

In the Matter of the Application of
Waste Management of New York, LLC, Pursuant to
Articles 19 and 24 and Title 7 of Article 27
of the Environmental Conservation Law for
permits to operate a solid waste landfill in
the Town of Sardinia, New York

RULING ON ISSUES
AND PARTY STATUS

DEC Application No. 0-1462-001/00017

Summary

This ruling addresses the proposed issues for adjudication regarding the application of Waste Management of New York, LLC (Applicant, WM) for the expansion of its Chaffee, New York landfill. The project is known as the Western Expansion and has a proposed new waste footprint of 52.5 acres and a waste overliner of 14.9 acres. The current permit applications relate only to the new waste footprint of 52.5 acres and 3.5 acres of waste overliner. A future permit proceeding would be necessary to authorize use of the remaining 11.4 acre waste overliner area. As part of the project, a 19.6 acre mine is proposed to be developed which would provide approximately 900,000 cubic yards of soil material necessary for the expansion. There are approximately 0.70 acres of proposed impacts to federal wetlands and construction of a wetland mitigation area of 2.15 acres adjacent to NYS Department of Environmental Conservation (DEC, Department) regulated Freshwater Wetland SD-1 would be required. Currently, WM operates the Chaffee Landfill for the disposal of municipal solid waste and non-hazardous commercial and industrial wastes. The existing Solid Waste Permit allows the facility to receive 600,000 tons of waste per year and the Western Expansion would have the same waste acceptance limit.

Department Staff has made a determination to approve the application and draft solid waste management, air state facility and freshwater wetlands permits and a water quality certification for the proposed facility permit have been prepared.

This Ruling also addresses the request for party status made herein. The permit hearing procedures under Part 624 of Title 6

of the New York State Official Compilation of Codes, Rules and Regulations (6 NYCRR) govern the proceeding. The Applicant and the Department are parties to the hearing under the DEC permit hearing procedures. A petition for party status was served by Concerned Citizens of Sardinia (CCS).

The petition of CCS is denied, as more fully addressed herein. Upon review of the record in this matter, no issues met the Part 624 standards for adjudication. A total of five issues were proposed for adjudication in CCS's July 15, 2005 petition for party status, a sixth issue was proposed after the issues conference in CCS's post issues conference brief and two additional issues were proposed by CCS in a letter dated November 15, 2005. WM moved to strike the issue proposed by CCS in its brief and that motion was granted. The two issues proposed on November 15, 2005 are rejected, as addressed herein.

Background

Waste Management of New York, LLC has applied for permits pursuant to the following: Environmental Conservation Law (ECL) Article 27, Title 7, 6 NYCRR Part 360 Solid Waste Management, ECL Article 19, 6 NYCRR Part 200 Air Pollution Control; ECL Article 24, Freshwater Wetlands ; 6 NYCRR Part 608, Water Quality Certification. The permits and certification are necessary for the Applicant to expand the existing Chaffee landfill. The project will also require a State Pollutant Discharge Elimination System (SPDES) general permit for storm water discharges for operation of the landfill.

SEQRA

This project is a "Type I" action under the State Environmental Quality Review Act (SEQRA) and a Positive Declaration was issued on July 30, 2002 by the Department, acting as lead agency. The Department noticed acceptance of the Draft Supplemental Environmental Impact Statement (DEIS) on May 13, 2005.

PROCEEDINGS

Legislative Hearing

Department Staff requested that a public hearing be held and the matter was sent to the Department's Office of Hearings and Mediation Services (OHMS) and was assigned to Administrative Law Judge (ALJ) Molly T. McBride. By Notice dated May 13, 2005 Department Staff noticed the legislative hearing and issues

conference as well as the acceptance of the DEIS and the Notice of Complete Application. This Notice was published in the Department's internet publication, *Environmental Notice Bulletin* (ENB) on May 18, 2005 as well as the *Arcade Herald* and *Buffalo News*. Copies of the Notice were also sent to the persons identified as interested parties, and to Erie County and the Town of Sardinia.

