

**Michael B. Gerrard**  
Michael.Gerrard@aporter.com  
212.715.1190  
212.715.1399 Fax  
399 Park Avenue  
New York, NY 10022-4690

November 25, 2008

**Via Federal Express and Email**

Mr. John Iannotti  
New York State Department of Environmental Conservation  
Division of Solid & Hazardous Materials  
625 Broadway  
Albany, New York 12233-7250  
hwsiting@gw.dec.state.ny.us

Re: **Comments of the County of Niagara, the Town of  
Lewiston and the Village of Youngstown, New York  
on the Re-Draft New York State Hazardous Waste  
Facility Siting Plan and Draft Generic Environmental  
Impact Statement**

Dear Mr. Iannotti:

We are writing on behalf of Niagara County, New York, the Town of Lewiston, New York and the Village of Youngstown, New York (“the Municipalities”) to provide comments on the re-draft of the New York State Hazardous Waste Facility Siting Plan (the “Plan”) and associated Draft Generic Environmental Impact Statement (“DGEIS”). The Town of Porter, New York is precluded from joining in these comments by its host benefit agreement with CWM. We understand that this Plan re-draft is the first of two re-drafts that the Department intends to offer for public comment. We look forward to an opportunity to provide more detailed comments on the next re-draft.

On August 3, 1987, the New York State legislature enacted a law<sup>1</sup> requiring the New York State Department of Environmental Conservation (“NYSDEC” or “DEC”) to “immediately begin preparation of a statewide hazardous waste facility siting plan.” The Plan was to be completed within 15 months. In the intervening *twenty-one years* the world of hazardous waste management has changed dramatically. However, the need for coherent statewide guidance on the siting of hazardous waste facilities has not. Nor has the need abated for recognition of, and for a plan for the resolution of, the significant historical inequities in the geographic distribution of hazardous waste disposal facilities in New York State. Unfortunately, DEC’s newest iteration of the draft Plan again fails to provide what is needed.

---

<sup>1</sup> L.1987, c. 618, adding, *inter alia*, Environmental Conservation Law (“ECL”) §§ 27-0105 and 27-1102.

John Iannotti, NYSDEC  
November 25, 2008  
Page 2

The Municipalities are extremely disappointed that the new draft Plan includes absolutely no acknowledgement of the well-known problems faced by Western New York as host to the only hazardous waste landfill in the state, and in fact in the northeast United States. DEC's total avoidance of this issue in the Plan – the lack of even a simple acknowledgement of the problem, or its role in the history of the law requiring the siting plan in the first place – appears to be an attempt by DEC to avoid making the politically difficult choices that it is required to make. DEC has passed the buck to future siting boards and complicated future siting board determinations by sending conflicting signals regarding what facilities are and are not needed, where, and under what circumstances. The Municipalities' decades-old concern over the endless expansion of hazardous waste disposal operations in a single community was meant to be addressed in the Plan, and no draft of the Plan that completely neglects such an examination can survive scrutiny. All of the comments presented below must be read in light of this fundamental deficiency.

These comments are broken into three sections. The first two sections focus on the two broad inadequacies in the draft Plan: (1) the failure to provide useful guidance on the issue of need for new or expanded hazardous waste disposal facilities in New York State, and (2) the failure to adequately address equitable geographic distribution of hazardous waste disposal facilities. The third section addresses several more specific problems: the failure to focus separately on waste disposal, the failure to implement the land disposal phase-out requirements, and the failure to advance the waste minimization policy.

**A. The Plan Fails To Provide Useful Guidance on the Issue of Need for Additional Facilities**

The legislature intended the Plan to provide guidance to future siting boards on determining the “need” for proposed facilities. This intention was stated clearly at ECL § 27-1102.1: the Plan must “*establish a framework to guide state agencies and authorities and the facility siting board . . . in the discharge of their responsibilities*” (emphasis added). DEC itself appears to recognize that the Plan must provide guidance to future siting boards “in the fulfillment of their duties.”<sup>2</sup>

---

<sup>2</sup> See, e.g., Response to Comments (“RTC”) on the previous version of the Plan and DGEIS, 5 (“The Siting Plan is intended to provide guidance to a Siting Board and to State Agencies in the fulfillment of their duties, and as such, must address more than just facilities subject to Siting Board review.”).

John Iannotti, NYSDEC  
November 25, 2008  
Page 3

The “responsibilities” of the facility siting board are stated clearly at ECL § 27-1105: the board is instructed that it “shall deny” an application for any facility “if the *need for such facility is not identified in [the Plan]* and the board finds that the facility is not otherwise necessary or in the public interest.”<sup>3</sup> In other words, the siting board must determine whether a facility is “needed,” and the Plan must provide a “framework” for the siting board to carry out this duty.

This “framework” need not be a list of specific facilities that must be built. The legislature required DEC to “include [in the Plan]. . . a determination of the number, size, type and location by area of the state of new or expanded industrial hazardous waste treatment, storage and disposal facilities which will be needed for the proper long-term management of hazardous waste.”<sup>4</sup> However, as DEC has noted, it need not actively initiate a siting proposal<sup>5</sup> – the market should be allowed to provide solutions. Nonetheless, DEC must provide signals to the market regarding the types of facilities that are needed, and, by giving guidance to the siting board, whether a siting board will, or will not, agree with the market that a given proposed facility is actually needed. The “framework” would be a set of criteria for establishing whether a facility is needed.

There is no question that DEC is capable of providing guidance to future siting boards regarding the issue of need for facilities. DEC has already provided a framework to be used *after* need is established, for determining whether the siting criteria are met. This guidance is carefully spelled out at ECL § 27-1103.2 and the associated regulations at 6 N.Y.C.R.R. § 361.7 and appendix. DEC has provided an extremely detailed system of factors, numerical scores and weights to assist a siting board in determining whether a needed facility is appropriately sited, resulting in a siting score that the board will use to guide its determination.<sup>6</sup>

What DEC has not done, and what it must do, is provide a framework for determining whether a facility is needed in the first place. The law provides for a thorough adjudication of this question when a facility is proposed – ECL § 27-1103.3(d) and 6 N.Y.C.R.R. § 361.3(e)(6) require that the applicant present its argument that the facility is needed, and the hearing procedures guarantee that parties that disagree with an applicant’s claim of need will be heard and considered. What is missing is guidance to a siting board itself on what is to be done with the conflicting arguments on need for facilities that will inevitably be raised. The appropriate place for such guidance is the Plan, yet no such guidance is provided.

---

<sup>3</sup> ECL § 27-1105.3(f) (emphasis added).

<sup>4</sup> ECL § 27-1102.2(f).

