

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for Conceptual Review of a  
Proposal to Site a Solid Waste Management  
Facility in the Town of Farmersville, New  
York, pursuant to Article 70 of the  
Environmental Conservation Law and Part 621  
of Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the State of  
New York

by

**INTEGRATED WASTE SYSTEMS, INC.**

Applicant.

DEC Project No. 9-0438-00004/00003-9

RULING OF THE ASSISTANT COMMISSIONER ON THE MOTION TO REOPEN THE  
POST-CONCEPTUAL REVIEW DECISION AND CONCEPTUAL REVIEW HEARING

October 25, 2005

RULING OF THE ASSISTANT COMMISSIONER<sup>1</sup>

Integrated Waste Systems, Inc. ("IWS") has applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for permits to construct and operate a solid waste management facility consisting of a landfill with support and ancillary facilities ("landfill" or "project") on a 430-acre site on New York State Route 98 in the Town of Farmersville, Cattaraugus County, New York ("Farmersville site").

In 1996, following a conceptual review of the proposed project conducted pursuant to section 621.11 of title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("6 NYCRR"), the DEC Commissioner held that IWS's site selection process satisfied the requirements of 6 NYCRR former 360-2.12, IWS had evaluated a reasonable range of alternative sites, and the aquifer underlying the Farmersville site was not a principal aquifer (see Matter of Integrated Waste Systems, Inc. for Conceptual Review of its Proposal to Site a Solid Waste Management Facility, Decision of the Commissioner,

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<sup>1</sup> By memorandum dated March 29, 2005 (see also memorandum dated October 18, 2005), the Acting Commissioner of the New York State Department of Environmental Conservation delegated decision making authority in this matter to the Assistant Commissioner for the Office of Hearings and Mediation Services ("Office of Hearings").

May 15, 1996, at 5)("1996 Post-Conceptual Review Decision"). By motion dated October 28, 2004, Chautauqua County moved to reopen "the hearing regarding the Commissioner's [1996 Post-] Conceptual Review Decision" in light of the recent identification of a State-regulated freshwater wetland on the Farmersville site.

Papers in support of the motion were also submitted by Cattaraugus County, the City of Olean and the Town of Ischua ("Cattaraugus Objectors") and Concerned Citizens of Cattaraugus County, Inc. ("CCCC"). CCCC, in its papers, argues that significant new information about the local hydrogeology constitutes additional grounds for reopening the conceptual review process. CCCC requests that this local hydrogeology information, in addition to new information finding a State-regulated wetland on the Farmersville site, be considered as a basis to reopen the post-conceptual review decision.

For the reasons that follow, the motion of Chautauqua County and the requests of CCCC and the Cattaraugus Objectors to reopen the 1996 post-conceptual review decision and the conceptual review hearing are denied.

## BACKGROUND

### Conceptual Review: Legal Authority

Pursuant to section 70-0117(4) of the Environmental Conservation Law ("ECL"), the Department is authorized, in conjunction with one or more applications for permits and on request of an applicant, to "undertake a conceptual review of a proposed project evaluating the general approvability or nonapprovability of a proposed project, including all proposed phases or segments thereof, subject to the development and submission of more detailed plans and information and such additional applications for permits in the future as may be necessary."

Section 621.11 of 6 NYCRR establishes the criteria governing conceptual review. As provided in the regulations, a project sponsor may request the DEC to conduct "a conceptual review of the substantive consistency of the project or any component thereof with current State environmental policy and standards at the time of submission of an application (which need not be complete)" (6 NYCRR 621.11[a]). The conceptual review process includes a determination whether the information that an applicant provides is sufficient for the purposes of conceptual review, publication of a notice regarding the commencement of

conceptual review and, where required, a public hearing and an adjudicatory hearing (see 6 NYCRR 621.11[c]-[g]).

Following completion of conceptual review, the Department is required to issue a post-conceptual review decision (see 6 NYCRR 621.11[h]). Although the post-conceptual review decision does not constitute a permit, it is intended to provide an applicant "with a binding decision from the department as to the general acceptability of a proposed project or any component or issue specified, the standards which will be applied to it and desirable design standards" (6 NYCRR 621.11[j][emphasis added]). Conceptual review does not, however, relieve an applicant from the requirement to obtain all necessary permits prior to commencing a project (see id.).

