 and 8, existing Fac Ponds 1 and 2, located west of SLF 1- 6, will be up-graded and separated into two ponds to increase capacity and serve as the final qualification ponds." Id. *See also* DRAFT PUBLIC SCOPING DOCUMENT, p. 15 (an identical statement).

The Fac Pond 1 and 2 upgrade would affect the areas of jurisdictional wetlands labeled as Areas EE and FF. *See* Application, Figure 3. However, Table 2 of the Application lists the impacts to these wetlands as zero. Thus, the Application is insufficient to obtain a permit to allow "construction of the RMU-2 landfill and other support facilities." Application, p. 3.

In addition, an "altered flow pattern" would result from RMU-2 because, unlike runoff from RMU-1, which flows to Twelvemile Creek, runoff from RMU-2 "would discharge to a tributary of Four Mile Creek via an engineered outlet structure and open channels" Id., p. 31. A "new stormwater retention basin" would be required to manage RMU-2 runoff because "in addition to the altered flow pattern, the rate of run-off from the capped landfill would be greater than the current rate of run-off due to the increased slope of the land surface." Id.

Finally, substantial volumes of soils and gravel would be stockpiled for RMU-2. Id., pp.

---

[2] The referenced section of this application, submitted to NYSDEC, is attached hereto.

36-37. The current stockpiles are located immediately south of the east-west perimeter road south of Fac Pond 3. This location drains to the east-west ditch on the south side of the perimeter road (not depicted on the latest CWM drainage map). As currently proposed, "All stockpiles would be approximately 30 feet maximum height and have slopes no steeper than 1.5H:1V in order to obtain acceptable soil erosion rates." Id., p. 36. However, the proposal provides no more than the following guidance for stormwater management of these stockpiles: "Utilization of perimeter channels, silt fences, hay bales, rock check dams and other measures would provide the primarysediment controls to prevent soils from entering into the facility's stormwater drainage system." Id., pp. 36-37.

The Corps should, at a minimum, insist that the Application be modified to include a demonstration of need for the proposed projects, an adequate mitigation plan, and a demonstration that the projects' alteration of stormwater flow patterns will not have an adverse impact on the environment.

3. The Activity Is Unnecessary

The Corps' 404(d) Guidelines prohibit permit issuance if there is a less damaging practicable alternative. 40 C.F.R. § 230.10(a). The Guidelines create a presumption that practicable alternatives to the filling of wetlands are available where the activity is not water dependent, unless "clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3).[3] The burden to clearly demonstrate a lack of practicable alternatives lies with the project applicant, not with the Corps. *See* GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL, 45 Fed. Reg. 85,336, 85,339 (Dec. 24, 1980) ("the applicant may rebut the presumption [that practicable alternatives exist] through a clear showing in a given case").

The Guidelines also provide that an alternative is practicable "if it is available and capable

[3] Courts analyzing 40 C.F.R. § 230.10(a)(3) have held that the regulation requires the Corps to critically evaluate the applicant's assessment of the project's purpose and whether applicant carried their burden to show that no practicable alternatives are available. See La. Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5th Cir. 1985) (noting the applicant's burden to show no practicable alternatives); Korteweg v. Corps of Eng'rs of the U.S. Army, 650 F. Supp. 603, 604 (D. Conn. 1986) (same); Hough v. Marsh, 557 F. Supp. 74, 83-84 (D. Mass. 1982), aff'd, 725 F.2d 677 (4th Cir. 1984) (vacating and remanding the Corps' issuance of a permit where the Corps failed to hold applicants to their burden to show to show no practicable alternatives); Shoreline Assoc. v. Marsh, 555 F. Supp. 169, 179 (D. Md. 1983) (upholding the Corps' denial of a permit where the applicant "failed to show . . . why it is necessary for the [development] to be located on the wetlands rather than the uplands, except for its preference to build on the wetlands"); Friends of the Earth v. Hintz, 800 F.2d at 835-36 (9th Cir. 1986) (recognizing the Corps must rely on information provided by the applicant but must not do so "uncritically").

of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Where insufficient information is provided to determine whether the activity proposed complies with the practicable alternatives requirement, the Guidelines require that no permit be issued. 40 C.F.R. § 230.12(a)(3)(iv); 61 Fed. Reg. 30,990, 30,998 (June 18, 1996) (citing 40 C.F.R. § 230.12(a)(3)(iv)).

Because the proposed activities are not water dependent, the regulations require the Applicant to clearly demonstrate that it there is no practicable alternative to undertaking these activities at this site. Because it has failed to even attempt to carry this heavy burden, the Application must be rejected.