<sup>5</sup> As DEC notes, it “is required to first look to the private sector in the construction and operation of such facilities, and only in the event that the private sector does not adequately respond, should DEC” move to solve the problem unilaterally. Plan, 6-1.

<sup>6</sup> See 6 N.Y.C.R.R. § 361.7(c)(3) (“Facilities which score 200 or above do not meet the siting criteria. Facilities which score below 200 are adequately sited but may require the imposition of special conditions under the certificate.”)

John Iannotti, NYSDEC  
November 25, 2008  
Page 4

These criticisms are not new: the previous version of the Plan also failed to provide useful guidance on the question of need, and DEC was informed.<sup>7</sup> DEC's response was that the Plan "provides the *information* required by the authorizing statute and provides sufficient guidance. Information to guide evaluation of siting proposals is contained throughout the Plan, with *findings and recommendations* summarized in the Executive Summary."<sup>8</sup> Yet "information" and "findings" are not guidance. Guidance would go beyond a review of the available information and instruct a recipient (the siting board) on how to understand and use these data.

As for the Plan's recommendations, with respect to the need for facilities the Plan's only clear message is that DEC wishes to avoid making the decisions it is required to make. DEC recommends that "any proposal for locating a new facility or expanding an existing hazardous waste facility *should be evaluated* on its own merit, taking into account the national need as well as state need." DEC opines that because existing landfill units will be filled, "the need for a replacement unit *should be evaluated*" when that happens. DEC instructs that "State agencies and authorities and future Siting Boards *should evaluate* a proposed or expanded facility from a national as well as State perspective in its determination of need." DEC concludes that the Plan itself "should not discourage the consideration of siting proposals . . . because the future need for hazardous waste TSD facilities is extremely difficult to assess at this time."<sup>9</sup> In other words, no advice is given on *how* need "should be evaluated"; DEC simply states that it is difficult to assess future need and the determination must be done at some future time. The important question of how an agency or the board should go about deciding whether or not a facility, particularly a disposal facility, is really "needed" at that future time is simply dodged.

The Plan's discussion of "Facility Need"<sup>10</sup> adds no meaningful direction to the recommendations. DEC notes only that the Plan "must assure the availability of industrial hazardous waste TSD facilities which have adequate capacity for the destruction, treatment or secure disposition of all hazardous wastes generated in New York."<sup>11</sup> Yet it is not clear how a siting board should approach claims that a given facility is needed if DEC's definition of need is

---

<sup>7</sup> See RTC, 7 ("The draft plan states that 'The Siting Plan is to be used as guidance by any hazardous waste siting facility board reviewing proposals for siting certain new or expanded hazardous waste management facilities within New York State and for the Department and other State government agencies to use to assess the availability of sufficient hazardous waste facility capacity.' So, why does your fifty-plus page plan not provide any guidance?").

<sup>8</sup> RTC, 7 (emphasis added).

<sup>9</sup> Plan, ES-4 (emphases added).

<sup>10</sup> Plan, 6-1 to 6-7, and particularly pages 6-5 to 6-7.

<sup>11</sup> Plan, 6-5.

John Iannotti, NYSDEC  
November 25, 2008  
Page 5

simply to examine disposal capacity.<sup>12</sup> There is no guidance on what “need” looks like in the future.

Furthermore, no matter how difficult it may be to establish whether there will be a need for facilities in the future, DEC should be able to identify *present* needs, and has not attempted to do so. Does New York, today, need any more hazardous waste landfill capacity, at any location? If DEC cannot answer that question in the Plan, how can a facility siting board be expected to answer it in the future? Only an examination of today’s need for facilities will serve as useful guidance for future siting boards – this is the “framework” that the legislature required.

Lacking such a framework, the siting board’s decisionmaking at the individual site level will become mired in questions of national-, regional- and state-level need that should have been confronted and resolved by the Plan.<sup>13</sup>

The Plan should therefore include a well-reasoned analysis and determination of:

- What factors would indicate, presently, that a hazardous waste management facility (treatment, storage *or* disposal) was needed.

---

<sup>12</sup> The closest the Plan comes to describing a future in which a facility might be needed is a paragraph discussing the diminishing capacity of landfills, “a fact that must be considered in exploring the question of need for additional capacity *in the future*.” Plan, 6-6 (emphasis added). Again, it is not clear if DEC is identifying disposal capacity as the single criteria for “need.” DEC appears in its recommendations to take the position that once a landfill unit reaches capacity, a new facility may be needed to replace it: “as a landfill unit is filled the need for a replacement unit should be evaluated.” Plan, ES-4, 6-14. But the Plan also notes that if “additional landfill capacity is not available in New York when CWM [the only hazardous waste landfill in the northeast United States] reaches capacity, the use of out-of-state land disposal facilities by New York generators will increase accordingly.” DEC provides no guidance on how to reconcile, on the one hand, diminishing landfill capacity, and on the other hand, out-of-state availability, in a future need determination. This defers guidance on whether there is a foreseeable future need for additional capacity.

<sup>13</sup> This is not conjecture – this is the legacy of hazardous waste facility siting that DEC has left to the people of New York in the twenty-one years that it has failed to fulfill its duties under the law. One commenter, discussing the fights over the CWM landfill expansions in 1989-90 and the failed CECOS proposal in 1987-90, summarizes that the issue of facility need was “to a large degree [a] technical matter[] that led parties to the proceedings to argue over projections and predictions about waste generation rates and risk assessments, among other things.” Thomas H. Fletcher, *From Love Canal to Environmental Justice: The Politics of Hazardous Waste on the Canada-U.S. Border* [hereinafter “Fletcher 2003”], 132 (2003). Fletcher goes on to describe the vague and varying analyses of need that were attempted by siting board officials during the decisionmaking on these proposals, ultimately concluding that the evidence indicates “a difference of opinion over facility need, not only among stakeholders, but also among siting board officials.” *Id.* at 147. The new draft of the Plan guarantees that this confusion will continue, undermining the rationality of all future siting board decisions and imposing significant costs on interested parties as they attempt to find meaning in the Plan’s delphic pronouncements on need.

John Iannotti, NYSDEC

November 25, 2008

Page 6

- Whether, as of the date of the issuance of the Plan, and of any annual review thereafter, circumstances exist that necessitate the construction or expansion of hazardous waste management facilities in New York state.
- If no need for facilities is identified, whether any indication exists that such factors may materialize at some future time.

These analyses should be broken out by facility type, and should particularly focus on land disposal facilities.<sup>14</sup> Based on the data presented in the draft Plan,<sup>15</sup> it appears that DEC has concluded that no circumstances presently exist that necessitate the construction of new or expanded land disposal facilities, in which case DEC should clearly so state.

