

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

In the Matter

- of -

the Application for Permits Pursuant to  
Articles 19 and 24 and Title 7 of Article 27  
of the Environmental Conservation Law to  
Construct and Operate a Solid Waste Landfill  
in the Town of Sardinia, County of Erie,  
New York,

- by -

**WASTE MANAGEMENT OF NEW YORK, LLC,**

Applicant.

DEC Project No. 9-1462-00001/00017

DECISION OF THE COMMISSIONER

October 20, 2006

DECISION OF THE COMMISSIONER

Waste Management of New York ("WM" or "applicant") proposes to construct and operate a landfill adjacent to its existing Chaffee Landfill, which is located in the Town of Sardinia, Erie County, New York. The proposed project, known as the Western Landfill Expansion, involves the construction of a 52.5 acre waste footprint and 3.5 acres of waste overliner. WM has applied for a solid waste management permit, an air state facility permit, a freshwater wetlands permit and a water quality certification. A State Pollutant Discharge Elimination System ("SPDES") general permit for storm water discharges will also be required.

The matter was referred to the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation ("Department") and assigned to Administrative Law Judge ("ALJ") Molly T. McBride. ALJ McBride issued her Ruling on Issues and Party Status ("Ruling") on March 7, 2006, in which she determined that no adjudicable issues had been raised. Concerned Citizens of Sardinia ("Concerned Citizens") filed an appeal from the Ruling, which was received by the Department on March 31, 2006.

Based upon my review of the record in this proceeding,

I hereby affirm the ALJ's Ruling, subject to my comments in this decision, and remand this matter to Department staff for issuance of the permits and the certification applied for by WM, consistent with the draft permits and certificate prepared by Department staff.

#### BACKGROUND

Currently, WM operates the Chaffee Landfill for the disposal of municipal solid waste and non-hazardous commercial and industrial waste. The Western Landfill Expansion would be sited immediately to the west of the existing landfill. It would consist of six cells and is proposed to accept 600,000 tons of solid waste per year. Approximately 0.70 acres of federal wetlands would be impacted. The project also includes the construction of a wetland mitigation area of 2.15 acres adjacent to New York State Freshwater Wetland SD-1.

Concerned Citizens filed a petition for party status ("Petition"), contending that several issues required adjudication. Following an issues conference and the receipt of post-issues conference submissions, the ALJ issued her Ruling in which she concluded that no adjudicable issues were raised. Concerned Citizens appealed from the Ruling, citing the following four grounds for its appeal:

"1) issues were dismissed in the Ruling as untimely that were in fact raised in [Concerned Citizens'] petition and thus have not been addressed;

"2) the existing landfill was used as a surrogate for a site-specific air emissions estimation, but site specific estimates should be limited to operating facilities;

"3) the expansion landfill should be classified a 'co-disposal' as is the existing landfill; [and]

"4) after the issues conference closed [WM] proposed [a] landfill gas to energy plant but no opportunity was provided to comment or raise issues on the combined emissions [that the] addition of the plant would create" (Appeal, at 1).<sup>1</sup>

Replies to the appeal were submitted by WM on April 13, 2006 ("WM Reply") and Department staff on April 14, 2006 ("Department Reply"). Both WM and Department staff contend that the appeal should be rejected and the Ruling affirmed.

#### DISCUSSION

Pursuant to the Department's permit hearing regulations at 6 NYCRR part 624 ("Part 624"), a potential party must demonstrate that an issue it proposes is "substantive" and "significant" for it to be adjudicable (6 NYCRR 624.4[c][1][iii]). An issue is substantive "if there is sufficient doubt

---

<sup>1</sup> By letter dated March 31, 2006, Concerned Citizens submitted corrections to its appeal and requested that these be accepted. WM and Department staff filed no objections to Concerned Citizens' request, and the corrections are hereby accepted.

about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). 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" (6 NYCRR 624.4[c][3]).

In determining whether an adjudicable issue exists, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (6 NYCRR 624.4[c][2]).

Where Department staff has reviewed the application and determined that a component of the project, as proposed or as conditioned by the permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on a potential party proposing any issue related to that project component to demonstrate that the issue is substantive and significant (see 6 NYCRR 624.4[c][4]). A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues (see

Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2; see also 6 NYCRR 624.5[b][2][ii]). Judgments must be made as to the strength of the offer of proof presented by a potential party. Any assertions made must have a factual or scientific foundation (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2). Speculation, expressions of concern, or conclusory statements alone are insufficient to raise an adjudicable issue. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions (see Matter of Thalle Industries, Inc., Decision of the Deputy Commissioner, November 3, 2004, at 19-20).

