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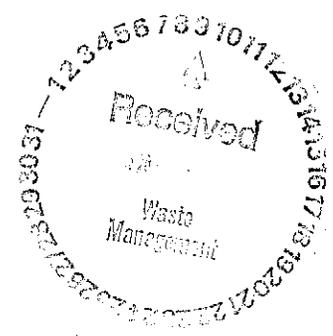
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June 6, 2006

Via e-mail and U.S. Mail

Mary Penny Thompson, Esq.
General Counsel
North Carolina Department of Environment and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601

Mr. Dexter Matthews
North Carolina Department of Environment and Natural Resources
Division of Waste Management
1636 Mail Service Center
Raleigh, NC 27699-1646



Re: Alligator River Recycling – Floodplain Modification

Dear Mary Penny and Dexter:

As you are aware, Alligator River Recycling, LLC (ARR), is seeking to build a material treatment and processing (T&P) facility and associated construction and demolition debris (C&D) landfill in Hyde County, North Carolina (the Facility). After considering several alternatives, ARR selected a site where a significant portion of the Facility would be located in what is currently designated a Special Flood Hazard Area (SFHA or 100-year floodplain).¹ Both state and local law prohibit the location of the landfill portion of the Facility in the floodplain unless a variance is granted pursuant to the local ordinance. ARR therefore sought and received a variance from Hyde County to construct the Facility in the floodplain. However, the Hyde County Commissioners' decision was challenged by a local landowner (who, by the way, owns property *across* the Intracoastal Waterway that would not be affected by any floodplain-related issues on the facility site (the Site), but who opposes the project for other reasons). ARR has recently learned that the presiding judge plans to rule against the County and invalidate the variance.

¹ There are good reasons, including good environmental reasons, for the selection of the preferred site, which are discussed in the Environmental Assessment for the project.

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Rather than pursuing a variance further, which may not be possible to obtain, ARR and the current owner of the Site seek to avail themselves of well established federal procedures for modifying sites and redefining floodplain boundaries.² Specifically, ARR proposes to raise portions of the ground surface at the Site above the flood elevation and have the site reclassified pursuant to regulations of the Federal Emergency Management Agency (FEMA).³ Indeed, ARR has already received a Conditional Letter of Map Revision Based on Fill (CLOMR-F) through which FEMA has determined if ARR fills portions of the Site currently located in the floodplain, then those portions of the Site will no longer be located in the 100-year floodplain and FEMA will revise its floodplain maps accordingly.⁴

This proposed activity will obviously require the clearing and grading of land. That raises the question of whether such activity would violate the Commission on Health Services' (CHS) prohibition on an applicant clearing or grading land for a solid waste management facility prior to having obtained a permit for the construction of such facility from the Division of Waste Management (DWM). *See* 15A NCAC 13B .0201(b)(1). Since a permit to construct the Facility in the floodplain cannot be issued, it is unclear how ARR should proceed in order to perform the clearing and grading activities required to utilize FEMA's reclassification process. We request your assistance in resolving this issue.

Applicable Federal Regulations

FEMA, in consultation with the community and based on review of topographic surveys and hydrologic and hydraulic analyses, identifies and maps flood hazard areas for each community that participates in the National Flood Insurance Program (NFIP). These maps are published as Flood Insurance Rate Maps (FIRM). An area of land on a FIRM will be designated as a SFHA if there is at least 1% chance of flooding in any given year, which is commonly called the 100-year floodplain. 44 CFR § 59.1. FIRMs are revised regularly to denote changes in the condition of the land that effectively remove the land or parts of it from the SFHA. *See* 42 U.S.C. § 4101 (a)(1), (a)(2). One circumstance in which FEMA will revise a flood map is where a property owner elevates some or all of its property with earthen "fill" so that it is no longer below the base flood elevation. The applicable FEMA regulations acknowledge that many areas of special flood hazard (excluding V zones and floodways) may be elevated with earthen fill above the base flood elevation. 44 CFR § 65.5(a). In such cases, FEMA will revise the floodplain map by issuing a Letter of Map Revision Based on Fill (LOMR-F). *See* 44 CFR § 72.2.

² For simplicity, we refer to ARR as the party that would be acting to modify the Site to remove it from the floodplain, but as discussed in more detail below, this might be done by ARR or by the current landowner.

³ The amount of fill needed to elevate the site to a level above the flood elevation is minimal, and in all cases is less than will be necessary to create the required four-foot separation between the waste and water table.

⁴ A copy of the CLOMR-F is enclosed.

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FEMA applies the following standard in making a decision on a LOMR-F request:

FEMA's determination to exclude a legally defined parcel of land or a structure from the area of special flood hazard will be based upon a comparison of the base flood elevations to the lowest ground elevation of the parcel or the lowest adjacent grade to the structure. If the lowest ground elevation of the entire legally defined parcel of land or the lowest adjacent grade to the structure are at or above the elevations of the base flood, FEMA will exclude the parcel and/or structure from the area of special flood hazard.