Pursuant to the Notice, a legislative public hearing was held on June 20, 2005. ALJ McBride presided over the hearing for the Department. Two sessions of the legislative hearing were held on June 20, 2005. Both sessions were held at the Town of Sardinia Community Center located at 12230 Savage Road, Chaffee, New York. DEC Staff appeared by the following Staff from the Department's Region 9 office: Steven Doleski, regional permit administrator. The Applicant was represented by Daniel Darragh, Esq. of Cohen and Grigsby, P.C. In addition to Mr. Darragh, WM's district manager Tom Lewis and Mike Manns and Tom Heins of McMahan and Mann, environmental engineers, presented an overview of the project for those in attendance.

There were approximately 45 people in attendance at the afternoon session and nine people spoke on the project. The evening session had approximately 100 attendees with seven speakers.

Issues Conference

The issues conference was convened at 9:00 a.m. on July 25, 2005 at the Town of Sardinia Community Center. 6 NYCRR Part 624 allows for participation at the issues conference by Department Staff and the Applicant (WM) as parties to the proceeding. 6 NYCRR 624.5(a). Also, those seeking party or amicus status pursuant to 6 NYCRR 624.4 may participate. The Notice of Public Hearing directed that those seeking party or amicus status file a written request to the ALJ by July 15, 2005. A petition for party status was filed by Concerned Citizens of Sardinia on July 15, 2005.

DEC Staff appeared at the issues conference by David J. Stever, Esq. assistant regional attorney, as well several members of staff from the Department's Region 9 office. WM appeared by Daniel Darragh, Esq. of Cohen and Grigsby, P.C. and representatives of McMahan and Mann. CCS appeared by Gary A. Abraham, Esq. and Charles Rosenburg, of Northeastern Ecological Associates, Inc.

The issues conference was concluded on July 15, 2005. The

parties made written submissions on several outstanding issues. Site visits were conducted by CCS and Department Staff. The record for the issues conference closed on or about November 15, 2005.

Standards for identifying issues for adjudication

In cases such as this where the applicant has accepted all terms and conditions in the Department's draft permits, the purpose of the issues conference is to obtain sufficient information to determine who should be afforded party status and whether substantive or significant issues exist which require adjudication. The terms "substantive" and "significant" are defined at 6 NYCRR § 624.4(c)(2 & 3). An issue is substantive if there is sufficient doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.

In order to establish that an adjudicable issue exists,

"an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues." (*In the Matter of Halfmoon Water Improvement Area*, Decision of the Commissioner dated April 2, 1982).

Concerned Citizens of Sardinia

CCS filed a petition dated July 15, 2005 seeking party status pursuant to 6 NYCRR § 624.5(b). CCS proposed five issues

for adjudication in its petition seeking party status, proposed an additional issue, in its post issues conference brief and proposed two more issues in a letter dated November 15, 2005. Section 624.5(b) identifies the requirements to obtain party status: file a timely petition that has the required contents as well as identify an issue for adjudication which meets the criteria of Section 624.4(c) and present an offer of proof specifying the witnesses, the nature of the evidence to be presented by that person and the grounds upon which the assertion is made with respect to that issue. Part 624 of 6 NYCRR places the burden of persuasion that an issue is substantive and significant on the party raising the issue. CCS has not met that burden with respect to the issues proposed. The petition is denied as no substantive and significant issue was presented.

The issues presented will be addressed separately, below.

Issue One: The first issue raised by CCS relates to stormwater and groundwater (GW) management and discharge. This issue has numerous subparts that address various concerns of CCS related to collection and discharge of leachate contaminated water.

The first matter addressed by CCS is the volume of groundwater to be extracted and contained by WM. The applicable solid waste regulations require that there be a five foot separation between the seasonal high water mark and the bottom of the landfill liner. The proposed expansion provides for a pore water collection system that would serve to drain any groundwater to meet that requirement. CCS questioned the figures of the potential amounts of collected water and the ability of the collection system to hold that water. WM used "worst case scenario" figures to calculate the amount of groundwater that would be collected in its containment system. Data collected over a sixteen month period (including 2 spring seasons) indicates that the water table in the area of the proposed expansion varies but is below the intended site of the liner for the landfill, according to applicant the range is .7 feet to 12 feet. The collection figures used to calculate the adequacy of the system used an assumption that the water table was actually five feet higher than that, putting the water table above the liner. Using that assumption, the amount of groundwater anticipated to be extracted would be .33 gallons per/minute, which is .02% of the permitted collection pool volume. Using those exaggerated numbers, Department Staff was satisfied that the collection system proposed would be sufficient to keep the liner dry. After WM's counsel presented the specifics of the plan and data collected, and those figures were agreed upon by Department Staff, CCS counsel withdrew his challenge to the

volume of groundwater and questioned the quality of the groundwater when it is discharged to the nearby Hosmer Brook.

