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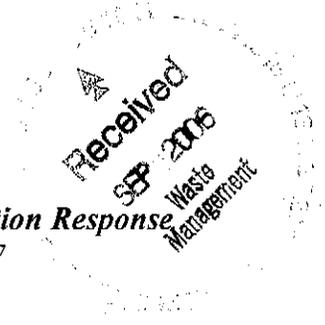
North Carolina Department of Environment and Natural Resources

Michael F. Easley, Governor

September 1, 2006

William G. Ross Jr., Secretary

Steven J. Levitas, Esq.
Kilpatrick Stockton, LLP
3737 Glenwood Avenue
Raleigh, NC 27612



Re: **Alligator River Recycling, LLC – Floodplain Modification Response**
My correspondence reference number: 00306200600637

Dear Steve:

I have reviewed your letter dated June 6, 2006 requesting the Department’s opinion on whether filling and grading could occur on the proposed landfill site under several different scenarios. In short, it is the view of the Department that current law prohibits such activity.

The prohibition on clearing and grading arises out of the requirement to obtain a landfill permit that can only be issued after certain statutory and regulatory conditions are met. Among those is N.C. Admin. Code tit. 15A, r. 13B.0201(b)(1), which states that an “applicant shall not clear or grade land or commence construction for a solid waste management facility until a construction permit has been issued.”

Our statutes on floodplain regulation prohibit “[n]ew solid waste disposal facilities, hazardous waste management facilities, salvage yards, and chemical storage facilities” without a variance from the appropriate local government. N.C. Gen. Stat. § 143-215.54(c). Much of the proposed Alligator River facility would be located in a floodplain. Although Hyde County approved a variance for the project, the variance has been the subject of a legal challenge and the judge hearing the matter has indicated an intent to overturn the variance decision. At the time of your letter, Alligator River could not obtain a landfill permit because the project did not have a valid local government variance.

In order to avoid the need for a local government variance and still resolve the floodplain issues, Alligator River proposes to fill the site to above floodplain grade and request FEMA to modify its floodplain designation accordingly. As you noted in your letter, the amount of fill needed to elevate the site to a level above the current flood elevation standard is less than will be necessary to create the required four-foot separation between the waste and water table. The fill that coincides with the required four-foot separation is a part of the landfill facility or landfill unit. It constitutes the base or foundation of the landfill and is a necessary, not optional, component. Therefore, the fill that Alligator River is contemplating constitutes construction of the landfill and cannot be done without a permit. Even if the factual situation were varied to withdraw the application or have another entity pursue the filling and grading, the prohibition would still apply since the site is ultimately planned for a landfill as evidenced by Alligator River’s State Environmental Policy Act (SEPA) submittal.

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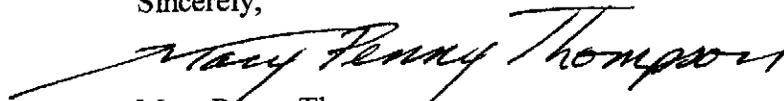
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Review of the Alligator River project will also be affected by the General Assembly's recent enactment of legislation placing a moratorium on landfill permitting. Under the one-year moratorium, the Department "shall not consider a permit application nor issue a permit for a new landfill for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste . . ." N.C. Sess. Law 2006-244 § 2. Because of the moratorium, the Department must suspend consideration of permits required for the Alligator River facility until after August 1, 2007.

Although the Department cannot consider a permit application at this point, Alligator River may undertake any study that does not require Departmental review, comment or approval. Please be advised that your client would be undertaking any study related to this project at its own risk since the moratorium's required legislative study may lead to changes in statutes and rules applicable to landfills and their appurtenances.

I trust this letter answers your questions about clearing and grading. Thank you for your inquiry.

Sincerely,



Mary Penny Thompson
General Counsel

cc: William G. Ross, Jr., Secretary, DENR
Robin W. Smith, Assistant Secretary, DENR
Dexter Matthews, Division of Waste Management Director, DENR
Kathleen Waylett, Attorney General's Office
Nancy Scott, Attorney General's Office