Here, the project purpose is to create additional capacity for disposal of hazardous waste in a national and international market. See Application, p. 3. A number of other facilities, including some owned and operated by the Applicant, exist that could meet the current demand for hazardous waste disposal, and could possibly accommodate any need for additional capacity. The applicant offers no affirmative demonstration that any need for additional capacity exists, let alone whether any such need could be practicably met at other facilities, or by some combination of modifying production of hazardous waste and reliance on other hazardous waste treatment and disposal facilities. Thus, if and when the Applicant addressees the issue of practicable alternatives, it will need to deal with two separate sub-issues; first, whether more hazardous waste disposal capacity is needed, and second, whether there are alternative sites at which any needed capacity could be provided.

The Applicant's failure to show any current need for additional hazardous waste disposal capacity is not surprising, because both New York Department of Environmental Conservation ("DEC") and EPA have found that there is no need for any additional capacity through at least the year 2013. DEC, NEW YORK STATE HAZARDOUS WASTE FACILITY SITING PLAN (2004 DRAFT) ("DEC SITING PLAN"), p. 8-1.[4] In addition, both agencies recognize that the market for hazardous waste disposal is national in nature. Id., p. 6-1. See also CWM, DRAFT PUBLIC SCOPING DOCUMENT, pp. 47-48. Illustrating this fact, waste has come to RMU-1 from as far away as California and Texas. DEC SITING PLAN, p. 1-10. In addition, over 70% of the waste received at RMU-1 in the year 2000 came from outside of New York. Id., p. 5-2. DEC has therefore proposed that applicants wishing to site hazardous waste disposal facilities in New York State should provide an assessment of need based on the need for additional capacity at the national level. Id., p. 8-2. The Army Corps should require a similar showing if the Applicant is to take the first step toward clearly rebutting the presumption that there are practicable alternatives, including the no-action alternative.

In addition, even if the Applicant were able to establish that, contrary to DEC and EPA findings, additional hazardous waste disposal capacity is needed nationally, the search for alternative sites at which to provide any needed capacity would not be limited to the applicant's

[4] Available at <http://www.dec.state.ny.us/website/dshm/hzwstman/hazsiteplan.htm>.

preferred site, but would be regional or national. Thus, to clearly rebut the presumption that practicable alternatives to the proposed activity exist, the Applicant must conduct an extensive study of whether the facility is necessary, and if so, whether it could be sited elsewhere. Unless it conducts such a study to the satisfaction of the Army Corps, any application to enable the development of RMU-2 must be denied.

The Applicant may argue that it discussed the need for the project in its section on Project Alternatives. Application at 4-5. However, this argument is untenable because the alternatives section fails to even mention the no-action alternative. Furthermore, while the purpose of the project is to provide hazardous waste disposal services to entities "throughout the northeastern United States and other regions," Id. at 3, the alternatives considered are limited to on-site locations or "properties . . . within the area." Id. at 5. Thus, far from clearly demonstrating a lack of practicable alternatives, the Project Alternatives section merely confirms that the Applicant has failed to seriously consider practicable alternatives to its proposal to fill wetlands to allow it to construct RMU-2.

Finally, if the Army Corps were to decide that Projects 1 and 2 have some independent utility from the development of RMU-2, the Applicant would have to separately justify the need for those projects. As discussed above, the existing RMU-1 landfill is now reaching its permitted capacity. Therefore, RMU-1 does not need a new access road or new drum management facilities. Thus, Projects 1 and 2 are only necessary if no practicable alternatives exist to constructing RMU-2.

4. Impact Is Not Minimized

Even if there were a need for the proposed activity and there were no practicable alternative sites, the Corps 404(d) Guidelines would still require the Applicant to minimize impacts: "[n]o discharge of material shall be permitted unless appropriate and practical steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. Part 230.10(d). *See also* MEMORANDUM OF AGREEMENT BETWEEN THE EPA & THE DEPT. OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CWA SECTION 404(B)(1) GUIDELINES (February 26, 1990).

The Applicant has failed to minimize wetland impacts from the proposed activity. If the footprint of RMU-2 were smaller, RMU-2 could be developed without the need for filling of wetlands, except perhaps for Area H, which lies close to the center of the proposed footprint of RMU-2.

5. The Mitigation Plan is Inadequate

The longstanding policy of the Army Corps is that proposed actions should cause no net loss of wetlands. *See*, *e.g.* MEMORANDUM OF AGREEMENT BETWEEN THE EPA & THE DEPT. OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CWA SECTION 404(B)(1) GUIDELINES (February 26, 1990) ("the Corps . . . for wetlands, will strive to achieve a

goal of no overall net loss of values and functions"). The Army Corps and other federal agencies recently reaffirmed their commitment to the goal of no net loss through the National Wetlands Action Plan, issued in December 24, 2002 ("The Bush administration affirms its commitment to the goal of no net loss"), and a rulemaking proposal on wetland mitigation, 71 Fed. Reg. 15525 (March 28, 2006) ("the agencies have a longstanding policy of achieving no overall net loss for wetland acreage and functions.").

