KNAUF SHAW LLP

October 4, 2012

Ms. Karen DeMay, Clerk of the Board
Ontario County Board of Supervisors
Ontario County Municipal Building
20 Ontario Street
Canandaigua, NY 14424

Re: Proposed Expansion of Ontario County Landfill – FEIS Comments

Dear Ms. DeMay:

We have been retained as environmental counsel by the Town of Seneca ("Town"). We are writing to submit comments to Ontario County ("County") on the Final Environmental Impact Statement ("FEIS") for the proposed expansion ("Expansion") of the Ontario County Landfill ("Landfill"). Enclosed are comments from the Town's consultants, CHA Consulting ("CHA"), which are also submitted on behalf of the Town, and incorporated by reference.

For many reasons, the FEIS has both substantive and procedural deficiencies, and does not satisfy the requirements of the State Environmental Quality Review Act ("SEQRA"). These flaws fail to satisfy the requirement of "literal" or "strict compliance" with the SEQRA process. *See King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341, 653 N.Y.S.2d 233 (1996); *Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958, 624 N.Y.S.2d 689, 690 (4th Dep't 1995), *stay vac'd* 85 N.Y.2d 961, 628 N.Y.S.2d 48 (1995), *app. dis'd* 85 N.Y.2d 812, 631 N.Y.S.2d 289 (1995). These defects include (but are not limited to) the following, as well as additional deficiencies discussed by CHA in their enclosed comments:

- **Alternatives.** An Environmental Impact Statement ("EIS") must contain an evaluation of alternatives to the proposed action, ECL §8-0109(2). The analysis of alternatives has been called the "driving spirit" of the SEQRA process. *Citizens for Preservation of Windsor Terrace v. Smith*, 130 Misc.2d 967, 498 N.Y.S.2d 684 (Sup. Ct. Kings Co. 1986), *rev. on other grounds* 122 A.D.2d 827, 505 N.Y.S.2d 896 (1st Dep't 1986). The "range of alternatives must include the no-action alternative," and "may also include, as appropriate, alternative: (a) sites; (b) technology; (c) scale or magnitude; (d) design; (e) timing; (f) use; and (g) types of action." 6 N.Y.C.R.R. §617.9(b)(5)(v). While for private applicants, "[s]ite alternatives may be limited to parcels owned by, or under option to [the] private project sponsor," the private party, there is no similar exception for public applicants like the County. *Id.*

  Therefore, the County was required to examine alternative sites for the additional Landfill capacity, as well as a smaller scale or magnitude, and (as discussed below) alternative waste technologies. While the EIS gave lip service to alternatives, it did not seriously examine

them at a sufficient level of detail so they could be intelligently evaluated by the ultimate decisionmakers.

The EIS should have also examined alternate sites for the proposed borrow area ("Borrow Area"), or alternative sources for the required materials, but failed to do so. Given the County's land holdings and condemnation powers, other sites are available that would not result in the loss of prime agricultural land, but none were proposed. Nor did the EIS review the alternative of construction of a sewer line to the Canandaigua sewer plant to manage leachate, which would minimize on-site lagoon storage and eliminate leachate trucking.

- **Solid Waste Hierarchy.** ECL §27-0106 sets the following priorities for solid waste management (the "Solid Waste Hierarchy"):

  (a) first, to reduce the amount of solid waste generated;

  (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;

  (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and

  (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department [of environmental conservation].

  Under the State Solid Waste Hierarchy, landfilling is the least desired alternative. This was confirmed by the latest revision of the State Solid Waste Plan prepared by the New York State Department of Environmental Conservation ("NYSDEC"), *Beyond Waste: A Sustainable Materials Management Strategy for New York State* (2010) ("State Solid Waste Plan") available at http://www.dec.ny.gov/docs/materials_minerals_pdf/frptbeyondwaste.pdf, which states that "landfilling should be the management method of last resort, given the state policy goals expressed in the solid waste management hierarchy." *Id*. at 171.

  Since only about 8.81% of the waste landfilled originates in the County, FEIS §2.2.1, the Expansion is clearly not necessary to serve County residents. The assertion that it is, DEIS §1.5, is camouflage for the true intent to extend the stream of royalties the County will receive from its private Landfill operator, Casella Waste Services of Ontario, LLC ("Casella"). But even if County residents truly needed more capacity for waste disposal, not only is the EIS analysis of the preferred alternatives insufficient, but the County cannot make the necessary findings (*see* below) that the Expansion will avoid or mitigate environmental impacts. Rather, the Expansion will only make it easier to landfill waste, and result in less waste recycling, and less utilization of waste for energy production.

