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May 21, 2010

Via Electronic and First Class Mail

ALJ Edward Buhrmaster
NYS Department of Environmental Conservation
Office of Hearings & Mediation Services
625 Broadway, 1st Floor
Albany, NY 12233-1550

Re: Chemung County Landfill Permit Modification
DEC Project No. 8-0728-00004/00013

Dear ALJ Buhrmaster,

The purpose of this letter is to request that Your Honor strike a number of the submissions made by Residents for the Preservation of Lowman and Chemung ("RFPLC") in response to the noise and drill cutting reports offered by New England Waste Services of New York, Inc. ("NEWSNY") as part of the April 28, 2010 Issues Conference and marked as I.C. Exhibits 9 and 10 and, with respect to the remaining submissions, request leave from Your Honor for NEWSNY to reply. The exclusion of certain submissions and leave for reply is warranted given RFPLC's blatant disregard of the "limited" scope to respond to I.C. Exhibits 9 and 10 authorized by Your Honor at the Issues Conference for RFPLC as well as the Department's own permit hearing procedures.

The following quote from the Issues Conference aptly summarizes the scope authorized for RFPLC's responses:

I believe that the citizens group and DEC staff deserve an opportunity to review more carefully and maybe even consult with each other, if they so choose, with regard to Exhibit 9 and Exhibit 10 so that a response, *limited to the information in these documents*, can be provided to supplement the record of the issues conference and assist me in determining whether or not there are factual issues to litigate with regard to either noise or radioactivity with regard to the Marcellus shale drill cuttings which is the waste stream that is addressed by the exhibit, the report which is Exhibit 10.

I.C. Tr., p. 359, l. 5-20 (Buhrmaster) (emphasis added).

Despite this clear directive, RFPLC's submissions go above and beyond responding to the information contained in I.C. Exhibits 9 and 10. Rather, they evidence a blatant attempt to bolster RFPLC's Petition for Party Status by raising new arguments not previously advanced, rearguing arguments previously made and offering further information (which notably preexisted the Issues Conference) in an attempt to bolster such arguments and offering two proposed expert witnesses not previously disclosed. Indeed, the submissions by RFPLC include (1) a four page attorney letter, (2) three consultant reports regarding radioactivity and drilling wastes totaling twenty pages, (3) a five page excerpt from a Part 373 renewal permit for CWM Chemical Services, (4) a four page newspaper article dated November 9, 2009, and (5) a ten page consultant report, with attachments, regarding noise.

With respect to the three consultant reports purportedly offered to respond to I.C. Exhibit 10, there are three reasons why they should be stricken. First, two of the three reports are offered by purported experts that were not identified in RFPLC's Petition for Party Status or prior to the April 9, 2010 date established in the notice of hearing as the deadline for filing for party status. They also were not offered as part of the Issues Conference. However, Section 624.5(b)(2)(ii) of the Department's permit hearing procedures requires that a party seeking full party status "present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" in their petition for party status. Given that neither Mr. Volz nor Mr. Ingraffea was previously identified by RFPLC as a witness, their submissions should be stricken.

Second, of the twenty pages which comprise RFPLC's three consultant reports on radioactivity and drilling wastes, at best, only three to four pages even attempt to respond to I.C. Exhibit 10. Instead, they offer new and supplemental information on drilling operations and the purported radioactivity of drill cuttings. Rather than being submitted post-Issues Conference, such information was required to be filed as part of RFPLC's Petition for Party Status. 6 NYCRR § 624.5(b)(2)(ii). It should, therefore, be stricken from the record of this proceeding as improper. The same holds true with respect to the 2009 newspaper article, 2005 Part 373 permit renewal excerpt and legal analysis detailed in Gary Abraham's letter dated May 18, 2010 – all of which could have been and, indeed, should have been, submitted as part of RFPLC's Petition for Party Status or during the Issues Conference.

Finally, as NEWSNY explained in detail during the Issues Conference, the radioactivity issue raised by RFPLC is not properly before Your Honor. *See, e.g.*, I.C. Tr. 34-35, 90 (West). Drill cuttings are currently being received by NEWSNY at the Chemung County Landfill with the Department's full approval. *See* I.C. Exh. 10, p. 2, I.C. Tr. 142, l. 22 (West); Hennessey Letter to ALJ Buhrmaster, dated May 18, 2010. In addition, the landfill's current permit does not prohibit the receipt of drill cuttings (Permit, Conditions 28 and 31; I.C. Tr. 43, l. 1-7 and 9-13[West]) and, as such, the requested permit modification does not seek any change to the existing permit relative to the receipt of drill cuttings. *See, e.g.*, I.C. p. 33, l. 13-15 (West).

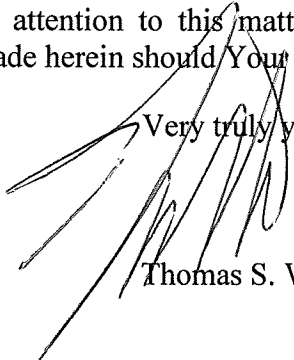
For the foregoing reasons, RFPLC's submissions purportedly in response to I.C. Exhibit 10 should be stricken from the record. Alternatively, NEWSNY should be afforded the

opportunity to respond in order to correct the misrepresentations propounded by RFPLC relative to NEWSNY's acceptance of drill cuttings at the MSW landfill.

Regarding the report submitted by The Noise Consultancy ("TNC"), it also exceeds the authority granted to RFPLC to respond to I.C. Exhibit 9. For example, Section 2.0 of TNC's report summarizes new modeling performed by TNC. This use of straight-line modeling is really a new offer of proof by RFPLC as opposed to an analysis and critique of the actual noise measurements detailed in I.C. Exhibit 9. And, as stated above, such belated attempts to bolster a party's petition for party status is improper. *See* 6 NYCRR § 624.5(2)(b)(ii). In addition, much of TNC's report misrepresents the actual measurements and the conditions under which these measurements were taken. This is despite the thorough explanation of the measurements and conditions detailed in I.C. Exhibit 9 and further explained at the Issues Conference. Given the foregoing, NEWSNY seeks leave to reply to correct the record.

Thank you in advance for your attention to this matter. We remain available for a conference call to discuss the requests made herein should Your Honor deem one appropriate.

Very truly yours,



Thomas S. West

TSW/rsb
cc: Service List