For "in-lieu-fee" mitigation, where applicants pay for other entities to carry out mitigation, four federal agencies, including the Army Corps, issued guidance in October 2000.[5] Pursuant to the Action Plan, the Army Corps revised its Regulatory Guidance Letter ("RGL") regarding mitigation on December 24, 2002. This guidance stated that Districts need to co-ordinate closely with local government entities and that operational guidelines developed by the National Research Council in 2001 should be considered when evaluating mitigation plans. RGL 02-2 (December 24, 2002). It also stated that the focus should shift from counting acres to functional assessment and replacement. Id. It further emphasized that various assurances, including financial, would be necessary for an acceptable mitigation plan.

On October 29, 2003, the Army Corps formally incorporated the National Research Council's operational guidelines into the Army Corps 404 permit program. MEMORANDUM TO THE FIELD from Mark F. Sudol of October 29, 2003. Shortly thereafter, the Army Corps issued a check-list to "serve as a technical guide for permit applicants preparing compensatory mitigation plans." MEMORANDUM TO THE FIELD from Michael B. White and John W. Meagher of November 7, 2003. More recently, the Buffalo Office of the Army Corps put out its own set of guidelines for mitigation plans, modeled largely on the National Research Council's operational guidelines.[6] Most recently, EPA and the Army Corps proposed new rules about mitigation. 71 Fed. Reg. 15520 (March 28, 2006).

Despite the focus on improving mitigation at the national level, the mitigation proposed by this Application is to contribute $30,000 to the Buffalo Audubon Society's Birds of Prey Center Project. Application at 5. According to its website this Center will feature a live collection of birds of prey. *See* <http://www.buffaloaudubon.com/bopc.htm>. Apparently, the other funding provided by CWM to this project went to "create exhibitry and attractions." Id. There is no mention of creation of wetland habitat as a project goal. There is not even any mention of preservation of existing wetlands. Furthermore, the County understands from the Buffalo Audubon Society that it has not even agreed to accept the proposed donation.

The in-lieu-fee guidance specifically states "funds collected under any in-lieu-fee arrangement should be used for replacing wetlands functions and values and not to finance non-

---

[5] Available at <http://www.epa.gov/owow/wetlands/pdf/inlieufee.pdf>.

[6] Army Corps, BUFFALO DISTRICT MITIGATION AND MONITORING GUIDELINES (December 15, 2003).

mitigation programs and priorities." In-lieu-fee Guidance at 6. A one-time donation of funds to a non-profit organization for activities that are unrelated to wetland conservation cannot substitute for proper mitigation of wetlands impacts. Moreover, off-site mitigation is only acceptable where there is no practicable opportunity for on-site mitigation. Id. at 3-4. As mentioned above, CWM has failed to show why RMU-2 could not be made smaller to reduce wetland impact and enable any residual wetland loss to be mitigated on-site.

6. Required NEPA Analysis Is Missing

Army Corps regulations recognize that issuance of an individual wetlands fill permit normally requires NEPA analysis. 33 C.F.R. § 230.7(a). This is because issuance of a permit is a major federal action. Where, as here, filling of a relatively small area of wetlands is necessary to enable a much larger project to commence, a critical issue in the NEPA analysis is which activity to analyze, the filling of the wetlands only, or the activity which would occur only if the Army Corps grants the wetland fill permit.

On this issue the Army Corps regulations state, in part, "The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. Part 325, Appendix B § 7(b)(2). In addition, the cumulative effects attributable to the filling of wetlands and jurisdictional ditches must be considered to the extent they can be reasonably and practicably predicted. 40 C.F.R. § 230.11(g)(2).

Judicial findings regarding whether the whole action must be considered for NEPA purposes or a sub-set of the action have been highly fact-dependant. For example, the District Court for the Southern District of Florida found that where the Army Corps proposed to permit the filling of 21.3 acres of jurisdictional drainage ditches to allow a 535-acre development to proceed, the Army Corps not only had to evaluate the impact of the 535 acre development, but it also had to include the impact of a related 1,919 acre development. Florida Wildlife Federation v. U.S. Army Corps, 401 F.Supp.2d 1298 (S.D. Fl. 2005). The court found that the smaller development had no independent utility if detached from the larger development and that the larger developments were causally connected to the Army Corps approval. Id. at 1317-1327. Lacking independent utility, the court found that the cumulative impact of the wetland fill and both developments had to be addressed in the NEPA analysis. Id. at 1330.