Where an issues ruling is appealed, substantial deference is given to the ALJ on factual issues (see Matter of Saratoga County Landfill, Second Interim Decision, October 3, 1995, at 3).

My initial consideration is whether the ALJ has properly applied the substantive and significant standard (see Matter of Hyland Facility Associates, Commissioner's [Third]

Interim Decision, August 20, 1992, at 2). My review of the record confirms that the ALJ correctly applied the substantive and significant standard in this proceeding. Concerned Citizens on appeal has failed to rebut the ALJ's analysis or otherwise demonstrate that the substantive and significant standard was misapplied.

#### Wetland-Related Issues Dismissed as Untimely

As its first ground for appeal, Concerned Citizens contends that the Ruling failed to address issues timely raised in its petition for party status "regarding the impacts of groundwater drawdown and movement of surface water drainage within a surface water divide on wetlands" (Appeal, at 4). According to Concerned Citizens, the ALJ improperly dismissed the issues as untimely and, accordingly, these issues have not been addressed.

Concerned Citizens, in correspondence dated November 15, 2005, long after the filing deadline for petitions for party status and the conclusion of the issues conference, stated that it now "question[ed] whether the volume drawdown analysis for [WM]'s proposed dewatering system is adequate." Concerned Citizens further stated that "there may be potential adverse impacts of shallow groundwater drawdown on regional wetland

hydrology not adequately considered in [WM]'s application." No explanation was given as to why Concerned Citizens did not raise these issues in a timely fashion. Notwithstanding their untimely nature, the ALJ considered whether the requirements for an adjudicable issue had been met. The ALJ noted that Concerned Citizens failed to present any offer of proof with respect to these issues or identify witnesses or evidence that would be presented. As the ALJ concluded, "[t]he introduction of a question does not raise an issue for adjudication" (Ruling, at 13). I fully concur. Concerned Citizens failed to satisfy the basic requirements for raising these concerns as adjudicable issues in this proceeding (see 6 NYCRR 624.5[b][2][ii]).

In addition to the untimely filed issues in the November 15, 2005 correspondence that the ALJ nonetheless considered and determined to be non-adjudicable, Concerned Citizens, on its appeal, makes various general and otherwise vague references to its Petition and other documents, to suggest that additional issues relating to the impacts of groundwater drawdown and movement of surface water drainage were timely raised. Concerned Citizens' efforts to compose an issue or issues from disparate portions of the record are not persuasive. The ALJ considered and resolved all issues that were properly presented to her.



I note that, in this proceeding, Concerned Citizens has followed a pattern of raising issues late, including through submission of consultant memoranda long after the due date for the petitions for party status and even after the July 2005 conclusion of the issues conference (see, e.g., Concerned Citizens' consultant memorandum dated March 29, 2006, attached to the appeal). In this regard, the surface water drainage issue that Concerned Citizens now references on its appeal was not raised in a timely fashion (see WM Reply, at 8-9 [addressing untimeliness of submission of consultant memorandum on surface water drainage that was attached to Concerned Citizens' correspondence dated October 24, 2005]).

Concerned Citizens has not presented any credible argument to justify its late submissions on these water/wetland-related issues. Accordingly, such late submissions should not and shall not be considered at this appellate stage of the proceeding (see Matter of Saratoga County Landfill, Second Interim Decision of the Deputy Commissioner, October 3, 1995, at 2 [new information not presented to the ALJ at the issues conference cannot be substantively evaluated on appeal]; see also Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5 [attempt by community organization to raise new offer of proof on appeal of ALJ's

issues ruling rejected as untimely)).

I note that, in this proceeding, Concerned Citizens appears to be making the claim that 6 NYCRR 360-2.12(c)(8), which establishes state landfill siting restrictions relative to federal wetlands, imposes separate and more stringent requirements on applicants than those that must be met to obtain a federal wetland permit from the Army Corps of Engineers. That claim is not supported by the language of the cited regulation (see Matter of Waste Management of New York [Towpath], Ruling of the Administrative Law Judge, December 31, 1999, at 61).