Subsequent to the issuance of a post-conceptual review decision, a further hearing may be required in certain circumstances. The regulations provide that "[i]n cases where a hearing has been conducted as part of conceptual review, a further hearing shall be required only:

- "(1) if the department's post-conceptual review decision specified that a hearing would be held on a specific issue;
- (2) if a significant change requiring a hearing is proposed in the project which was originally reviewed;
- (3) if relevant significant new information becomes available;
- (4) if applicable law or regulations have changed; or

(5) if it becomes apparent that the applicant may be unable to meet the conditions specified in the department's post-conceptual review decision or the requirements for a permit pursuant to section 621.3 or 621.4 of this Part" (6 NYCRR 621.11[k][1-5]).

The post-conceptual review decision remains binding on the Department and in effect "as long as the proposed project continues to conform to the descriptions contained in the request for a conceptual review subject to the limitations . . . concerning modifications" (6 NYCRR 621.11[l]). If an applicant, following a post-conceptual review decision, proposes amendments or modifications to the project that the Department determines are significant, "the review process and, if necessary, the hearing process may be reopened to review those modifications" (6 NYCRR 621.11[m]).

#### Conceptual Review of the Farmersville Site

On July 10, 1990, IWS filed an application with the Department for a permit to construct and operate a landfill at the Farmersville site. On July 26, 1991, IWS formally requested that the Department conduct a conceptual review, pursuant to 6 NYCRR 621.11, to ascertain whether the Farmersville site satisfied the landfill siting regulations at 6 NYCRR former 360-2.12.

On January 20, 1994, Department staff determined that

IWS's request was sufficient for the purpose of conducting conceptual review. Department staff referred the request for conceptual review to the Office of Hearings on July 29, 1994, and Administrative Law Judge ("ALJ") Robert P. O'Connor was assigned to the matter. Following publication of a hearing notice in several newspapers, ALJ O'Connor held a legislative public hearing on September 21, 1994 and an issues conference on September 22, 1994.<sup>2</sup> On December 6, 1994, ALJ O'Connor issued rulings on party status and issues (see Matter of Integrated Waste Systems, Inc., Rulings of the ALJ on Party Status and Issues, December 6, 1994 ["December 1994 Ruling"]). The ALJ held that, for purposes of conceptual review, adjudicable issues had been raised with respect to various siting matters including: whether the hydrogeological characteristics of the sand and gravel deposits underlying or adjacent to the site should be considered to be a principal aquifer; the ability of IWS to meet regulatory requirements governing stability, monitorability and remediability; the potential absence of low permeability unconsolidated deposits underlying the site; the characterization of the site's underlying bedrock; and the site's groundwater flow

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<sup>2</sup> Participants at the September 22, 1994 issues conference included IWS, Department staff, Cattaraugus County and the City of Olean (jointly represented), the Town of Farmersville, CCCC, a diverse group of individuals referred to in ALJ O'Connor's rulings as "Concerned Professionals," and the South Towns Homeowners Association, Inc.

patterns (see December 1994 Ruling, at 16-21).

The ALJ, however, held that with respect to state-regulated wetlands:

"Department staff has determined on the basis of the currently available information there are no state-regulated wetlands on the site. Moreover there is no information in the instant record concerning any requests pending before the Department to amend the Freshwater Wetlands Maps for Cattaraugus County with respect to this site. . . .

. . . Furthermore, since there are no state regulated wetlands on the site, there are no statutory or regulatory bars to potential landfill siting. However, it is appropriate for the Applicant to conduct a supplemental wetlands delineation on the site. Depending on the results of the supplemental investigations, it may be appropriate to reconsider these issues at a future date" (December 1994 Ruling, at 14-15).

Appeals were taken from the December 1994 Ruling.<sup>3</sup> On March 4, 1995, Acting Executive Deputy Commissioner Gary L. Spielmann issued an interim decision ("Interim Decision") which certified two issues for adjudication in the conceptual review

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<sup>3</sup> No appeal, however, was taken from ALJ O'Connor's December 1994 Ruling insofar as the ALJ determined that the issue of State-regulated wetlands would not be an issue for adjudication in the conceptual review proceeding (see Letter dated January 21, 2005 from Duke, Holzman, Yaeger & Photiadis LLP to Commissioner Erin M. Crotty ["Applicant's 2005 Letter"], at 19-20). Although Acting Executive Deputy Commissioner Gary L. Spielmann stated that CCCC had asked that further specificity be included on the ALJ's statement regarding supplemental wetland delineation, he determined that CCCC's request "is not a matter that constitutes an appeal of the rulings" (Interim Decision, at 8; see also 1994 Post-Conceptual Review Decision, at 2).