These analyses also require DEC to address what exactly constitutes a “capacity shortfall” given the virtually borderless nature of modern hazardous waste disposal. Currently, it appears that the Plan identifies *only* a shortfall in capacity as a factor that would indicate that a facility was needed. Yet other factors, such as an alleged increase in cost associated with disposal at more distant or more expensive disposal facilities, will certainly be raised during the decisionmaking process when a Siting Board is asked to determine whether a new or expanded facility is “needed” in New York.<sup>16</sup> DEC should identify whether these are acceptable considerations in the need analysis, and if so, develop thresholds or other guidance regarding the nature of consequences (higher disposal costs, traffic safety, vehicle miles traveled, greenhouse gas emissions, etc.) that would be so unacceptable that a new in-state facility would be needed. All of this should be updated as time progresses and new information becomes available to DEC.

The Plan, as it stands, hands all of these questions to future siting boards and, as a result, to the future parties of siting board proceedings. Applicants will argue that facilities are “needed” and opponents will argue that facilities are unnecessary, and the siting board will have no basis on which to support a determination one way or the other, because rather than provide the necessary guidance, DEC has again avoided doing its job.

---

<sup>14</sup> See further discussion of facility-type breakdowns in the discussion of geographic equity in Section B, below. See discussion of the need to focus on land disposal facilities in Section C, below.

<sup>15</sup> The EPA capacity projections and EPA’s own projection as presented at Plan, Appendix J; 6-6 to 6-7.

<sup>16</sup> Whether other disposal facilities are in fact more expensive than CWM to New York customers is questionable, in view of the economies of scale and rail access that some other facilities enjoy. Further commentary is impossible because DEC has not identified the factors to be examined in analyzing whether a new facility is “needed.”

John Iannotti, NYSDEC  
November 25, 2008  
Page 7

**B. The Plan Fails to Adequately Address the Equitable Geographic Distribution of Facilities**

When DEC was instructed to draft the Plan in 1987, it was required to consider the “equitable geographic distribution of facilities.” The animating purpose behind this requirement is not a mystery: the legislature was concerned with the historical coincidence and contemporary inertia that had resulted in all of New York’s hazardous waste land disposal being concentrated in Niagara County.

DEC’s difficulties in implementing the geographic equity policy, and the results of this failure, are no secret. A commenter succinctly describes the history:

[T]he 1987 amendments – [ECL §] 27-1102(2)(f) – required DEC to develop a comprehensive hazardous waste facility siting plan that would promote ‘equitable geographic distribution,’ due to concerns about Niagara County’s disproportionate share of disposal capacity and contaminated sites in need of cleanup. DEC developed drafts of the facility siting plan for public comments in June 1988 and August 1989 but [as of 2003 had] not produced a final plan or implemented any of its intended provisions. This lack of action became a central issue for Niagara area voters in the 1990 campaign for state governor when the region’s Republican State Senator Daly publicly criticized then Governor Cuomo for failing to deal with the problem. . . .

With respect to the [circa 1990] CECOS and CWM facility siting cases specifically, fairness and equity concerns had little bearing on the proceedings or the siting board decisions. In each case, opposition groups argued that the proposals ran counter to the geographic equity policy and, therefore, should not be approved. The ‘toxic legacy’ of Love Canal, they submitted, was indicative of Niagara County’s existing hazardous waste burden and was therefore reason enough to deny the certificates of approval. But to the extent these issues were even considered, the siting boards reduced them to ‘psychological’ or ‘psychosocial’ issues that ultimately had no impact on their decisions to approve or deny the proposals. The siting board’s conclusion and recommendation regarding equity in the initial approval of the CECOS proposal are illustrative of this point.

The [CECOS] application and the prospect of the facility being built was shown to have an adverse psychological impact on a significant, though unquantified, proportion of persons in the community. This impact was not demonstrated in terms of the traditional measures of stress, but was

John Iannotti, NYSDEC  
November 25, 2008  
Page 8

shown to be characterized by feelings of powerlessness and inequity due to the proposed expansion of hazardous waste activities at CECOS . . . This psychological effect is not a sufficient basis for denial of the permit or certificate, but it does provide a basis for the imposition of mitigative permit conditions.

CECOS should be required to increase and intensify its community outreach and educational programs. A specific plan with a schedule for implementation of such expanded programs should be prepared by CECOS subject to approval of [DEC] staff, or the Siting Board and Commissioner may prescribe specific elements of such a plan within their discretion. . . .

Of course, because the initial approval was later overturned, these issues eventually became moot. Nonetheless, the preceding statements show a lack of regard for community concerns about fairness, even in the context of a geographic equity law specifically written into [the] ECL and a draft policy developed by New York's DEC but never implemented. The siting board's recommendation that CECOS should 'intensify' its outreach and education efforts fails to comply with the original intent of the legislation, which was to promote geographic equity of facility sites, not 'psychosocial' sensitivity of the same waste management corporations operating new hazardous waste facilities in the same places. Ultimately, NY DEC found the geographic equity policy difficult to implement without an [Ontario Waste Management Corporation]-style governmental site selection process. The State of New York had used such an approach unsuccessfully in the early 1980s and was unwilling to try this again. . . .

In the end, Niagara, New York communities saw no relief through either geographic equity or procedural assistance from the existing disproportionate burdens of hazardous waste that they presently face.<sup>17</sup>

In other words, the result of DEC's failure to implement the equitable geographic distribution policy has been the diminishment or outright dismissal, at the individual site level, of all local equity concerns. DEC has the responsibility of providing guidance to future siting boards so as to avoid interpretations of the geographic equity policy as removed from the law's

---

<sup>17</sup> Fletcher 2003, at 133, 158-160, *citing* Olsen, *The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community*, 39 Buffalo L. Rev. 473 (1991); personal interview with R. Nils Olsen, Jr., Dean of SUNY Buffalo School of Law (June 28, 1995); *Hearing Report and Recommended Decision in the Application of CECOS International, Inc.*; and personal interview with P. Eismann, Deputy Permit Administrator, Division of Regulatory Services, NYSDEC (Feb. 6, 1995).



John Iannotti, NYSDEC  
November 25, 2008  
Page 9

intent as the “psychosocial” considerations of the CECOS siting board. Unfortunately, again DEC appears to remain completely unwilling to do its job.<sup>18</sup>

The law’s mandate, of course, is broad – DEC is to ensure that *all* hazardous waste facilities are distributed equitably – but land disposal is the primary concern and must be individually and completely addressed. To properly evaluate the equity of distribution, DEC must identify not only the distribution of facilities, but the distribution of the *impacts* of those facilities, and decide upon a framework for judging the present equity of that distribution, and what steps, if any, should be taken in the future in light of that distribution. Not incidentally, DEC must define what, exactly, constitutes “equitable geographic distribution.” These are difficult tasks, to be sure. However, DEC’s present approach – to assiduously avoid them – is not an acceptable or lawful option.