The proposed collection system consists of 4 retention ponds, ponds #1, #2 and #3 and one identified as SMP-5. SMP-5 is to serve as the main collection pond for leachate breakouts and other non-stormwater discharges in the event of a spill or release. The three remaining ponds serve as the stormwater runoff collection ponds. The facility's stormwater collection system encircles the entire landfill. A series of conveyance pipes serve to collect the water and direct it to the different collection ponds. Potentially contaminated water collected in SMP-5 is eventually released to the 3 collection ponds only after it has been tested and deemed appropriate to release. If the contaminants in the collected water in SMP-5 meet satisfactory levels, the collected water will be released to the 3 collection ponds. If the collected water has higher contaminate levels, it is then pumped out of SMP-5 and transferred from the facility for appropriate disposal. Applicant demonstrated that the collection systems have sufficient volume that there will not be releases without testing. Department Staff agreed that they were satisfied that there would not be releases from SMP-5 before it is tested.

CCS acknowledged that the collection system plan provides for regular testing of the collected water in SMP-5 to determine contaminant levels. However, counsel for CCS questioned releases from SMP-5 that may occur between tests. Because of the sensitive nature of the site, as described by CCS, any release of contaminants, inadvertently, between tests, would cause harm to the nearby Hosmer Brook. There is no dispute that Hosmer Brook, which runs adjacent to the landfill, is a trout spawning stream.

The collected water in SMP-5 is tested for contaminants, and if/when the water samples indicate contaminants meet satisfactory levels, the collected water will be released to the 3 collection ponds. If the collected water has higher contaminate levels, it is then pumped out of SMP-5 and transferred from the facility for appropriate disposal. The GW collected in the three remaining ponds is tested three times a year under the terms of the Part 360 permit and two times a year under the SPDES permit. Those ponds then serve to further process the water, allowing for sedimentation and oxygenation. Submissions from WM's engineers, as part of the application package, detail the collection system. Pond #1 is designed to be a forebay to pretreat 100 percent of the water quality volume and ponds #2 & #3 have permanent wet pools and an aquatic bench which serve to further treat the water.

CCS identified 4 particular contaminants (ammonia, sulfate, iron and acrylonitrile) as concerns. CCS questioned whether the discharged water from #1, #2 & #3 would contain levels of those contaminants that exceed allowable levels. WM and Department Staff both argued that CCS fails to note that the groundwater will be significantly diluted by stormwater. Department Staff and WM agreed that while contaminants may be present in the collected groundwater, they will be so significantly diluted by stormwater as to pose no threat at all. Department Staff specifically addressed the allowable levels of the contaminants identified by CCS and affirmed its' position that the system, as designed, does not pose a threat of release of collected water that exceeds acceptable levels. CCS offered no legal support or offer of proof to support the claims that there could be discharges that exceed allowable limits. As noted above, pursuant to *In the Matter of Halfmoon Water Improvement Area*, "... a conclusory statement without a factual foundation is not sufficient to raise issues".

CCS also suggested that the collection system could fail to collect all contaminants in the event of a leachate breakout or other event. SMP-5 serves as the retention pond for such events. CCS questioned whether there could be a premature closing of SMP-5 that would allow contaminants to bypass that safety system and go directly into the 3 remaining ponds. CCS theorized that once WM believes that all potentially contaminated water has been collected, SMP-5 could be closed when, in fact, additional contaminated water remained to be collected. Department Staff and WM agreed that this could not occur and concur that SMP-5 will not be closed while it is being used to collect any type of breakout or other related event. WM staff and the DEC on-site monitor will have the responsibility to ensure that any potentially contaminated GW is collected in SMP-5 in its entirety. Then, if necessary, SMP-5 could be closed until the collected GW is tested and removed. DEC Staff stated that they did not believe that SMP-5 could be closed prematurely, because of the fact that WM staff and the monitor will both be overseeing the collection. WM argued that even if CCS's argument were to be accepted, the proposed system with SMP-5 is above and beyond what is required by the applicable regulations for a landfill. Department Staff and WM stated that the 3 collection ponds themselves meet all applicable regulations and Department requirements and therefore, that system without using SMP-5 would sufficiently handle any event, such as a leachate breakout.