- **Segmentation.** The SEQRA regulations recognize that "[a]ctions commonly consist of a set of activities or steps," 6 N.Y.C.R.R. §617.3(g)(1), and provide that "[c]onsidering only a part of segment of an action is contrary to the intent of SEQR." 6 N.Y.C.R.R. §617.3(g)(1). Thus, SEQRA generally prohibits "segmentation," which is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." 6 N.Y.C.R.R. §617.2(ag). Accordingly, "[e]nvironmental review of the entire project is required before 'any significant authorization is granted for a specific proposal.'" *Kirk-Astor Drive Neighborhood Ass'n. v. Town Board of Town of Pittsford*, 106 A.D.2d 868, 869, 483 N.Y.S.2d 526, 528 (4th Dep't 1984), *app. dis'd* 66 N.Y.2d 896, 498 N.Y.S.2d 791 (1985). This review must include later projects or phases that are contemplated at the time of the SEQRA review. *Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 799 N.Y.S.2d 205 (1st Dep't 2005).

  The FEIS acknowledges that a master plan will be developed for the Landfill. However, the substance of the master plan and the resulting environmental impacts are not discussed in the FEIS. The Town is concerned that the plan may be to convert the planned new Borrow Area to a future Landfill expansion at a later date, or to pile the Landfill higher than 1025 feet. Given the acknowledgement that there will be a master plan, it is likely that another expansion will be proposed as part of the plan. Therefore, it is imperative that the master plan be reviewed as part of the EIS. Like in *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 688 N.Y.S.2d 848 (4th Dep't 1999), where the EIS deferred analysis of a plan to remediation soil contamination, the deferral of discussion of the master plan was an illegal segmentation that fails to meet the requirements of SEQRA.

  Likewise, the FEIS relies on the proposed new Ontario County Solid Waste Management Plan, which relies upon continued use of the Landfill. The SEQRA review of this plan also should not have been segmented from the SEQRA review of the Expansion.

  Moreover, many details of the proposed Expansion are absent due to the fact that the County has not yet prepared its applications to NYSDEC for a solid waste management facility permit under 6 N.Y.C.R.R. Part 360 or for a Title V air permit. This also constitutes illegal segmentation, since it is improper to defer analysis of environmental impacts for later study. *New York Archaeological Council v. Town Board of Town of Coxsackie*, 177 A.D.2d 923, 576 N.Y.S.2d 680 (3d Dep't 1991); *Kahn v. Pasnik*, 90 N.Y.2d 569, 664 N.Y.S.2d 584 (1997). Thus, in *Town of Red Hook v. Dutchess County Resource Recovery Agency*, 146 Misc.2d 723, 728, 552 N.Y.S.2d 191, 194 (Sup. Ct. Dutchess Co. 1999), the FEIS for a proposed county landfill was insufficient because it deferred certain environmental review until the later submission of a Part 360 permit application, since that would "effectively insulate" the additional data and analysis from the SEQRA process.

- **Mitigation.** An EIS must include "a description of the mitigation measures." 6 N.Y.C.R.R. §617.9(b)(5)(iv). However, as set forth in the comments from CHA, the FEIS fails to fully assess measures necessary to mitigate impacts including severe odors, visual impacts, noise, landfill gas, and loss of agricultural lands. This is another example of improper deferral of the SEQRA analysis. *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 688 N.Y.S.2d 848 (4th Dep't 1999).

- **Impact Analysis.** The EIS is an "environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." *Town of Henrietta v. DEC*, 76 A.D.2d 215, 220, 430 N.Y.S.2d 440, 448 (4th Dep't 1980). Thus, the lead agency "must identify 'the relevant areas of environmental concern' and take a 'hard look' at them." *Merson v. McNally*, 90 N.Y.2d 742, 665 N.Y.S.2d 605, 609 (1997). Accordingly, the EIS must contain "a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence."

  As set forth in the comments from CHA, the FEIS fails to remedy defects in the discussion of various impacts, including odors, dust and noise. In particular, as discussed in detail by CHA, the soil balance is nonsensical, and appears contrived in order to try to justify the Borrow Area.

- **Zoning.** Under the Town of Seneca Zoning Law, even assuming the present Landfill is a grandfathered use in the M-1 District, and the Expansion does not require a use variance from the Town of Seneca Zoning Board of Appeals ("ZBA"), *see* Seneca Zoning Law §§55.0, 57.0, 126.0(E), the Zoning Law does not allow establishment of the new Borrow Area.

  In the A-G District where the Borrow Area would be located, an excavation operation requires a special permit from the ZBA. Seneca Zoning Law §§13.0(E), 70.0(A). Further, the excavation operation must have any required NYSDEC permit, Seneca Zoning Law §13.0(C), and a reclamation plan approved by the Town of Seneca Planning Board. Seneca Zoning Law §13.0(H). Although an "Excavation Site" is defined as "[a] parcel of land used for the purpose of extracting stone, sand, gravel or topsoil for sale as an industrial or commercial operation," presumably the extracted soil will not be sold, so the Borrow Area may not qualify. More likely, the Town will determine that the planned Borrow Area will be part of the Landfill operation, which is not permitted in the A-G District. Seneca Zoning Law §10.0. And while the ZBA can grant a special permit for an excavation operation that constitutes a "quarry for the removal of stone in bulk without crushing, a sand or gravel pit and topsoil removal," such an operation must meet various requirements, including a 300-foot setback from the road, and a NYSDEC-approved reclamation plan. Seneca Zoning Law §70.0(R). In any event, it is clear that some sort of zoning approval is required from the

ZBA, and perhaps the Planning Board, under the Seneca Zoning Law, and that the ZBA and possibly the Planning Board is a SEQRA involved agency.