1. **What the Law Requires**

Per ECL § 27-1102.2(f), the Plan “shall include . . . a determination of the number, size, type and location by area of the state of new or expanded industrial hazardous waste treatment, storage and disposal facilities which will be needed for the proper long-term management of hazardous waste *consistent with . . . an equitable geographic distribution of facilities*” (emphasis added).

In DEC’s Response to Comments (“RTC”) on the previous version of the Plan and DGEIS, DEC summarized criticisms of its analysis of site distribution and stated that “the law does not require differentiation by type of facility to determine equitable distribution of facilities.” DEC goes on to explain that Plan Chapter 6 was nonetheless expanded to its current form, which does provide some (though inadequate) facility differentiation. In its response to other comments on the previous equitable geographic distribution analysis, DEC appears to take the position that it has broad discretion regarding what is and is not to be considered, and makes it clear that DEC feels it has already done more than was ever expected of it in this regard.

In fact, the Department has got it wrong. The law does require facility differentiation and DEC has not done nearly as much as was expected of it. First and foremost, DEC’s analysis of the equitable geographic distribution of facilities must include a specific analysis of the geographic distribution of hazardous waste *disposal* facilities. As already explained, this was the primary intent of the law. This is also clear from Governor Cuomo’s comments upon approving

---

<sup>18</sup> Nils Olsen noted in 1991 that earlier Plan drafts up to that date had “evidence[d] a categorical unwillingness on the part of the D.E.C. to grapple with the issue of concentration of facilities in Western New York.” 39 Buffalo L. Rev. at 484.

John Iannotti, NYSDEC  
November 25, 2008  
Page 10

the law,<sup>19</sup> where he stated that the purpose of the analysis was to “avoid further concentration of *disposal facilities* in only one part of the state” (emphasis added). This, of course, was a reference to the concentration of land disposal facilities in Niagara County. That this was a primary concern of the authors of the legislation is also clear from the bipartisan sponsorship of the law by Western New York legislators Senator John B. Daly (R, Dist. 61 – Niagara County) and Assemblyman Joseph T. Pillittere (D, Dist. 138 – Niagara County).<sup>20</sup> The Plan’s current aggregation of all “treatment, storage and disposal” facilities for purposes of analysis of equitable geographic distribution is demonstrably contrary to the intention of the law, arbitrary and without any discernable basis other than to help DEC find equitable geographic distribution despite the common knowledge that significant inequities exist.

Second, DEC’s analysis must be based on a clear definition of “equitable geographic distribution.” No number of repetitions of the vague and conclusory statement that the “evolution of the hazardous waste management industry within the State has resulted in an equitable geographic distribution of hazardous waste management facilities”<sup>21</sup> can replace a reasoned explanation of what does and does not qualify as “equitable” geographic distribution of facilities. DEC itself acknowledged this over twenty years ago in its comments on the then-proposed law,<sup>22</sup> focusing on the need to carefully define that term in regulations that DEC intended to promulgate, while considering “other requirements of the plan, such as need, and the geographic delineations necessary to achieve the policy underlying the legislation.” Thus, DEC recognized that the term would be subject to some debate and that the parameters of the analysis should be carefully considered and defined before the analysis was ever conducted. Unfortunately, DEC has never defined “equitable geographic distribution of facilities” by

---

<sup>19</sup> State of New York Executive Chamber, Memorandum filed with Assembly Bill Number 7835-C, Aug 3, 1987. (“This bill will enact a portion of my 1987-88 Legislative Program. . . . Under the bill, the plan will include a determination of the types and nature of facilities which will make the plan consistent with an equitable geographic distribution of disposal capacity across the state. With these provisions, the State will be able, consistent with the enacted hazardous waste disposal hierarchy, to avoid the further concentration of disposal facilities in only one part of the state.”)

<sup>20</sup> The assembly and senate debates, particularly Senator Daly’s remarks (“What are we going to do in ten years . . . when those holes are filled up if we don’t do something now? Where are you going to put the waste?”), also illustrate the central importance of disposal facilities.

<sup>21</sup> Plan, ES-2 & 6-13; DGEIS, 4; RTC, 7.

<sup>22</sup> Memorandum from Langdon Marsh, DEC Executive Deputy Commissioner, re Assembly 7835-C, July 24, 1987 (“We note that new ECL §27-1102.2(f) requires the plan to determine the new or expanded facilities needed for long term management of hazardous waste which should be consistent with an ‘equitable geographic distribution of facilities’. *The term ‘equitable geographic distribution of facilities’ will best be defined in regulations promulgated by the Department in accordance with DEC’s responsibility to devise the statewide siting plan. The definition must be considered in relation to other requirements of the plan, such as need, and the geographic delineations necessary to achieve the policy underlying this legislation.* Furthermore, ECL §27-1105.2(f) charges the siting board to render a decision consistent with the Plan and not to determine *de novo* its own concept of equitable geographic distribution.”) (emphasis added).

John Iannotti, NYSDEC  
November 25, 2008  
Page 11

regulation and does not attempt to do so in the draft Plan. Lacking a clear definition of “equitable geographic distribution,” DEC’s conclusion that facilities are currently distributed equitably is indefensible.

DEC’s 1987 comments also indicate that the Department realized the importance of its equitable geographic distribution analysis as guidance to future siting boards. In fact, DEC went so far as to state its opinion that siting boards would be *barred* from reassessing equitable geographic distribution, and would be required to rely on the analysis provided by DEC. If the siting board may not revisit the analysis, it is incumbent upon DEC to perform it properly in the first instance.<sup>23</sup>

Finally, if the law does require that the siting board follow DEC’s equity analysis, then DEC’s conclusion that facilities are *currently* equitably distributed, even if it were based on some reasoned analysis (and it is not), would be insufficient. What is required is a study not only of the current state of affairs, but of the acceptability of future proposals, given the geographic status quo. Most importantly, DEC must address whether or not the continued expansion of hazardous waste landfills in Niagara County would be “equitable” given the present geographic distribution of such landfills. This is necessary given the current realities of geographic distribution (and concentration) of hazardous waste landfills in New York. If DEC’s conclusion is (somehow) that there is no inequity in the geographic distribution of hazardous landfills, and that expansion of existing facilities or siting of new facilities in Niagara County will not result in an inequitable distribution, it must say so and provide support for that conclusion.<sup>24</sup>

---

<sup>23</sup> It is not clear that this remains DEC’s position. The law requires only that the siting board must make a determination “consistent” with the Plan and it is not clear that this bars the siting board from revisiting DEC’s analysis, particularly when confronted with information that is not discussed in the Plan. Nonetheless, even if the siting board is not barred from performing a separate analysis, DEC should provide useful guidance.