RULING: CCS has not raised a substantive and significant issue with regards to the adequacy of the collection system.

CCS also questioned the location of the landfill as an aquifer is located underneath the landfill. Department Staff stated that they are not concerned about that fact. In the 30 years that the landfill has been sited above the aquifer, the groundwater has not tested positive for contaminants related to the landfill. WM tests the area quarterly and those test results are furnished to the Department. Also, the Erie County Health Department annually tests the nearby wells and the groundwater has never shown any signs of contamination from the landfill. Department staff stated we "... have implicit faith in the double-lined construction regime that's required under the current Part 360 and believe that this is superior to the previous methods...". (81)¹ Department Staff stated that they are satisfied that the new landfill, with the significantly superior system of a double liner and other requirements, will serve to provide superior protection to the nearby environment, including the aquifer. Again, when pressed, CCS made no offer of proof to support the questions and doubts raised about the landfill and its placement near the aquifer.

RULING: No substantive and significant issue is found with respect to the location of the landfill and the aquifer.

CCS completed its arguments regarding groundwater by stating that the Department's Technical Operations Guidance Series (TOGS) prohibit discharges into Hosmer Brook, and therefore the permit can not be issued. CCS relied on the Departments' Department of Water TOGS 1.3.1(b) which prohibits discharges into trout spawning streams. WM argued that 1.3.1(b) is not applicable as it relates to discharges from residential and commercial sanitary systems. Further, WM notes that TOGS are guidance for Department Staff and do not create an enforceable right for the benefit of any party. The Department of Water TOGS being cited by CCS read, in part, "Nothing set forth herein prevents staff from varying from this guidance as the specific facts and circumstances may dictate, provided staff's actions comply with applicable statutory and regulatory requirements." Department Staff also argue that the TOGS relied upon by CCS are not applicable here as they relate to residential and commercial sanitary system discharges. Intervenor was then questioned as to how the TOGS do apply since they refer to sanitary systems. The response was "well, then it ought to address an industrial discharge like a regional landfill if it applies to a sanitary system." (96) I do not agree with CCS. The TOGS can not apply

¹Numbers in parentheses reflect page numbers in the Issues Conference transcript

if they do not address this type of an operation. Also, as noted by WM and Department Staff, TOGS are guidance for Staff and not regulatory in nature. The intervenor is not given any rights in the TOGS to seek an enforcement of them.

RULING: CCS has failed to show how the Department is violating laws or regulations by allowing a discharge into Hosmer Brook.

Issue Two: CCS argues that Department Staff's conclusion that a general SPDES permit is sufficient for this facility is incorrect. 6 NYCRR 750-1.21(b)(3) authorizes the use of a general SPDES permit for a landfill, as defined at 40 C.F.R. 122.26(b)(14)(v). CCS argues that to discharge leachate contaminated water into Hosmer Brook, a site specific SPDES permit would be required. However, the permit application does not seek to discharge such contaminated waters into Hosmer Brook. The Department's draft permit does not allow for such discharges of contaminated water either. As addressed above, the collection system proposed for the expansion protects against such releases. Department Staff has again noted that it has exhaustively reviewed the water quality data supplied during the permit application process and it is quite satisfied that all aspects of the project are in compliance and that there will not be any discharges to the environment that would require the SPDES permit petitioner seeks. CCS has again raised an issue for argument but put forth no factual basis and made no offer of proof that would support the questions raised in the event that a hearing was held on the issue raised. One important point that CCS has not addressed and must not be overlooked is that the permit application contain a leachate breakout plan that would work to control leachate breakout before it would lead to the point of collecting it in SMP-5. SMP-5 is in essence, a back up to that plan that includes excavation and control work in the area of the breakout "to retain the leachate material on site and within the landfill." (115) CCS questioned past leachate breakout practices and both Department Staff and WM addressed how they have been handled in the past and CCS had no offer of proof to demonstrate that breakouts have not been contained in the past.