In this case, as discussed above, the proposed improvement projects are designed to enable the RMU-2 hazardous waste landfill to be developed. They have no independent utility, because RMU-1 is close to capacity and the existing facilities are more than adequate to serve RMU-1. Furthermore, because the activities authorized by the permit are tied to the development of the RMU-2 landfill, not RMU-1, NEPA analysis of the RMU-2 project must be completed before the permit can issued. When the Army Corps undertakes the required Environmental Assessment, it will find that a large hazardous waste landfill that serves the national and international waste

disposal market has a potentially significant environmental impact, and therefore a full Environmental Impact Statement will be required.

7. The Required Water Quality Certification Cannot Be Issued

Before a federal permit can be issued for any activity that may result in any discharge into navigable waters, the State in which the discharge originates must issue a Water Quality Certification. 33 U.S.C. § 1341(a)(1) (Clean Water Action Section 401). In New York State, such certifications are issued pursuant to 6 NYCRR § 608.9. Recognizing the need for such a certification, the Applicant submitted a joint permit application to DEC and the Army Corps for both a wetland fill permit and a state "401 Water Quality Certification." Application at 1.

It does not appear the Applicant can meet the requirements for a state Water Quality Certification. Section 608.9 requires the Applicant to demonstrate that the proposed activity will not cause any violation of various water quality requirements, including effluent limitations, water quality standards, standards of performance for new sources, and all other state requirements. However, the Applicant has made no attempt to demonstrate such compliance.

Furthermore, there is evidence that the activity proposed by the Applicant could lead to violations of its water discharge permit. According to DEC, PCB discharges from federally jurisdictional ditches draining to Four Mile Creek and Lake Ontario are ongoing, in violation of the applicant's current water discharge permit. DEC, CWM Permit Renewal - DEC Responsiveness Summary - Section II - CWM Comments & Responses at II-177 (Response to Comment 94).[7]

Because PCB discharges from the site are ongoing, there is no assurance that authorizing disturbance of the site stormwater management system would avoid further violations of water quality standards. Thus, until this issue is addressed and the Applicant makes the demonstration of compliance required by the regulations, DEC may not issue the Water Quality Certification.

8. Conclusion

The Applicant has:

i) submitted an incomplete application;

ii) failed to clearly rebut the presumption that there are alternatives to the proposed activity;

iii) failed to minimize the impact on wetlands;

iv) proposed an inadequate mitigation plan;

---

[7] Available at <http://www.dec.state.ny.us/website/dshm/hzwstman/ressum68to134.pdf>.

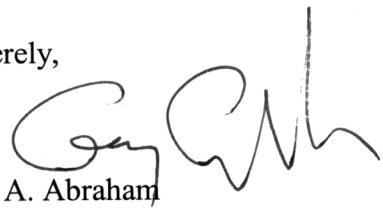
v) failed to demonstrate that the proposed activities would comply with all water quality requirements; and

vi) failed to provide the Army Corps with any environmental analysis of the impact of the proposed activity.

Because the Application requests a permit for an activity for which practicable alternatives exist, it would remain unacceptable even if the deficiencies in the Application were resolved. Furthermore, the Army Corps cannot issue any permit unless it completes the required NEPA analysis. Thus, it would be entirely inappropriate to issue a conditional permit in this case. Furthermore, the failure of the Applicant to finalize its mitigation proposal, to address whether it has minimized impacts, and to analyze whether it could comply with water quality requirements has made it impossible for the County to comment on these essential elements of the Application at this time. One of the hallmarks of the wetland permit process is that interested parties get an opportunity to comment on complete applications. Giving a conditional permit to allow the Applicant to remedy the many deficiencies in the Application would deprive the County of this opportunity, and is therefore inappropriate in this case. Moreover, those deficiencies are so extensive, that a reasoned decision cannot be taken on the merits of the Application. Thus, instead of issuing a conditional permit, the Army Corps should reject the Application entirely because it is manifestly incomplete.

If the Applicant revises the Application, we look forward to making further comments. In addition, in order to obtain necessary information about the scope and scale of the proposal, we request that the Army Corps hold a public hearing on this permit at the appropriate time.

Sincerely,



Gary A. Abraham

gaa/encs

cc: Steven J. Doleski, Regional Permit Administrator, NYSDEC w/o enc.
Clyde Buhrmaster, Niagara County Legislature, w/o enc.
John Ceretto, Niagara County Legislature, w/o enc.
Paulette Kline, Niagara County Health Department, w/o enc.