proceeding: (a) whether a principal aquifer underlies the proposed site; and (b) whether the site is located in an unstable area (Interim Decision, at 9). He also determined that the parties would be allowed to submit proposals for issues "with regard to any matters that relate to the comparative assessment of alternate sites, including whether the [siting] criteria in 6 NYCRR [former] 360-2.12(d) are satisfied by the preferred alternative [i.e., the Farmersville site]" (id.).<sup>4</sup>

ALJ O'Connor issued supplementary rulings on July 24, 1995, in which he addressed submissions of the parties on the comparative assessment of alternative sites and compliance with 6 NYCRR former 360-2.12(d), and the presence of a State-listed threatened plant on the Farmersville site (see Matter of Integrated Waste Systems, Inc., Supplementary Rulings of the ALJ on Issues, July 24, 1995, at 1-2) ("1995 Supplementary Ruling"). With respect to siting, the ALJ determined that the Farmersville site satisfied the landfill siting requirements in 6 NYCRR former 360-2.12(d), and that IWS "had complied with Part 360 requirements relating to comparative assessment of alternate sites" (id. at 5).

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<sup>4</sup> For purposes of conceptual review, the solid waste regulations in 6 NYCRR Part 360, including the landfill siting criteria at 6 NYCRR 360-2.12(d), "effective December 31, 1988, as revised May 28, 1991" were applied (1996 Post-Conceptual Review Decision, at 1).

Following an adjudicatory hearing on the primary aquifer and site stability issues, the ALJ submitted a hearing report and final environmental impact statement to DEC Commissioner Michael D. Zagata. Subsequently, Commissioner Zagata issued a post-conceptual review decision on May 15, 1996. The Commissioner stated that the record of the proceeding demonstrated that the aquifer at the site had "no reasonable potential to be categorized as a principal aquifer" (1996 Post-Conceptual Review Decision, at 4). Regarding stability, the Commissioner stated that he could only conclude that the site satisfies the appropriate stability and strength criteria for purposes of this conceptual review. He indicated that stability would be subject to review of the final design under the criteria and safety factors applicable at the time IWS submitted a permit application for the project (id. at 5).

The Commissioner noted that ALJ O'Connor resolved the issue of comparative assessment of alternate sites in the 1995 Supplementary Rulings, and that all other siting issues had previously been addressed in the December 1994 Ruling and the Interim Decision (id. at 3). The Commissioner concluded:

"I find that the Applicant's site selection process satisfies the requirements of 6 NYCRR [former] 360-2.12, that based on the information provided in the Applicant's Site Selection Study Report, the Applicant has evaluated a reasonable range of alternative sites, and, subject to the evaluation of need . . . , the

Farmersville site is the most appropriate site for the Project . . . .

. . . . .

"In summary, this conceptual review Decision approves the Applicant's site selection process and selection of the Farmersville site for the proposed IWS solid waste management facility. Pursuant to 6 NYCRR [621.11] this Decision will remain binding on the Department and in effect as long as the proposed project continues to conform to the descriptions contained in the Applicant's request for conceptual review, subject to the limitations in Part 621 concerning modifications.

". . . I also find that the Applicant's site selection study, which determined the Farmersville site to be the preferred site, satisfies the requirements of SEQRA" (1996 Post-Conceptual Review Decision, at 5-6).

In 1998, IWS undertook a supplemental wetland delineation for the Farmersville site.<sup>5</sup> A copy was furnished to Department staff and, on April 20, 1999, Department staff visited the Farmersville site to review the delineation. Subsequently, by letter dated May 17, 1999, Department staff advised IWS that "none of the wetlands on and adjacent to the proposed [Farmersville] site meet the jurisdiction requirements of [New York State] Environmental Conservation Law Article 24 and [6] NYCRR Part 664" (Letter from Kenneth C. Taft, DEC Region 9 Deputy Regional Permit Administrator to William L. Heitzenrater, Southern Tier Waste

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<sup>5</sup> IWS had previously undertaken a wetlands delineation of the Farmersville site which had been included as part of the draft environmental impact statement for the conceptual review process (see Applicant's 2005 Letter, at 7 & Exhibit A attached thereto).

Services, Inc., May 17, 1999; see also 6 NYCRR 664.2[f][defining freshwater wetland for purposes of State jurisdiction]).<sup>6</sup>

Part 624 Proceeding on IWS's Permit Applications

Following the issuance of the post-conceptual review decision, IWS developed engineering plans and prepared permit applications for the Farmersville site. On October 24, 2003, Department staff advised IWS that its permit applications for the facility were complete and referred the permit applications to the Office of Hearings for consideration pursuant to the permit hearing procedures set forth at 6 NYCRR part 624 ("Part 624"). Due to the retirement of ALJ O'Connor, ALJ Kevin J. Casutto was assigned to the permit hearing proceeding.