Furthermore, I take official notice that the Army Corps of Engineers has issued a federal wetland permit to WM, conditioned on WM's receipt of a Department-issued water quality certification (see letter dated January 27, 2006 from WM to ALJ McBride, and copied to Department staff and Concerned Citizens, under cover of which is forwarded the provisional federal wetlands permit; see also Matter of Oneida-Herkimer Solid Waste Management Authority, Interim Decision of the Commissioner, April 2, 2002, at 10 ["To the extent the matter of Corps wetlands was tied into this proceeding as an issue under the Part 360 regulations, it is hereby eliminated by virtue of the Corps permit issuance"]).

Co-Disposal Landfill Issues: Use of Site-Specific Data and Co-Disposal Landfill Criteria

As part of the application process, WM estimated the air emissions from the Western Landfill Expansion to determine whether it would be subject to New Source Review under the federal Clean Air Act.

The United States Environmental Protection Agency guidance, "Compilation of Air Pollutant Emission Factors" (commonly referred to as AP-42) provides default values for estimating anticipated emissions from a facility. A default value has been established for "co-disposal" landfills and a separate value for "no co-disposal" landfills. As discussed in prior proceedings, "co-disposal" landfills refer to those facilities where hazardous waste is disposed along with non-hazardous commercial, residential and industrial waste, a practice that is now prohibited by law. "No co-disposal" facilities do not receive such hazardous waste (other than possibly certain categories of household hazardous waste). The default values for "co-disposal" landfills are higher than those for "no co-disposal" facilities (see Matter of Oneida-Herkimer Solid Waste Management Authority, ALJ Hearing Report, at 161-162, adopted by Decision of the Commissioner, March 19, 2004; Matter of Sullivan County Division of Solid Waste, ALJ Hearing Report, July 20, 2004, at 43-45).

WM initially used the AP-42 "no co-disposal" default values to estimate non-methane organic compound emissions from the proposed landfill expansion and determined, based on those calculations, that the expansion would not be subject to new source review. WM later collected actual air emissions data from the existing Chaffee Landfill. The resulting data for the existing landfill were comparable with, albeit slightly higher than, the calculations using the AP-42 default value for "no co-disposal" landfills. This result supported WM's use of the "no co-disposal" default value for the Western Landfill Expansion (see WM Reply, at 10-11); see also Post-Issues Conference Brief of Department Staff dated September 9, 2005, at 10-11 [actual data show that neither New Source Review nor "co-disposal" is applicable]).<sup>2</sup>

ALJ McBride held that WM properly relied upon actual emissions data from the existing Chaffee Landfill in its determination (see Ruling, at 13-14).

On appeal, Concerned Citizens objects to the methodology that WM utilized to determine whether Western Land

---

<sup>2</sup> According to WM, the slightly higher than default readings for the existing Chaffee Landfill may be explained by the fact that, "[n]ot much is known about the wastes received [by the Chaffee Landfill] prior to the late-1970s" (WM reply, at 11 n12).

Expansion is subject to New Source Review. It contends that it was an error for WM to use actual air emissions data from the existing landfill as part of the process of estimating the maximum air emissions from the Western Landfill Expansion. Concerned Citizens states that WM should be limited to using one of two default emission factors from AP-42, and it has argued in this proceeding that WM should have used the default value for "co-disposal" landfills (and not the default value for "no co-disposal" landfills) to estimate maximum air emissions from the Western Landfill Expansion.

Concerned Citizens also asserts that the Ruling failed to address the legal arguments that it raised regarding the criteria for "co-disposal" landfills. Referencing its earlier submissions, Concerned Citizens requests, on its appeal, "a determination from the Commissioner based on the applications of the federal standards to the facts in this case" (Appeal, at 5).<sup>3</sup>

Under Concerned Citizens' rationale, the Western

---

<sup>3</sup> Concerned Citizens further contends that the Ruling erroneously asserted that it agreed that the Department has the authority to determine whether a landfill constitutes a "co-disposal" landfill (Appeal, at 5). Whether the Ruling was correct with respect to Concerned Citizens' "agreement" is of no import. It is Department staff's responsibility to consider whether an applicant has utilized the appropriate default values in its air emission calculations for such solid waste management facilities.