RULING: CCS has not raised a substantive and significant issue with regards to the SPDES permit.

Issue Three: The landfill does not meet Part 360 landfill siting criteria. CCS raised four siting criteria, (a) the need to comply with Agriculture and Markets Law section 305; (b) the adequacy of the survey for threatened or endangered species; (c) whether Federal Wetland 11 should be considered part of State

Wetland AR-11 because they may be hydraulically connected; and (d) whether the application contains the demonstrations required by 6 NYCRR 360-2.12(c)(8) to permit a landfill in a federally regulated wetland. During the issues conference, Department Staff requested an opportunity to further review the second and third issues.

3(a): 6 NYCRR 360-1.7 prohibits permitting landfill expansion on land within an agricultural district unless there has been compliance with section 305 of the Agriculture and Markets Law of the State of New York which requires the submission of an Agricultural Data Form to farm owners within 500 feet of the landfill at the same time as the applicant applies to the local authority (Town of Sardinia) for a special use permit to expand the landfill. This is not a requirement that the applicant must meet before the Department can issue a permit. This argument is raised prematurely and assumes that WM will not comply with the applicable regulations. In the event that the Department issues a permit to WM, it will require WM to obtain all necessary approvals, local or otherwise, that are required to operate.

RULING: No substantive and significant issue has been proposed.

3(b): Department Staff requested more time at the issues conference to review the question of whether the surveys completed by WM were adequate with respect to endangered or threatened species. 6 NYCRR 360-1.7(a)(2)(iii) addresses endangered species. "Solid waste management facilities must not be constructed or operated in a manner that causes or contributes to the taking of any endangered or threatened species or to the destruction or adverse modification of their critical habitat". The regulations do not detail what an applicant must do to show that it has met this burden. CCS questioned the adequacy of the information relied upon by WM. WM stated that its permit application addressed this issue with submission of (1) a survey completed after site visits in May 2001 and April 2003 as part of a wetland delineation and functional assessment; and (2) letters from the U.S. Fish and Wildlife Service and DEC that indicated that there were no known records of threatened or endangered species on or near the site. CCS's expert, Charles Rosenberg, Northeastern Ecological Associates, Inc., spoke on behalf of the intervenor and stated that the data offered was insufficient in several ways. The site visits that support the completed surveys were conducted to look at wetlands and not specifically to focus on the threatened and endangered species. He questioned whether a thorough survey could have been conducted under those circumstances. Mr. Rosenberg also noted that timing is important

when conducting a species survey and he indicated that the site visits were not conducted during the times of the year when all possible species could be present. Mr. Rosenberg had not been to the site prior to the issues conference and indicated that if he could visit the site he could comment more specifically on why he thinks the data supplied by WM was inadequate. WM agreed to allow Mr. Rosenberg to visit the site after the issues conference.

After Mr. Rosenberg's site visit, counsel for CCS submitted additional argument on the question of threatened and endangered species. The arguments again focused on the question of timing of the surveys. CCS continues to argue that the assessment must be done at particular times of the year to capture the true picture. WM's consultants also visited the site after the issues conference and produced a supplemental report addressing threatened and endangered species. That report concluded that no threatened or endangered species habitats were located at the site. Mr. Rosenberg indicated that he reviewed the supplemental study of WM's consultant that was provided after the issues conference but still questioned the lack of season specific studies. Mr. Rosenberg stated that the timing of the most recent visit "was not appropriate for most RTE (rare, threatened and endangered) species." (Rosenburg Memo of 10/13/05) Mr. Rosenberg noted that bird surveys were not completed during breeding season for the RTE birds that could possibly occur at the site and that the site could possibly be the habitat for the spotted turtle but that the spotted turtle would not likely be seen during the time of year that the study was done. He went on to identify seven endangered and threatened species that were not surveyed for at the site that could possibly be found in that type of an area.