ALJ Casutto conducted legislative hearings on the project on March 30 and 31, 2004 and commenced the issues conference on April 27, 2004. Among those participating in the current proceeding, in addition to Department staff and IWS, are:

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<sup>6</sup> Chautauqua County in its motion asserts that IWS failed to undertake the additional site wetland delineation referenced by ALJ O'Connor in the December 1994 Ruling, and that this failure warrants reopening the conceptual review hearing. Chautauqua County's assertion is not factually correct. As noted, IWS performed a delineation of onsite wetlands in 1998 and presented the findings to Department staff which reconfirmed that no State-regulated wetlands existed on the site at that time. Accordingly, there was no failure to undertake an additional site wetland delineation.

Chautauqua County; CCCC; the Cattaraugus Objectors; a group of local residents; Ischua Valley Estates, LLC; and the Town of Farmersville.

ALJ Casutto adjourned the issues conference, in part, to await IWS's submission of a freshwater wetlands permit application for the project. Previously, by letter dated February 20, 2004, Cattaraugus County and the City of Olean requested that the DEC amend its freshwater wetlands maps to add acreage to an existing wetland on the Farmersville site (see Exhibit C to Applicant's 2005 Letter). With this addition, Cattaraugus County and the City of Olean argued that the resulting wetland would be greater than 12.4 acres and, accordingly, would meet the "state jurisdictional size threshold" for a State-regulated wetland (id., at 2). Department staff subsequently re-evaluated wetland conditions and redelineated the existing wetland. As a result, the wetland's size was increased to greater than 12.4 acres, thereby subjecting the wetland to State regulation.<sup>7</sup> A portion of this wetland would be impacted

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<sup>7</sup> Department staff, in papers filed on January 19, 2005 in opposition to the motions to reopen the post-conceptual review decision ("Department Staff's Papers"), indicated that the redelineated wetland contained 13.3 acres (Department Staff's Papers, at 9). Although the estimates of the project's impacts on the wetland and its adjacent area vary somewhat, only a small portion of the wetland and its adjacent area is claimed to be impacted (see Department Staff's Papers at 9; Applicant's 2005 Letter, at 13).

by the proposed landfill's perimeter berm and a stormwater retention pond. Although IWS has not conceded that the redelineated wetland is subject to State regulation, it agreed to prepare a freshwater wetlands permit application "to be included as part of its Part 360 permit application package" (Applicant's 2005 Letter, at 12-13).

#### Motion to Reopen the Post-Conceptual Review Decision

By letter dated October 28, 2004, Chautauqua County moved to reopen the hearing on the Commissioner's 1996 Post-Conceptual Review Decision ("Motion"). The basis of the motion, according to Chautauqua County, "is that relevant significant new information has become available since the [post-conceptual review] decision was issued . . . and the [a]pplicant will be unable to meet the conditions specified in the [post-conceptual review decision] or the requirements for a permit" (Motion, at 1 [citing 6 NYCRR 621.11(k)(3) and 6 NYCRR 621.11(k)(5)]).

Chautauqua County contends that the 1996 post-conceptual review decision was based, in part, upon a record and finding that no State-regulated wetlands were located on the Farmersville site. The County notes that the recently identified State-regulated wetland on the site would be impacted by the proposed landfill. Accordingly, Chautauqua County contends that

because Part 360 prohibits constructing or operating a solid waste management facility within the boundary of a regulated wetland (see 6 NYCRR former 360-1.14[c][4]),<sup>8</sup> IWS cannot meet the conditions specified in the 1996 post-conceptual review decision or the Part 360 requirements for a solid waste management facility permit (see Motion, at 2).

Chautauqua County further maintains that, if the State-regulated wetland on the Farmersville site had been identified at the time of conceptual review, IWS's siting criteria would have eliminated the Farmersville site as the location for a proposed landfill (see id.).<sup>9</sup> Chautauqua County states that the existence of a State-regulated wetland on the Farmersville site represents a threshold issue, and should be assessed in the site selection process (id. at 4). Accordingly, Chautauqua County argues that reopening the conceptual review process is the "only appropriate resolution" (id.).