Landfill Expansion would be classified as a "co-disposal" facility. As a result, WM would be required to calculate the concentration of non-methane organic compounds in landfill gas using the AP-42 default value of 2,420 parts per million by volume ("ppmv") as hexane, rather than the lower level of 595 ppmv for a "no co-disposal" facility that WM used. The use of the default value for a "co-disposal" landfill likely would have triggered new source review requirements for the Western Landfill Expansion (see WM Reply, at 10 n11). Based on my review of the record, including but not limited to the issues conference transcript, the Petition and Concerned Citizens' post-issues conference brief, together with the submissions of Department staff and WM and prior Department precedent, Concerned Citizens' argument is rejected.

Concerned Citizens provides no support for its argument that actual air emissions data from the existing Chaffee Landfill (which is located immediately to the east of the Western Landfill Expansion) cannot be used in calculating air emissions for the Western Landfill Expansion. Nor has Concerned Citizens contended that the actual data from the Chaffee Landfill was inaccurate.<sup>4</sup>

---

<sup>4</sup> As Department staff note, the physical site, the anticipated waste stream and the operator of the Western Landfill Expansion are all comparable to the existing Chaffee Landfill and that this supports utilizing actual data from the existing facility (see Department Staff Reply, at 3).

Furthermore, it has made no offer of expert testimony to support its argument that the "co-disposal" landfill default value should be used in a calculation of emissions from the Western Landfill Expansion.<sup>5</sup> Concerned Citizens has failed to make any offer that the Western Landfill Expansion would accept hazardous or other categories of waste that would require use of the "co-disposal" default value. Concerned Citizens' offer of proof on these air emission issues is clearly insufficient.

Moreover, the Department has previously determined that, for modern landfill operations subject to restrictions on the disposal of hazardous waste, as is proposed here, the use of the "no co-disposal" landfill default value from AP-42 is appropriate (see Matter of Oneida-Herkimer Solid Waste Management Authority, ALJ Hearing Report, at 161-162, adopted by Decision of the Commissioner, March 19, 2004; Matter of Sullivan County Division of Solid Waste, ALJ Hearing Report, July 20, 2004, at 43-45; see also WM Reply, at 11-13). Concerned Citizens has raised no argument that would support overturning or modifying

---

<sup>5</sup> As noted in a prior proceeding on a solid waste management facility where arguments were raised regarding the use of AP-42 default values, the lack of an offer of expert testimony on appropriate emission factors was considered "particularly troubling" for an area "where so much depends on the proper application of engineering judgment" (Matter of Sullivan County Division of Solid Waste, ALJ Hearing Report, July 20, 2004, at 42-43).

the ALJ's ruling with respect to the calculation of air emissions.<sup>6</sup>

#### Landfill Gas-to-Energy Plant

In its appeal, Concerned Citizens states that WM has submitted an application dated December 2005 to the Department for a gas-to-energy plant ("plant") at the Chaffee Landfill (Appeal, at 5-6). Concerned Citizens contends that the plant will be operated in conjunction with the Western Landfill Expansion and, therefore, the hearing on the Western Landfill Expansion should be reopened to consider air emissions from the proposed plant and the impacts to wetlands from the plant's construction. Concerned Citizens further asserts that, because of the proposed plant, the draft permit for the Western Landfill Expansion should be modified but it does not identify which of the draft permits for the Western Landfill Expansion should be modified or in what manner those permits must be modified.

---

<sup>6</sup> Based on a review of the record, it appears that Concerned Citizens' challenge to the use of actual data from the Chaffee Landfill as part of the process of calculating air emissions data for the Western Landfill Expansion is raised for the first time on this appeal (see Department Reply, at 3; WM Reply, at 11). Consequently, the challenge would be untimely and could be precluded on that basis alone (see Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5 [attempt to raise new offer of proof on appeal of issues ruling rejected as untimely]).



Attached to the Concerned Citizens' appeal is a copy of a letter dated March 13, 2006 from the Department's Region 9 permit administrator to the Town of Sardinia ("March 2006 Letter") that advises the Town of WM's application for the plant. Components of the proposed operation include a six engine, 4.8 megawatt landfill gas-to-energy plant, 0.4 miles of associated utility lines, cooling radiators, parking and access road (March 2006 Letter, at 1).