Department Staff conducted another site visit after the issues conference and reviewed the additional data submitted by intervenor and applicant, and concluded that the requirement of 360-1.7(a)(iii) was met. Department Staff recognized the limited seasonal nature of the studies provided but looked at in the context of what the regulations provide for, which is that facilities must not be constructed or operated in a manner that causes or contributes to the taking of any endangered or threatened species or to the destruction or adverse modification of their critical habitat. The draft permit provides for a 100 foot buffer between the areas that may serve as a habitat for threatened or endangered species and the footprint of the landfill, and Staff determined that the buffer was sufficient to provide the protection required. Department Staff rightly note that while the intervenor does question the adequacy of the studies, they do not make an offer of proof to demonstrate how

there will be any taking of RTE species or destruction or adverse modification of their critical habitat. Absent some credible offer of proof, a substantive and significant issue can not be found.

RULING: No substantive and significant issue has been proposed.

3(c): 6 NYCRR 360-1.7(a)(2)(iv) prohibits a landfill expansion within the boundary of a regulated wetland. Section 663.2(b) of 6 NYCRR provide for a buffer area of 100 feet from wetlands to protect them. If such a buffer is created here, the buffer would then cut into a portion of applicant's proposal designated as Borrow Area C. After the issues conference, Department staff and applicant agreed to a modification of the draft permit that allowed for that 100 foot buffer requested by CCS. This issue became moot when, by letter dated November 9, 2005, counsel for WM advised the Department that it is revising its permit application to delete proposed Borrow Area C. Due to the modification to the permit application, this is no longer an issue.

3(d): CCS also proposed as an issue that due to the federal wetlands on the property, located adjacent to Borrow Area C, applicant can not meet the siting requirement found at §360-2.12(c). The modification to the application to remove Borrow Area C from the project negates the need to address the issue raised by CCS with regards to the federal wetlands.

CCS submitted a letter on November 15, 2005 in response to WM's modification notification. While CCS agreed that there is no longer a need to look at the issues raised with respect to Borrow Area C, they did raise two new issues. Both issues are not timely and therefore will not be issues for adjudication. CCS offered no explanation for why these issues were not raised in the petition for party status or even at the issues conference. In addition to not being timely, CCS does not present any offer of proof with respect to the issues or identify witnesses or evidence that would be presented at an adjudicatory hearing. 6 NYCRR 624.5 establishes that to be granted party status, a potential party must file a timely petition that has the required contents as well as identify an issue for adjudication which meets the criteria of Section 624.4(c) and present an offer of proof specifying the witnesses, the nature of the evidence to be presented by that person and the grounds upon which the assertion is made with respect to that issue. These two issues proposed were not contained in the petition filed on July 15, 2005, not raised at the issues conference held on July

30, 2005, and not even raised in CCS's post issues conference brief. In addition to being raised too late, the issues fail to meet the requirement of 624 that an offer of proof be presented with the proposed issue, identifying witnesses and the grounds upon which the assertion is made, and identifying the nature of the evidence to be presented.

However, I will briefly address the two proposed issues. (1) CCS returned to the question of extraction of groundwater and its effect on the site. At the issues conference, CCS briefly touched on the issue of the groundwater extraction system. However, after brief discussion, CCS withdrew that argument. (37) In its' November 15, 2005 letter, CCS raised a question "whether the volume drawdown analysis for the dewatering system is adequate". CCS states that a lack of analysis by WM on hydrology at the site "causes us now to question whether the volume of drawdown analysis for dewatering system is adequate." CCS has not offered its own analysis on this issue or presented a summary of what evidence it intends to present on the proposed issue. The introduction of a question does not raise an issue for adjudication.

(2) CCS questioned what local approvals WM will need to get as part of the permit process. As noted by Department Staff at the issues conference, all DEC permits contain general language that a permit is conditioned on the applicant obtaining all necessary local permits. Any permits that WM will need to obtain from the local municipality will be determined by that municipality. Those permits will be necessary for the applicant to operate any landfill under the DEC permit, if a permit is issued by the Department

RULING: No substantive and significant issue has been proposed.

Issue Four: Air Quality Impacts. CCS proposed four subparts under air quality. 4(a): The first proposed issue, whether WM can comply with the Clean Air Act because the nine year term of operations is not enforceable has been withdrawn by CCS in its post issues conference brief and will not be addressed.