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<sup>8</sup> The prohibition with respect to the construction or operation of new solid waste management facilities within the boundaries of a State-regulated wetland at 6 NYCRR 360-1.14(c)(4) in the regulations that were effective December 31, 1988 as revised May 28, 1991 (see supra, fn 4) is found in the current Part 360 regulations at 6 NYCRR 360-1.7(a)(2)(iv).

<sup>9</sup> Chautauqua County notes that ALJ O'Connor found that two different sites considered by applicant, the Farmersville site and one referred to as "Albion/Murray", satisfied the Part 360 landfill siting requirements (Motion, at 5).

Following the filing of the motion, the Office of Hearings established a briefing schedule to allow the other participants in the issues conference before ALJ Casutto to submit comments on the motion. In accordance with that schedule, papers were submitted in support of the motion by the Cattaraugus Objectors on December 17, 2004 ("Cattaraugus Objectors' Supporting Papers") and by CCCC on December 18, 2004 ("CCCC Supporting Papers").

The Cattaraugus Objectors similarly argue that the applicable Part 360 regulations prohibit the construction and operation of a landfill on the Farmersville site. Furthermore, the Cattaraugus Objectors indicate that ALJ O'Connor recognized that later wetland surveys could re-open the conceptual review process (Cattaraugus Objectors' Supporting Papers, at 1, 3). The Cattaraugus Objectors contend that, in light of the recent identification of a State-regulated wetland on the Farmersville site, IWS's siting study, if repeated, would not select the Farmersville site as the preferred site (id. at 5-6). As part of its submission, the Cattaraugus Objectors also offer specific comments on IWS's freshwater wetlands permit application (see id. at 4-5 & Exhibit A [comments of the Cattaraugus Objectors' consultant on alleged impacts of construction and long term dewatering on wetlands in the immediate vicinity of the

Farmersville site and the "mitigation wetland area"]).

CCCC, in its submission, argues that, in addition to the presence of a State-regulated wetland, "significant new information about the local hydrogeology . . . has come to light" since the 1996 post-conceptual review decision (CCCC Supporting Papers, at 1). CCCC indicates that both of these matters were addressed in its petition for party status that was submitted in the pending proceeding before ALJ Casutto and should be considered as grounds to reopen the 1996 post-conceptual review decision.<sup>10</sup> CCCC also argues that IWS's site selection study failed to implement an "iterative selection methodology" (*id.* at 2-4).

Papers were submitted in opposition to the motion of Chautauqua County and the supporting submissions of CCCC and the Cattaraugus Objectors by Department staff on January 19, 2005 ("Department Staff's Papers") and by IWS on January 21, 2005 ("Applicant's 2005 Letter"). Department staff contends that the appropriate forum for the wetland and hydrogeology matters that Chautauqua County, CCCC and the Cattaraugus Objectors have raised

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<sup>10</sup> Attached to the CCCC Supporting Papers are copies of its petition for party status, well survey information, hydrogeology-related comments dated June 23, 2004 by a CCCC consultant, and related material.

is the Part 624 proceeding on IWS's permit applications that is currently pending before ALJ Casutto.

IWS also argues that no purpose would be served by reopening the post-conceptual review decision to address these matters of wetland and hydrogeology and that they can and should be addressed in the pending proceeding on the permit applications.

#### **DISCUSSION**

The conceptual review process is intended to provide an early and binding decision for an applicant "as to the general acceptability of a proposed project or any component or issue specified" (6 NYCRR 621.11[j]). Conceptual review is considered particularly suited for the siting of solid waste management facilities (see DEC Organization and Delegation Memorandum #90-39, "Policy: Solid Waste Management Facility Siting and Conceptual Review," December 3, 1990 ["O&D #90-39"]). In addressing the relationship between facility siting and conceptual review, O&D #90-39 states that conceptual review "enable[s] early executive decisions on the acceptability of siting efforts by project sponsors before they must invest substantial time and money in long-term site monitoring and

characterization, as well as facility design" (id. at 1).