<sup>24</sup> Niagara County’s interest is primarily for an equity analysis of disposal facilities, and particularly landfills. However, the same analysis is also needed for the state’s treatment and storage facilities, to the extent that those facilities present distinct impacts.

John Iannotti, NYSDEC  
November 25, 2008  
Page 12

**2. A Proposed Framework for the Analysis**

DEC's current analysis of equitable distribution mixes questions of geography, impact, and equity into a whole that is substantially less than the sum of its parts. Part of the problem is DEC's failure to separate, on the one hand, the primarily descriptive and data-oriented analysis of geographic distribution from, on the other hand, an analysis of equity given that distribution. DEC should focus first on the geographic distribution of various *types* of hazardous waste treatment, storage and disposal facilities. It should then focus on the geographic distribution of *impact* from the various types of facilities it has analyzed. The analysis of equity should be postponed until the geographic distribution of impact is fully understood, and should be guided by a clear statement of what it means for geographic distribution of impacts to be "equitable."

**a. Geographic Distribution of Facilities**

DEC begins its analysis by aggregating hazardous waste treatment, storage and disposal facilities and totaling the number of such facilities in each of the nine DEC regions.<sup>25</sup> DEC then excludes from this distribution those facilities that only treat wastewater on-site.<sup>26</sup> DEC then focuses on those facilities that receive waste from off-site sources.<sup>27</sup> Finally, DEC separates the combustion and landfill units (permanent disposal facilities).<sup>28</sup> Essentially, DEC has identified four categories of facilities: (1) all TSD facilities; (2) all on-site wastewater treatment facilities; (3) all on-site facilities; (4) all disposal facilities,<sup>29</sup> and aggregated their totals by region.

Unfortunately, DEC has displayed most of its results in a convoluted and incomplete process of elimination. For example, there is no map of the on-site wastewater treatment facilities, only a count of those facilities that don't fit that definition. And although the disposal facilities are actually positively counted, there is no corresponding map. Compounding this confusion, facilities are not actually mapped, but are crudely grouped into DEC regions (county aggregates), foreclosing any alternative groupings without providing any justification for the regional groupings.

A much more logical and detailed set of maps is needed to support any further analysis of equitable distribution of facilities. First, facilities should be *mapped* at the outset, not aggregated by DEC region (these maps should look something like Figures 6-1 and 6-2, but on a state level). DEC has the locations of all of these facilities and mapping them should not be difficult.

---

<sup>25</sup> Plan Figure 6-3.

<sup>26</sup> Plan Figure 6-4.

<sup>27</sup> Plan Figure 6-5.

<sup>28</sup> Plan Table 6-2.

<sup>29</sup> DEC's fifth analysis, dealing with waste volumes, is discussed below.

John Iannotti, NYSDEC  
November 25, 2008  
Page 13

Second, although a master map might show all treatment, storage and disposal facilities (perhaps with different markers for different types of facilities), multiple maps should be provided so that a reader can easily discern the geographic distribution of, at a minimum: all treatment facilities, all storage facilities, all disposal facilities, all wastewater treatment facilities, all treatment facilities excluding wastewater treatment facilities, all combustion waste disposal facilities and all land disposal facilities. Other maps might indicate the distribution of captive facilities, on-site facilities, commercial facilities, etc. The primary purpose of these maps is to serve as an informational basis for a later discussion of equitable distribution.

This approach will most clearly demonstrate the geographic distribution of like facilities, and therefore begins to give some sense of the geographic distribution of impacts from the disposal of hazardous wastes, by disposal method, which is the purpose of the whole exercise.

As DEC appears to recognize, however, a geographic distribution of facilities is not enough to form the basis of an equity analysis. The impact of those facilities must be quantified and DEC must examine the geographic distribution of like impacts.

**b. Geographic Distribution of Impacts**

DEC follows its evaluation of the geographic distribution of facilities with a very brief discussion of the geographic distribution of hazardous waste received, in tons, per region. Presumably, DEC approaches the question of waste volume because it is attempting to find some foundation for an analysis of equitable distribution of the *impacts* of hazardous waste management facilities in the state – higher waste volumes might indicate higher impacts on the surrounding communities, for example. This is a good idea, but not well implemented.

First, it is not immediately clear from Figure 6-6 and the accompanying text whether DEC has only counted waste received by facilities shown in Figure 6-5 (those receiving waste from off-site), has aggregated waste received by all treatment, storage and disposal facilities, or has used some other metric. Yet even if it were more clearly presented, this information has limited utility unless it clearly shows varying impacts of varying forms of hazardous waste treatment, storage or disposal on varying parts of the state.

More importantly, it is not clear what DEC intends to accomplish by aggregating waste volumes by region. Are waste receipts a proxy for some impact of waste management, such as traffic? Only if weight is directly correlated to volume and shipment size? How many trucks does it require to move 100 tons of contaminated dirt, as opposed to 100 tons of liquid? Are all received wastes equal? The impacts to the area surrounding the Revere Smelting and Refining facility from the delivery and processing of 100 tons of lead acid batteries may be very different

John Iannotti, NYSDEC  
November 25, 2008  
Page 14

from the impacts on the environs of Model City of the delivery and permanent land disposal of 100 tons of concentrated wastes, or of 100 tons of remedial waste.

Instead, DEC must strive to identify exactly what the real impacts of the state's hazardous waste management operations are on the state's communities. All management methods include traffic and attendant impacts (from safety risks to greenhouse gas emissions). Disposal facilities create unique long-term environment and health risks. Combustion facilities create unique air risks. All of this information must be gathered and presented. There is no doubt that the accumulation and presentation of this data will be a difficult and complicated task, and that there will be some information that DEC will be unable to include because it lacks the necessary records. However, this should not stop DEC from doing all that it can.

Furthermore, once the information on impacts of like activities is sorted out, DEC will be faced with an even more difficult task: finding some acceptable framework for comparing different impacts (*e.g.*, the traffic impact of a storage facility versus the cancer risk of a landfill). It may be that a common denominator can be found in quantifications tied to risks to human health and safety. It may be that DEC determines that such comparison is impossible. Since DEC has not even attempted to approach these questions, it is impossible to say with any certainty what success DEC will have.

Only once the geographic distribution of facilities and impacts is fully understood and described should DEC approach the question of the equity of that distribution. It is impossible to fully evaluate the benefits and burdens, the give and take, of hazardous waste management without carefully constructed supporting data. DEC's attention must then turn to a definition of "equitable" distribution of facilities.