4(b): The proposed landfill would be a co-disposal landfill and therefore subject to higher default values for emissions calculations than the draft air permit uses, triggering New Source Review. The parties went back and forth at the issues conference on the question of whether this new expansion would be considered a co-disposal facility or not. All agreed that DEC has the authority to make that determination. (218) CCS relies

on an EPA letter of 2003, attached to its Petition for Party Status, that established estimated emissions levels for the existing facility. Using those estimates, the facility could be categorized as a co-disposal facility. However, as the Department notes, after the estimates were furnished by the EPA, WM conducted actual testing. That data was furnished to the DEC and it "showed actual emissions from the existing facility to approximate the level expected from a non co-disposal landfill rather than the far more elevated levels established for a co-disposal facility." (DEC Post Issues Conference Brief, p. 11) There is no need to rely on estimates in determining if this can be classified as a co-disposal facility. The actual data must be used, absent a showing of why that data is not reliable.

4(c) & (d) CCS objects to portions of the proposed air monitoring plan submitted to the Department with the permit application. DEC Staff advised CCS that the proposed plan is just a proposal by applicant and is not indicative of what the Department will require. The Department requires the monitoring plan to be submitted within 60 days of issuance of the permit and then, that plan is reviewed by the Department, offered to the public for comment, and a final plan is issued by the Department. CCS counsel agreed that his comments and objections to the air monitoring plan were premature and his client would have an opportunity to comment on the plan in the future, if a permit to operate the landfill is issued by the Department.

RULING: No substantive and significant issue has been proposed.

Issue Five: Compliance. CCS proposes as an issue for adjudication WM's poor compliance history for the existing landfill. CCS notes compliance problems related to uncontained leachate, litter, landfill cover, breaches, failure to maintain landfill cover properly to contain waste and failure to prevent off site odors from reaching nuisance levels. CCS relied on the DEC on-site monitor reports over a number of years at the landfill. WM argues that these reports reflect what is involved in operating and maintaining a landfill. (235) WM argues that "it would be foolish to think that the DEC could come here regularly and not observe things...". (236) The Department made arguments that helped explain the operations at the existing landfill by this operator. Department Staff contend that WM has become increasingly prompt in addressing situations brought to its attention by the monitor and are satisfied that WM does not have a compliance problem. (242-243) Mr. Stever noted that in the early and mid 1990's there were odor problems at the landfill that resulted in a consent order being issued. The owner at the time (not WM) installed an active gas collection system to

alleviate odors. Staff noted that, at that time, the system had to be installed down into a substantially large, existing landfill. Department Staff conclude that the new facility would operate more efficiently since the gas collection system would be installed at the beginning, at the deepest recesses of the waste. "There is every reason to believe that that should do as much more effective job with odors than was possible previously". (240) Department Staff have the duty of monitoring this facility, noting problems in a log book and working with WM to rectify those problems. Staff also has the discretion to determine if any problems rise to the level of a violation requiring enforcement.

CCS brought a citizen's suit against WM in 2003 in federal court. The Department elected not to participate in that proceeding but did, according to Staff, review compliance records. Both Department Staff and CCS stated at the issues conference that they conducted an extensive review of the compliance history at this facility as part of the 2003 lawsuit. Department staff stated that it is confident that WM has not posed a compliance problem since it purchased the facility in 1999 and does not pose a problem in the future for the new facility. Also noteworthy, no finding of a violation resulted from that lawsuit.

RULING: No substantive and significant issue has been proposed.

RULING

Accordingly, for the reasons stated above, no issues are found to be adjudicable. CCS's petition for party status is denied.

APPEALS

Pursuant to 6 NYCRR subdivisions 624.6(e) and (g), and 624.8(d), these rulings on party status and issues may be appealed in writing to the Commissioner. Appeals are due by March 31, 2006. Replies are due by April 14, 2006.

Any appeal must be received at the office of the Commissioner no later than 4:00 P.M. on the date specified, at the following address: Commissioner Denise M. Sheehan, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010 (Attn: Louis A. Alexander, Assistant Commissioner) .

The parties are to transmit copies of any appeals to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner. One copy should be served on the Administrative Law Judge and the Chief Administrative Law Judge and two copies should be served on the Commissioner. Service by fax is not authorized.

Appeals should address these rulings directly, rather than merely restating a party's contentions.

In the event that no appeals are filed, I hereby remand the application to Staff for further processing in accordance with this ruling.

_____/s/_____
Molly T. McBride
Administrative Law Judge
Albany, New York

Dated: March 7, 2006
To: Service List, attached

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