According to O&D #90-39, conceptual review approvals provide "a reliable foundation upon which project sponsors can build further investments and commitments to solid waste facility development" (id.) and serve as a "long-term guarantee" (id. at 4). Department staff has been directed "to make every effort" to provide "'grandfathering' protection" to projects that have been the subject of conceptual review approvals, "consistent with [the Department's] other mandates" (id.). A conceptual review decision on siting is not subject to further adjudication unless site conditions prove themselves drastically different than characterized in the conceptual review" (Attachment to O&D #90-39, at 4[emphasis added]).<sup>11</sup>

As ALJ O'Connor noted, the conceptual review with respect to the Farmersville site was meant to resolve siting issues at the Farmersville site so that those siting issues "would not have to be revisited in any subsequent permit

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<sup>11</sup> Prior administrative law judge rulings have also emphasized the finality of a post-conceptual review decision (see, e.g., Matter of Oneida-Herkimer Solid Waste Management Authority, Rulings of the ALJ on Party Status and Issues, January 30, 2001, at 26 ["[c]onceptual review allows project sponsors to receive binding decisions of the Department . . . so that these issues cannot arise later to defeat a project after development expenses have been incurred"]).

proceeding" (December 1994 Ruling, at 4; see also Interim Decision, at 1-2). The Commissioner, in approving IWS's site selection process and selection of the Farmersville site for the proposed IWS solid waste management facility, noted that the approval would be binding on the Department and "in effect as long as the proposed project continues to conform to the descriptions contained in the Applicant's request for conceptual review, subject to the limitations in Part 621 concerning modifications" (1996 Post-Conceptual Review Decision, at 5). IWS, in reliance on the post-conceptual review decision, conducted further investigations on the Farmersville site and prepared permit applications for the proposed facility.

Department regulation, guidance and precedent underscore that the binding effect of conceptual review should not be disturbed absent compelling reasons. Decisions arising from conceptual review are generally entitled to administrative repose. As noted, Chautauqua County argues that the recent delineation of a State-regulated wetland on the Farmersville site requires a "further hearing" and a reopened conceptual review process and cites 6 NYCRR 621.11(k)(3) ("relevant significant new information") and 6 NYCRR 621.11(k)(5)(applicant inability to meet the conditions specified in the post-conceptual review decision or the requirements for a permit) in support of its

position. The Cattaraugus Objectors also rely on 6 NYCRR 621.11(k)(3) in support of reopening the post-conceptual review decision. CCCC makes similar arguments in support of reopening the post-conceptual review decision based on alleged new information on local hydrogeology.

Contrary to the arguments of Chautauqua County, CCCC and the Cattaraugus Objectors, in cases where, as here, a hearing has been conducted as part of conceptual review, the regulatory provisions they cite do not mandate that the conceptual review hearing be reopened, but only that a "further hearing" be held (see 6 NYCRR 621.11[k]).<sup>12</sup>

In this matter, a hearing process other than conceptual review is not only available, but is the contemplated procedure to address any outstanding issues relating to the proposed project. Where a post-conceptual review decision is issued with respect to a proposed solid waste management facility, an applicant must still submit all required permit applications for

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<sup>12</sup> The post-conceptual review decision stated that the decision would remain binding upon the Department "subject to the limitations in Part 621 concerning modifications" (1996 Post-Conceptual Review Decision, at 5). The limitations concerning modifications appear in 6 NYCRR 621.11(m), and not section 621.11(k). Furthermore, the only reference to reopening the conceptual review process appears in 6 NYCRR 621.11(m), and not section 621.11(k).

that facility and Department staff will determine whether to refer the applications to the Office of Hearings for proceedings pursuant to Part 624. As indicated, Department staff referred IWS's permit applications to the Office of Hearings and ALJ Casutto has conducted a legislative hearing and commenced an issues conference on the permit applications. The pending Part 624 proceeding on IWS's permit applications before ALJ Casutto constitutes such "further hearing" as contemplated by the regulations and by the prior rulings and decisions in this matter (see 1996 Post-Conceptual Review Decision, at 7 & ALJ Hearing Report attached thereto, at 24 [design features and variances are matters for consideration in any future permit application proceedings], 25 [noting that IWS must still apply for permits to construct and operate the landfill]).

The proceeding before ALJ Casutto, which will be considering the State permit applications for the project, is the appropriate forum to consider issues relating to the State-regulated wetland at the Farmersville site and IWS's freshwater wetlands permit application. The Part 624 proceeding can effectively address the impact of the proposed landfill's construction and operation on the State-regulated wetland, including measures to minimize or avoid any impact on the wetland, the comments of the other participants (such as those

included in the Cattaraugus Objectors' Supporting Papers), any variance that may be proposed with respect to the State-regulated wetland,<sup>13</sup> any wetland mitigation, and appropriate permit conditions. Part 624 proceedings have routinely addressed such issues with respect to permit applications for other landfill proposals. Accordingly, the "further hearing" contemplated by 6 NYCRR 621.11(k) is the Part 624 proceeding currently being conducted before ALJ Casutto. The reopening of the conceptual review hearing in this context is neither required nor necessary, and would be contrary to the policy of affording finality to the conceptual review process.<sup>14</sup>

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<sup>13</sup> ALJ O'Connor in addressing hydrogeology issues stated that any required variances would be considered in future permit application proceedings, and would not be considered at the conceptual review stage (see ALJ's Hearing Report/Final Environmental Impact Statement, annexed to the 1996 Post-Conceptual Review Decision, at 24). His determination that such variances should be considered in future permit application proceedings equally applies to consideration of any variance relating to a State-regulated wetland, and underscores the appropriateness of considering wetland-related matters in the proceeding pending before ALJ Casutto.