### **3. Equitable Geographic Distribution**

What does it mean for the impacts of hazardous waste management facilities to be equitably distributed throughout the state? - No answer to this question is provided in, or discernible from, the Plan. In short, DEC must define "equitable geographic distribution." Some suggestions are provided below.

John Iannotti, NYSDEC  
November 25, 2008  
Page 15

As a threshold matter, DEC is correct to separately evaluate the issues of environmental justice and geographic equity,<sup>30</sup> although the two concepts are not entirely separate. Environmental justice, as that term is presently understood, is concerned with distributive fairness but with a focus on socioeconomic and racial inequities. This is particularly important in communities that historically have been underrepresented in political dialogue. Similarly, geographic equity is concerned with questions of distributive fairness (ensuring that burdens are allocated fairly and in some relationship to benefits), although the focus will be beyond socioeconomic and racial distinctions. An example of a violation of any type of distributive justice is a *concentration* in any one community of the burdens associated with a particular activity, particularly to the extent that the community enjoys a diminishing fraction of the associated benefits, and DEC should refer to the concept of concentration when defining “equitable geographic distribution.”

Other key factors to consider will be an area’s contribution to the problem (*e.g.*, need to landfill hazardous residuals), the benefits accruing to an area that is contributing the problem (*e.g.*, the economic benefits to a community of the industry that creates the hazardous residuals), and the amount of the problem that a community deals with on its own as opposed to relying on others (*e.g.*, disposal of hazardous residuals near to or distant from the point of generation). DEC should develop a framework that accounts for all of these factors.

DEC summarized one commenter’s proposed analysis:

Weights should be attached to each type of facility representative of the benefit received by the host communities. Criteria should be established where onsite facilities would generate the greatest benefit and score the lowest, and commercial disposal facilities that import the majority of the waste would score the highest. A county by county comparison could be made independent of the number of facilities, but recognizing costs and benefits, and the variation and acceptability by the host communities of these differing types of facilities.

Disposal methods . . . must also be considered in determining equitable distribution. Not all types of disposal are created equal, especially when the temporal and spatial differences are completely ignored. Clearly facilities that store or handle wastes on a temporary basis should not be lumped with facilities that permanently dispose of waste through landfilling or incineration. Again, a map should be prepared displaying disposal methods. A weighting mechanism

---

<sup>30</sup> See separate discussions at Chapter 6 and RTC, 1-4.

John Iannotti, NYSDEC  
November 25, 2008  
Page 16

should also be developed to recognize the disparate methods and their long and short term impacts and acceptability to New York State residents.<sup>31</sup>

Unfortunately, although DEC states that “the discussion on equitable geographic distribution in Chapter 6 has been expanded to include many of the ideas presented in this comment,” this is simply not the case. No effort is made at the nuanced and thorough analysis suggested.

Although considerable work remains to be done, one point may be made on a component of the current draft Plan that will need to be reconsidered when a proper analysis is performed. A “major finding” of the Plan is that New York is a net exporter of hazardous waste. This finding appears to be cited to support the proposition that geographic distribution is equitable. If so, DEC’s argument is extremely misleading.

DEC’s data indicate that in 2005 New York did in fact import 120,000 tons of hazardous waste, while exporting 171,000 tons,<sup>32</sup> which at first glance appears to support the conclusion that New York is a net exporter. What this ignores is the discrepancy between imports and exports *for the purposes of land disposal*. DEC reports that 12% of New York’s exports (18,816 tons) went to land disposal (this number is likely somewhat higher as 21%, or 33,935 tons, was destined for temporary storage, and was presumably treated or disposed later). However, DEC also reports that CWM accepted 96,847 tons of out-of-state hazardous waste for land disposal,<sup>33</sup> totaling 81% of the state’s 2005 total imports. In other words, while the state may be a net exporter of hazardous waste, it is a significant net importer of hazardous waste destined for land disposal. This waste arrived from 21 states (as far away as Texas), as well as Puerto Rico and foreign countries (primarily Canada).<sup>34</sup> Furthermore, DEC’s data indicate that 49,606 tons of hazardous wastes originating in New York were accepted by CWM.<sup>35</sup> This means that the full burden of land disposal in New York falls on Niagara County, that New York generators choose to landfill far more waste at that facility than out-of-state, and that this burden is compounded by an importing of double that amount for disposal from out-of-state. To be sure, some of the benefit of this disposal accrues to Niagara County – remedial wastes generated in Niagara County mean that sites are being cleaned; industrial byproducts from the industries of Western New York are disposed of close to the source – but this does not change the obvious fact that Niagara County is the dumping ground for the majority of the rest of New York state’s remedial and industrial wastes, and the destination of waste from much of the East Coast. This is *precisely* the type of concentration that is an indication of extreme distributional inequity.

---

<sup>31</sup> RTC, 5-6.

<sup>32</sup> Plan, 5-9.

<sup>33</sup> Plan, 5-11.

<sup>34</sup> Plan, 5-12 to 5-13.

<sup>35</sup> Plan, 5-11.



John Iannotti, NYSDEC  
November 25, 2008  
Page 17

**C. Other Issues**

The following issues are related to the broad problems discussed above, but deserve special emphasis and so are discussed separately.

**1. The Plan Must Focus on Disposal**

DEC may object to the focus of these comments on disposal facilities when treatment and storage facilities must also be examined in any comprehensive analysis of statewide hazardous waste management. Clearly, the siting of disposal facilities is but one of many issues that DEC must address. However, disposal creates unique impacts and poses unique risks, and therefore must be examined separately.<sup>36</sup> This is not only a logical approach to the analysis that DEC must perform, but was mandated by the legislature.

As described above, the draft Plan does very little to analyze the distinct concerns that arise from treatment, from storage and from disposal facilities. This is most obvious in the Plan's discussion of equitable geographic distribution of facilities, but the inclination to aggregate all "TSD facilities" permeates the Plan. However, the legislative directives governing the completion of a state siting plan clearly contemplate that the plan determine the need, respectively, for each of the three types of "treatment, storage *or* disposal facilities."<sup>37</sup> The legislature specifically instructed DEC to consider "the number, size, *type* and location by area of the state of new or expanded industrial hazardous waste treatment, storage *and* disposal facilities."<sup>38</sup> DEC has chosen to read this as authorizing a monolithic analysis wherein a "treatment, storage and disposal facility" is a collective noun, probably because in the several decades since RCRA and state hazardous waste laws have been passed "TSDF" has become a term of art to describe the facilities regulated under those programs. Yet there is no indication that the legislature meant it in this sense (indeed, DEC is instructed to consider treatment, storage and disposal facilities by "type"), nor are TSDFs actually aggregated under the federal RCRA regulations<sup>39</sup> or New York State counterparts.<sup>40</sup> In short, there is no basis for aggregating an

---

<sup>36</sup> The traffic impacts associated with a storage facility may be similar (in kind if not in magnitude) to those associated with a landfill or incinerator, but where storage is transitory, landfills are permanent. Where waste volumes at storage facilities are low and constant, landfill volumes are high and ever increasing. Where stored waste is contained, incineration will have widespread near-term air impacts, and land disposal will result in more localized but longer-term impacts on natural resources (particularly groundwater) and human health and safety.