Concerned Citizens argues that WM has "dramatically scaled back waste receipts to its existing landfill," and that this shows that the proposed plant is "planned to be operated in conjunction with the landfill expansion" (Appeal, at 6). Concerned Citizens cites to two regulatory provisions as support for modifying the draft permit and reopening the hearing on the landfill expansion. Specifically, it references 6 NYCRR 624.13(e) which states that "[a]t any time prior to issuing the final decision, the commissioner . . . may direct that the hearing be reopened to consider significant new evidence" and to 6 NYCRR former 621.14(a)(4)<sup>7</sup> which references "newly discovered material information or a material change in environmental conditions, [or] relevant technology" as grounds for modifying a

---

<sup>7</sup> Effective September 6, 2006, 6 NYCRR 621.14(a)(4) was renumbered 6 NYCRR 621.13(a)(4).

permit.

Concerned Citizens presents no credible factual support to support its contention that the two proposals (the plant and the Western Landfill Expansion) are interdependent or otherwise related. It submits no sufficient offer of proof for its assertion that the proposed plant "would not be viable unless operated in conjunction with the landfill expansion reviewed in this matter" (Appeal, at 6), nor does it offer any proof relating to the interdependence of the two proposals. Concerned Citizens did attach to its appeal a one-page tally of statistics which is entitled "Landfill Host Fee analysis" and dated March 14, 2006. Concerned Citizens offers no analysis or evaluation to show that the reduction in waste receipts during the first two months of 2006 for the existing Chaffee Landfill, as reflected in the tally, supports its assertion that the two proposals are interrelated.

In contrast to Concerned Citizens' speculation, both Department staff and WM demonstrate that the proposed plant and the Western Landfill Expansion are separate and that the application for the proposed plant is not dependent upon the Western Landfill Expansion in any respect. Department staff, in its reply, clearly refute Concerned Citizens' argument that the

declining waste receipts for the existing Chaffee Landfill indicates the proposed plant will be dependent on the Western Landfill Expansion. As Department staff explain:

"The application for the waste-to-energy project indicates that there is sufficient methane in the existing landfill to operate six gas turbine engines for at least ten years and to support varying numbers of gas turbines for a far longer period. In contrast, the proposed expansion area would not be suitable for waste-to-energy use for a substantial period of time, and would require the deposition and decomposition of a considerable amount of waste over a period of years" (Department Reply, at 4).

WM also confirms that the proposed plant is to be fueled by landfill gas from the existing Chaffee Landfill (see WM Reply, at 16-17). Although Concerned Citizens argues that the proposed plant is "inseparable" from the proposed landfill expansion, the facts in this proceeding demonstrate otherwise. Contrary to Concerned Citizens' suggestion, this separate consideration of two unrelated proposals in the circumstances specific to this matter does not constitute impermissible segmentation (see 6 NYCRR 617.2[ag]; WM Reply, at 17-18). Furthermore, any environmental impacts of the proposed plant will be fully evaluated in the consideration of that project's application.

Consideration of the proposed plant raises no doubt about WM's ability to meet statutory or regulatory criteria applicable to the Western Landfill Expansion. Nor has Concerned Citizens demonstrated that the consideration of the proposed

plant has the potential to result in the denial of permits for the Western Landfill Expansion, in a major modification to the Western Landfill Expansion, or in the imposition of significant permit conditions in addition to those already proposed. Accordingly, the issue of the proposed plant is neither substantive nor significant in this proceeding (see 6 NYCRR 624.4[c][2] & [3]).

Furthermore, no legal authority has been provided that would require consolidating the consideration of these two proposals into one proceeding or that would warrant reopening the hearing on the Western Landfill Expansion. Accordingly, Concerned Citizens' request to reopen the hearing is denied.

To the extent that Concerned Citizens has raised other arguments in support of its appeal, these arguments have been considered and rejected.

#### CONCLUSION

Based on my review of the record, Concerned Citizens has failed to raise any substantive and significant issues for adjudication and I affirm the ALJ's Ruling. Accordingly, I remand this matter to Department staff to complete, consistent with any applicable requirements of the State Environmental

Quality Review Act (see article 8 of the Environmental Conservation Law), the processing of the permit applications and certification, and to issue the requested permits and certification to the Applicant.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

/s/

By: \_\_\_\_\_  
Denise M. Sheehan, Commissioner

October 20, 2006  
Albany, New York

TO: Service List