44 C.F.R. § 65.5(a)(3). There are no limitations in the FEMA regulations on the use of property that is removed from the floodplain via the LOMR-F process. On the contrary, under federal law such property is treated no differently than property that was never in the floodplain to begin with.

Before it fills a SFHA, a developer may ask FEMA to issue a CLOMR-F, which is FEMA's comment on a proposed project that would, upon construction, result in the modification of the SFHA through the placement of fill outside the existing regulatory floodway. 44 CFR § 72.2. This is an optional procedure. A CLOMR-F does not revise an effective NFIP map; it merely indicates whether, based on the standards applied to requests for LOMR-Fs, the proposed project would take the relevant area outside the flood hazard area as currently mapped. Once the fill has been placed, the developer may seek a LOMR-F from FEMA, initiating an official map revision.

Applicable State and Local Law and Regulations

The North Carolina General Assembly has authorized local governments to regulate uses of property located in flood hazard areas. N.C.G.S. § 143-215.54. The law requires local governments to apply certain minimum standards in regulating the floodplain including a prohibition on the location of new solid waste disposal facilities within the floodplain. Pursuant to federal and state law, local governments may grant variances from the prohibition of solid waste disposal facilities within the floodplain if certain criteria are satisfied. Thus, DWM cannot issue a permit to construct a solid waste facility that is located in the floodplain unless the local government has granted the owner or operator a variance. The General Assembly has not, however, addressed the issue of modification of property to remove it from the floodplain, which is a matter of exclusive federal control.

As noted above, an applicant may not clear or grade land or commence construction for a solid waste management facility until a construction permit for such a facility has been issued by DWM. 15A NCAC 13B .0201(b)(1). This rule, taken together with the statutory prohibition on the issuance of permits for the construction of solid waste disposal facilities in floodplains,

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creates a potential Catch-22 for a party who wishes to avail itself of the federally established procedure for modifying property to remove it from the delineated floodplain. If the provisions are read to require a solid waste permit before fill can be placed at a proposed solid waste site pursuant to the FEMA process, but foreclose the possibility of the issuance of such a permit, the purpose and intent of the federal program would be frustrated.

Resolution of Conflicting Federal and State/Local Law

ARR seeks your assistance in avoiding the Catch-22 described above. We believe that state law and regulations must be interpreted to allow a party in this situation to avail itself of the LOMR-F process or the state program would be found to violate the Supremacy Clause of the United States Constitution.⁵ In addition, we believe, and hope you agree, that the intent of the CHS in adopting the rule in question was not to prohibit the action proposed by ARR, and that it would not be good public policy to do so. We have given considerable thought to various options for resolving this issue and offer the following potential solutions for your consideration.

1. The current landowner pursues the LOMR-F process. 15A NCAC 13B .0201(b)(1) regulates applicants for solid waste permits. We do not believe that DWM has any recourse against the current landowner – who is not an applicant – should he elect to improve his property, even though ARR proposes to build a solid waste management facility on the Site. Thus, one option would be for DWM to defer action on the pending site suitability and construction permit applications until the current landowner has successfully pursued the LOMR-F process. A disadvantage of this alternative and the following one is that the current landowner or ARR would have to incur substantial costs without having the benefit of DWM's evaluation of site suitability apart from the floodplain issue. If this is DWM's preferred option, we would want its written confirmation that it has no objection to this approach.⁶

2. DWM issues a letter authorizing clearing and grading by ARR for the purpose of pursuing the LOMR-F process. We believe it would be legally valid, particularly in light of preemption principles, for DWM to interpret 15A NCAC 13B .0201(b)(1) in a way that avoids a conflict between state and federal rules. That is, the prohibition on clearing and grading in the absence of a permit would be not be read to prohibit an applicant from availing itself of a well established federal process in an area that the federal government has clearly pre-empted. Under

⁵ The Supremacy Clause requires preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Owens v. Pepsi Cola Bottling Company of Hickory, NC Inc.*, 412 N.C. 666, 675, 412 S.E.2d 636,641 (1992) citing *Fidelity Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153 (1982). In these situations, state law is preempted to the extent that it conflicts with federal law. This includes circumstances where state regulations conflict with federal regulations. See, e.g., *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

⁶ A variation to this alternative would be for ARR to withdraw its site suitability and permit applications and for the current landowner to then pursue the LOMR-F. This alternative seems highly inefficient, given that it would require both ARR and DWM to restart the permitting process, and to require an unnecessary sleight of hand.

this approach, a site suitability determination would not be made and a permit to construct the Facility would not issue until the LOMR-F has been obtained, at which point the proposed Facility would be outside of the floodplain and the obstacle to permit issuance would no longer be present.⁷