<sup>14</sup> The Cattaraugus Objectors contend that, according to ALJ O'Connor's December 1994 Ruling, the outcome of later wetland surveys could re-open the conceptual review process. A similar contention is made by Chautauqua County. Those contentions read too much into ALJ O'Connor's ruling. ALJ O'Connor simply stated that, depending upon the results of a supplemental wetland redelineation, "it may be appropriate to reconsider [wetland] issues at a future date" (December 1994 Ruling, at 15). Any wetland issue can be addressed within the context of the pending Part 624 proceeding before ALJ Casutto.

Among its arguments, Chautauqua County contends that the identification of a State-regulated wetland on the Farmersville site warrants reopening the post-conceptual review decision because, under IWS's site selection methodology, a site with a State-regulated wetland would have been excluded from further consideration. The Cattaraugus Objectors argue that, with the identification of a State-regulated wetland on the Farmersville site, the site would have been excluded from consideration or it would have received a lower rating compared to alternative sites. The arguments of Chautauqua County and the Cattaraugus Objectors misinterpret the requirements of the site selection process set forth in 6 NYCRR former 360-2.12. That regulatory section provides for an iterative and phased approach for site selection. Pursuant to that approach, proposed sites are compared to each other at specific stages in the site selection process, based on the information then known. As sites are eliminated from consideration at various stages of the process, the remaining sites are subject to more detailed review and subsequent comparison.

It is expected that new and possibly significant information may be developed at each subsequent stage of analysis, particularly as those stages of analysis proceed from desk top reviews to site inspections. However, former section

360-2.12 does not require that, where new information is developed, the selection process be restarted or that sites previously excluded be considered anew or that sites currently under consideration be rescored and compared to the earlier scores of sites that had been previously eliminated (cf. Matter of Saratoga County, Second Interim Decision, October 3, 1995, at 14; see also Matter of Oneida-Herkimer Solid Waste Management Authority, Rulings of the ALJ, January 30, 2001, at 34-35; Matter of the Development Authority of the North Country, Interim Decision, July 24, 1990, at 4; see generally, DEC Division of Solid Waste, Solid Waste Management Facility Siting ["Siting Manual"], April 1990).

IWS followed a phased seven-step approach in its site selection process to identify and evaluate a reasonable range of alternative sites for development of a solid waste management facility (see, e.g., Draft Environmental Impact Statement for Conceptual Review, Volume I, December 1993). Following an initial evaluation of eighty-one sites and application of successive stages of the site selection process, the number of potential sites was finally reduced to two sites. After onsite investigations, the Farmersville site was identified as the preferred site (see id.).

In this site selection process, maps of State-regulated wetlands in Cattaraugus County were reviewed. These maps did not identify any State-regulated wetlands on the Farmersville site. During the onsite investigation of the Farmersville site in the site selection process, the wetlands on the property were delineated and no wetland subject to State jurisdiction was identified. Subsequently, in May 1996, the post-conceptual review decision was issued.

In 1998, a subsequent wetland delineation was performed and again it was determined that no state-regulated wetlands were present on the Farmersville site. Contrary to the argument of Chautauqua County, the wetland which is now identified as subject to State regulation was not "missed." Both before and after the completion of the site selection process, the wetland delineations and the State wetland maps indicated that any wetland on the Farmersville site was under the State's jurisdictional threshold of 12.4 acres. Wetlands, however, are a dynamic resource and their boundaries can be expected to increase or diminish in size over time (see DEC Policy Memorandum FW 87-2, "Confirmation of Freshwater Wetlands Determinations and Delineations," August 19, 1987, at 2 [size of wetland may vary over time thereby altering its jurisdictional status]).