<sup>37</sup> ECL § 27-1102.7 ("Upon adoption of the plan the department shall immediately establish a schedule for siting any new or expanded industrial hazardous waste treatment, storage *or* disposal facilities identified as necessary in such plan.") (emphasis added).

<sup>38</sup> ECL § 27-1102.2(f).

<sup>39</sup> See 40 C.F.R. Part 264, Subparts I through O, W, X, DD and EE and 40 C.F.R. part 265, Subparts I through R, W, DD and EE, setting out specific requirements and operating specifications and parameters for, *inter alia*, containers, tanks, containment

John Iannotti, NYSDEC  
November 25, 2008  
Page 18

analysis of disposal facilities with, for example, treatment facilities, unless some common denominator of impact can be identified.

Furthermore, considering treatment, storage and disposal facilities in the aggregate is inappropriate when the legislature, in the same law that required the Plan, established a waste management hierarchy that singles out disposal as an undesirable management method.<sup>41</sup> The goal of the Plan, to assure the availability of industrial hazardous waste treatment, storage and disposal facilities, is specifically conditioned on compliance with this hierarchy, and the distinctive status of land disposal is to be used to guide *all* hazardous waste policies and decisions. Therefore the Plan must treat land disposal facilities separately, apart from other treatment, storage and disposal facilities, consistent with ECL § 27-0105.

---

buildings, surface impoundments, waste piles, land treatment facilities, landfills, incinerators, munitions and explosives storage, thermal treatment, chemical/physical/biological treatment units, underground injection wells, and drip pads.

<sup>40</sup> See 6 N.Y.C.R.R. Parts 373 and 374.

<sup>41</sup> ECL § 27-0105, enacted together with ECL § 27-1102 at L.1987, c. 618.

John Iannotti, NYSDEC  
November 25, 2008  
Page 19

**2. The Plan Must Implement the  
Land Disposal Phase-Out Requirement**

DEC notes that “as recognized in ECL § 27-1102.2(d), land disposal capacity for treated residuals remains necessary.”<sup>42</sup> This is true, although DEC should note that the exemption for disposal of treated residuals is limited to those residuals “posing no significant threat to the public health or to the environment.”<sup>43</sup> In accordance with this policy, DEC was instructed to create “a schedule for phasing out land disposal, other than treated residuals [posing no significant threat].”<sup>44</sup> DEC’s failure to do this in previous drafts of the Plan was criticized,<sup>45</sup> and DEC claims to have expanded Plan Chapter 4 to address this issue. What DEC has provided is a detailed list of the many land disposal restrictions that have been enacted since 1986. This review ends with DEC’s conclusion that it “continues to consider land disposal as the least desirable management method, even though LDR standards have been achieved [and although] for many treated hazardous waste residuals and macroencapsulated hazardous waste debris, land disposal is a necessary and feasible management method,” and therefore that “landfill capacity continues to be needed for the management of hazardous wastes.”<sup>46</sup>

There is nothing inherently disagreeable with these statements, but they fall short of the requisite “schedule for phasing out land disposal.” DEC does not attempt to identify future opportunities for further limiting land disposal of hazardous wastes. Importantly, DEC should investigate whether viable alternatives, that permanently destroy the toxic substance, exist to land disposal of persistent toxics.<sup>47</sup> Ultimately, land disposal should be restricted to those wastes for which DEC has made a specific finding, based on a reasoned analysis, that the land disposal of that waste will pose no significant threat to the environment.

---

<sup>42</sup> DGEIS,3.

<sup>43</sup> ECL § 27-0105(d). DEC appears to have concluded that all land disposal that is consistent with EPA’s land disposal restrictions (“LDRs”) as mandated by the 1984 Hazardous and Solid Waste Amendments pose no significant threat to the public health and the environment. Plan, 4-1. If this is the case, DEC should clarify how meeting the LDRs ensures that disposal is limited to treated residuals that pose no significant threat to the public health or the environment, as required by state law.

<sup>44</sup> ECL § 27-1102.2(d).

<sup>45</sup> RTC, 23-24.

<sup>46</sup> Plan, 4-5.

<sup>47</sup> Promoting a toxic free future is among the goals of the Department’s mission and a current DEC policy priority. See <http://www.dec.ny.gov/about/511.htm>.

John Iannotti, NYSDEC  
November 25, 2008  
Page 20

**3. The Plan Must Incorporate the Policy  
Against Waste Generation**

ECL § 27-0105(a) states that it is the policy of New York State that the “generation of hazardous wastes is to be reduced or eliminated to the maximum extent practical.” This policy is meant to “be used to guide all hazardous waste policies and decisions” made in New York, which would include those policies implemented in the Plan.

The simplest method available to DEC for ensuring that waste generation is minimized is the imposition of cost on the generators of hazardous waste. It is well established that hazardous waste exhibits a price elasticity of generation: as prices increase (whether the cost of generation itself or of disposal once generated, or both), generation will decrease. This was demonstrated by the significant reduction in hazardous waste generation after the imposition of costs associated with RCRA and related programs,<sup>48</sup> and has been observed after the imposition of taxes on hazardous waste disposal.<sup>49</sup>

Presumably, excluding considerations of liability,<sup>50</sup> applicable taxes and transportation costs, the price of waste disposal functions according to basic principles of supply and demand: where demand for disposal remains constant but the quantity of available disposal supply diminishes, the price of disposal will increase. Given that price increases lead to reductions in waste quantities generated, a capacity assurance policy that also operates to minimize waste generation must assure that adequate capacity is available, *but no more*. To the extent that the Plan allows for disposal capacity beyond what is genuinely required, DEC will have in effect subsidized the generation of hazardous wastes.