The FEIS concludes that under *Matter of County of Monroe v. City of Rochester*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (1988), the Expansion is exempt from local zoning. That conclusion is wrong, and at the very least premature.

At the outset, it is not clear that the *County of Monroe* analysis even applies. The Landfill is now effectively a private business operated by Casella. As the FEIS admits, "the County… elected to privatize the landfill." FEIS at III-47. The Expansion will not serve a County function, since more than 90% of the landfilled waste originates from outside the County. If the Landfill was only used for waste from inside Ontario County, there would be plenty of capacity for years to come.

Even if the *County of Monroe* analysis applies, not only would it be presumed that local zoning requirements apply, but it would be up to the Town of Seneca to apply the necessary balancing test. We expect that the Town would properly conclude that given the available alternatives, and the fact that the facility will be operated by a private enterprise to primarily landfill waste from outside the County, local zoning restrictions should apply. This is particularly true for the Borrow Area, in light of the loss of prime agricultural land, the importance under the Town's Comprehensive Plan of preserving agricultural lands, and the lack of serious analysis of alternatives or mitigation measures.

- **Agricultural Land.** The EIS fails to adequately analyze the loss of 40 acres of prime agricultural land for use as the Borrow Area, which is contrary to the Town's Policy 1.3 set forth in its Comprehensive Plan to "[e]ncourage the preservation of farmland in Seneca." While Town Law §272-a(11)(b) requires that "[a]ll plans for capital projects of another governmental agency on land included in the town comprehensive plan adopted pursuant to this section shall take such plan into consideration," the EIS fails to do so. Not only does the EIS fail to study alternative borrow sites or adequately consider the need for the Borrow Area in light of the current volume of BUD materials, but it fails to offer mitigation measures such as creation of new farmland to compensate for the loss, and the imposition of deed restrictions that can be enforced by the Town (rather than just the County) to ensure that this land is never used for waste disposal.

  Since the Borrow Area will result in acquisition of more than 10 acres of farmland located in a state agricultural district, Agriculture and Markets Law ("AML") §305(4)(a) requires that the County "shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse impacts on agriculture in order to sustain a viable farm enterprise or enterprises within the district." However, acquiring 40 acres of prime agricultural land for use as a Borrow Area to

support the Landfill does not minimize or avoid adverse impacts on agriculture, especially when alternative sites are available, and no provision has been made to mitigate the impact.

Furthermore, AML §305(4)(b) requires that "[a]s early as possible in the development of a proposal of an action" subject to the law, "but in no event later than the date of any determination as to whether an environmental impact statement need be prepared" under SEQRA, a preliminary notice of intent ("PNOI") must be prepared and filed, in order to begin a comprehensive review of the loss of agricultural lands by the Commissioner of Agriculture and other officials. The PNOI should have been filed prior to the DEIS, and the agricultural review process should be ongoing and coordinated with the SEQRA review process. However, we are unaware of the status of this process.

Moreover, AML §305(4)(h-1) prohibits siting a "solid waste management facility" in an agricultural district, unless certain exceptions are met. In the event the Borrow Area was approved, in order to ensure compliance with this requirement, a deed restriction enforceable by the Town should be placed prohibiting use of that land for solid waste management facility.

- **Findings.** All involved agencies must make SEQRA findings prior to making a decision on the Expansion so that "to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided," ECL §8-0109(8), "by incorporating as conditions to the decision those mitigative measures that were identified as practicable." 6 N.Y.C.R.R. §617.11(d)(5). However, without a full analysis of possible mitigation measures in the FEIS, it is not possible for involved agencies to make findings that mitigation measures have been incorporated "to the maximum extent practicable," since they are not fully identified and discussed.

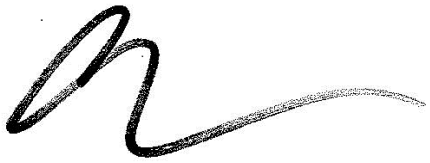
  Not only are mitigation measures absent for the Borrow Area, but the FEIS refused to even discuss possible amendments to the Host Community Agreement with the Town or the Property Protection Plan that might mitigate environmental impacts of the Expansion. In any event, given the inconsistency of the Expansion with the Solid Waste Hierarchy, and the unmitigated loss of agricultural lands, the necessary findings cannot be made.

Therefore, the FEIS is insufficient. Given the literal compliance requirements of SEQRA, many of the deficiencies could not have been "cured simply by including the item in the final EIS," *Webster Associates v. Town of Webster*, 59 N.Y.2d 220, 228, 464 N.Y.S.2d 431 (1983), but rather a new Draft EIS should be prepared, and the SEQRA process done over, so that a complete analysis of alternatives and environmental impacts is subjected to public comment.

Thank you.

Very truly yours,

KNAUF SHAW LLP



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