It was not until 2004, eight years after the post-conceptual review decision was issued, that the boundaries of an existing wetland on the Farmersville site were expanded and, as a result, the wetland became subject to State regulation.<sup>15</sup> IWS's site selection process (including the evaluation of alternative sites) had long been completed and, under Department regulation and policy, had been given final and binding effect by the 1996 post-conceptual review decision. This subsequent change to the boundaries of the existing wetland does not require the reopening of the site selection process. However, the binding effect given to site selection does not preclude review of project impacts on the State-regulated wetland at the Farmersville site. Any impact can be addressed in the pending Part 624 proceeding, and it is not necessary or required to reopen the post-conceptual review decision to accomplish that.<sup>16</sup>

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<sup>15</sup> As previously noted, IWS does not concede that the wetland meets the requirements of a State-regulated wetland.

<sup>16</sup> With respect to the site selection process, CCCC argues that IWS failed to implement an iterative site selection methodology in the site selection process and details what it considers flaws in IWS's identification of alternative sites (CCCC Supporting Papers, at 2-4). CCCC previously raised this argument in the conceptual review proceeding where it had a full opportunity to present and fully develop its position (see Applicant's 2005 Letter, at 21-22). CCCC's argument did not prevail in the conceptual review proceeding as both the DEC Commissioner and the ALJ considered and approved the iterative nature of IWS's site selection process (see, e.g., 1996 Post-Conceptual Review Decision, at 3; 1995 Supplemental Rulings, at 5). CCCC's attempt to revisit this argument is rejected.

Chautauqua County and the Cattaraugus Objectors

further maintain that, because the proposed project would impact a State-regulated wetland, the landfill cannot be constructed on the Farmersville site. They cite to 6 NYCRR former 360-1.14(c)(4) which provides that new solid waste management facilities are not to be constructed or operated within the boundary of a State-regulated wetland. The argument is misplaced. The Department's regulations provided, then as now, that a variance may be granted from one or more provisions of Part 360 under specified conditions (see 6 NYCRR 360-1.7[c] under both the current and former regulations), and such variances have been previously issued with respect to State-regulated wetlands (see Matter of Oneida-Herkimer Solid Waste Management Authority, Interim Decision, April 2, 2002, at 10; Decision of the Commissioner, March 19, 2004; see also Siting Manual, at 29 [sites that contain wetlands should not be routinely rejected]).

Furthermore, during any subsequent review of the permit applications for a landfill project, the boundaries of a proposed landfill can be redesigned or the landfill operations modified to minimize or avoid any impact to a State-regulated wetland. As previously discussed, any arguments relating to impacts on the wetland can be addressed during the consideration of the project's freshwater wetlands permit application in the ongoing

Part 624 proceeding.

CCCC, in addition to indicating its support for Chautauqua County's motion, offers what it characterizes as "significant new information" on local hydrogeology and argues that this information supports reopening the post-conceptual review decision. In its papers, CCCC presents information on a residential well survey, a recent (2002) study of the local watershed, Carpenter Brook, and local gravel mines, and lists various hydrogeology studies, among other information. It argues, in part, that this information supports the selection of the Albion/Murray site, rather than the Farmersville site, as the preferred site (see, supra, fn 9).

IWS, in responding to CCCC, submits that the arguments concerning hydrogeology that CCCC presents are more in the nature of a motion to re-argue issues that were previously raised in the conceptual review process rather than a request to reopen the process based upon "relevant significant new information" (Applicant's 2005 Letter, at 21). I agree. The information that CCCC presents was either previously known or could otherwise have been developed for submission in the prior conceptual review proceeding. Furthermore, CCCC fails to explain why the post-1996 studies that it references could not have been performed and

presented in the conceptual review proceeding. Accordingly, this information does not constitute "relevant significant new information" (see 6 NYCRR 621.11[k][3]) and is not a basis to support a reopening of the post-conceptual review decision.<sup>17</sup>

To the extent that Chautauqua County, CCCC and the Cattaraugus Objectors raise any further arguments that are not addressed here, they have been considered and rejected. Based on the record before me, the motion of Chautauqua County and the requests of CCCC and the Cattaraugus Objectors to reopen the 1996 post-conceptual review decision and the conceptual review hearing are hereby denied.

New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Louis A. Alexander  
Assistant Commissioner

Dated: October 25, 2005  
Albany, New York

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<sup>17</sup> CCCC states that it has presented the same hydrogeologic information in its petition for party status in the Part 624 proceeding pending before ALJ Casutto. To the extent that information is relevant to any proposed issue that was not subject to a binding decision in conceptual review and which is now before ALJ Casutto, the information can be considered in the Part 624 proceeding.