---

<sup>48</sup> See, e.g., Porter, *The Economics of Waste*, 209 (2002) (“Of course, the high price of its proper disposal is in itself a form of tax on its creation. Between 1976 and 1994, while the overall national price level roughly doubled, the cost of hazardous waste disposal in landfills rose from \$10 to \$250 a ton, and the cost of hazardous waste incineration even higher. . . . To the extent that the rises in disposal and incineration costs reflected the internalization of external costs, then the resulting reduction in the volume of hazardous waste creation was salutary. And there is extensive evidence that firms reduced their generation of hazardous waste by reusing, reducing, recycling or finding substitutes. Indeed, one econometric study estimated the elasticity of hazardous waste generation with respect to its disposal cost is 15—that is, a 1% increase in the cost of hazardous waste causes a 15% decrease in the volume of hazardous waste generated.”).

<sup>49</sup> See, e.g., A. Levinson, *NIMBY Taxes Matter: The Case of State Hazardous Waste Disposal Taxes*, *Journal of Public Economics* (Oct. 1999); H. Sigman, *The Effects of Hazardous Waste Taxes on Waste Generation and Disposal*, 30 *Journal of Environmental Economics and Management* 199 (1996); J. Peretz et al., “Environmental Policy and the Reduction of Hazardous Waste,” 16 *Journal of Policy Analysis and Management* 556 (1997). For convenience, copies of these articles are appended to these comments.

<sup>50</sup> Combustion costs significantly more but eliminates the risk of future CERCLA liability that attends the disposal of waste at a landfill.

John Iannotti, NYSDEC  
November 25, 2008  
Page 21

The draft Plan does not take any steps to assure that disposal capacity will be limited to necessary minimums, and therefore fails to advance the policy of waste minimization. In fact, DEC's permitting decisions at the CWM landfill have resulted in disposal capacity far in excess of what is necessary to meet the needs of generators in New York State, and a concomitant incentives to increase the rate of hazardous waste generation in the state and imports from other states. CWM's permitted annual disposal capacity is 450,000 tons (excluding 75,000 tons of exempt material). However, most hazardous waste landfilled in New York (between 65% and 87% in recent years) is remedial waste, and the Plan (at 3-10) estimates the volume of remedial hazardous waste that will be generated in New York will be 35,000 tons per year.<sup>51</sup> Thus, even if the generation rate was not further minimized, New York needs no more than 10% of the capacity of its existing landfill.

Because CWM has historically made available substantially more capacity than New York generators need,<sup>52</sup> generators have less incentive to minimize waste generation and utilize "opportunities for the recovery of the productive value of waste chemical streams." Currently, CWM has reduced its waste acceptance rate dramatically in order to extend the permitted life of the facility, pending the completion of the Plan. The absence of any significant pressure from generators for expanded capacity during this period (many of whom send hazardous waste out of state) suggests that current New York needs are less than CWM's current waste acceptance rate.

---

<sup>51</sup> Generation of much of the next largest category, secondary hazardous waste, can be expected to decline substantially as a result of a new EPA rule excluding hazardous secondary waste from the definition of solid waste. See EPA, Revisions to the Definition of Solid Waste, 73 Fed.Reg. 64667 (October 30, 2008) (promulgating 40 CFR 261.2(a)(2)(ii) and 261.4(a)(23), (24)).

<sup>52</sup> Note also that disposal needs for secondary materials can be expected to shrink in coming years. On October 7, 2008, EPA promulgated a new rule under RCRA that the agency estimates would exclude approximately 1.5 millions tons of hazardous secondary waste from the definition of hazardous waste. EPA, Revisions to the Definition of Solid Waste, 73 Fed.Reg. 64667 (October 30, 2008) (promulgating 40 CFR 261.2(a)(2)(ii) and 261.4(a)(23), (24)). The rule, which becomes effective on December 29, 2008, can be expected to increase the rate at which hazardous secondary materials are recycled and to substantially reduce the volume of such materials that previously were landfilled by New York generators. As the Agency explained in its initial proposal, "EPA expects that this proposed rule will encourage safe, beneficial recycling of hazardous secondary materials by industry. This regulatory initiative is thus consistent with the Agency's longstanding policy of encouraging the recovery and reuse of valuable resources as an alternative to land disposal." 68 Fed.Reg. 61557, 61560 (October 28, 2003). A study supporting the rule found that when hazardous waste with high BTU value is generated, the waste can be used as a substitute for fossil fuels in boilers and industrial furnaces. U.S. International Trade Commission, *Solid and Hazardous Waste Services: An Examination of U.S. and Foreign Markets*, Pub. 3679 (April 2004), p. 2-13, available at [http://www.usitc.gov/publications/abstract\\_3679.htm](http://www.usitc.gov/publications/abstract_3679.htm)> ("In the case of hazardous waste, internalization . . . -that is, firms generating the waste are likely to dispose of the waste on-site- . . . facilitates cost reduction by motivating waste minimization and increasing opportunities for the recovery of the productive value of waste chemical streams."). Since fuel prices have risen substantially since 2005, this trend can be expected to continue. The combined effect of the 2008 Revisions to the Definition of Solid Waste, excluding secondary hazardous waste from the RCRA Subtitle C program, and the rise in fuel prices, creating a new market for hazardous waste with high BTU value, will substantially reduce the volume of secondary materials that, in previous years, been managed at hazardous waste landfills.

John Iannotti, NYSDEC

November 25, 2008

Page 22

To the extent the Plan fails to find the need for hazardous waste disposal capacity is less than what is currently available, the Plan interferes with environmentally beneficial market forces in violation of the legislative policy. To the extent DEC plans for an unchanging volume of hazardous waste managed on-site, the Plan can be expected to have an environmentally adverse effect on the market in violation of the legislative policy.

An oversupply of disposal capacity will lead to lower disposal prices and increased generation of wastes. The generation of these wastes ensures that many more toxins than absolutely necessary will continue to be introduced into the environment, wasting resources; creating risks to the workers who come into contact with the wastes and to the residents of the communities in which the wastes will ultimately come to rest; discouraging the innovation in manufacturing and treatment processes; and requiring the continuation, in perpetuity, of the treatment, storage and disposal operations necessary to manage the risks that these materials impose, with the concomitant costs and risks associated with the transport of the wastes and the treatment, storage and disposal itself.

John Iannotti, NYSDEC  
November 25, 2008  
Page 23

**D. Conclusion**

The Municipalities have waited over twenty years for DEC to take seriously its responsibilities with respect to hazardous waste facility siting, to address the inequities that have resulted in the concentration of disposal activities at a single location, and to provide much-needed guidance to future siting boards. These comments show that once again DEC has refused to do so. The Plan, as written, is unacceptable and addressing its many inadequacies will require significant further work and revision. These comments have attempted to provide a roadmap of the path forward for DEC. It remains DEC's responsibility to complete this work.

Sincerely,



Michael B. Gerrard



Gary Abraham  
170 No. Second Street  
Allegany, New York 14706

Enclosures