3. DWM issues approvals only for those activities necessary to obtain the LOMR-F. Under this alternative, DWM would issue ARR a site suitability determination with the condition that ARR complete the LOMR-F process and receive approval from DWM that the Site is no longer in the floodplain before construction of the C&D facility begins. DWM would also issue ARR a permit to construct that only authorized those activities necessary to pursue and obtain a LOMR-F, not the full construction of the Facility. This would satisfy the rule requiring a permit applicant to have a permit to commence clearing and grading while allowing ARR to avail itself of the federal LOMR-F process. At the same time, DWM would not have issued a permit for the construction of a solid waste disposal facility in the floodplain (but only for limited pre-construction activities).⁸ ARR would be required to obtain a permit modification in order to construct the C&D disposal facility once the Site was removed from the floodplain via the LOMR-F process.

4. DWM issues a conditional site suitability determination and permit to construct the Facility. Under this alternative, DWM would issue ARR a site suitability determination and permit to construct the Facility with the condition that ARR complete the LOMR-F process and receive approval from DWM that the Site is no longer in the floodplain before construction of the C&D facility begins. This would satisfy the rule requiring a permit applicant to have a permit to commence clearing and grading while allowing ARR to avail itself of the federal LOMR-F process. Actual construction of the C&D facility would not occur until the Site is elevated from the floodplain, thereby complying with state and local law. The T&P permit application would remain unchanged as T&P facilities are allowed in the floodplain.

5. DWM issues a conditional site suitability determination and permit to construct for a modified facility with the first disposal cell outside of the current floodplain. ARR could modify its C&D site suitability and permit applications so that the disposal unit for first five-year permit phase is completely out of the floodplain. In that case, the floodplain issue would be removed from the site suitability determination. A permit to construct that facility could be issued that included authorization to grade, clear and place fill on portions of the Site outside of this disposal unit where future phases of the Facility are planned to be characterized and permitted. ARR could then proceed with the LOMR-F process for these other areas prior to the issuance of a permit to construct future phases of the Facility. In five years, when ARR seeks to

⁷ Alternatively, and preferably from ARR's standpoint, a site suitability determination could be made conditioned on the LOMR-F being issued.

⁸ The initial permit could also authorize construction of the T&P facility, as such facilities are not prohibited in the floodplain.

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renew and modify its C&D permits, the additional portions of the Site would no longer be in the floodplain. Again the T&P permit application would remain unchanged.

We hope that you agree that there are several viable options for resolving this matter and we would certainly welcome any additional ideas you may have. We appreciate the willingness DWM has already expressed to help ARR resolve this issue and hope that you will be able to make resolution of this issue a priority. Please call me as soon as possible to arrange a meeting to discuss this issue further. Thanks very much for your assistance.

With best wishes,

Sincerely yours,

KILPATRICK STOCKTON LLP



Steven J. Levitas

SJL/tnl

Enclosure

cc: Ms Robin Smith
Mr. Norbert Hector
Mr. Dan Moore
Mr. Chris Roof
Mr. Paul Givens

Page 1 of 2

Date: July 1, 2005

Case No.: 05-04-3551C

CLOMR-F



Federal Emergency Management Agency

Washington, D.C. 20472

CONDITIONAL LETTER OF MAP REVISION BASED ON FILL COMMENT DOCUMENT

COMMUNITY AND MAP PANEL INFORMATION

LEGAL PROPERTY DESCRIPTION

COMMUNITY
HYDE COUNTY, NORTH CAROLINA
(Unincorporated Areas)
COMMUNITY NO.: 370133
NUMBER: 3720766800J
AFFECTED MAP PANEL
NAME: NORTH CAROLINA
DATE: 5/15/2003

Tract One, S.B. Rich Tract (Alligator Recycling LLC), as described in the Dead recorded in Book 168, Pages 1012 through 1023, in the Office of the Register of Deeds, Hyde County, North Carolina. The portion of property to be removed from the SFHA is more particularly described by the following metes and bounds:

BEGINNING at the northern right-of-way of the Army Corps of Engineers, Intracoastal Waterway; thence N44°54'53"W, 4,234.35 feet; thence N42°55'04"E, 5,431.16 feet; thence S46°18'27"E, 2,347.83 feet;

FLOODING SOURCE: PUNGO RIVER; ALLIGATOR RIVER CANAL

APPROXIMATE LATITUDE & LONGITUDE OF PROPERTY: 35.571, -76.409
SOURCE OF LAT & LONG: PRECISION MAPPING STREETS 4.0 **DATUM:** NAD 83

COMMENT TABLE REGARDING THE PROPOSED PROPERTY (PLEASE NOTE THAT THIS IS NOT A FINAL DETERMINATION. A FINAL DETERMINATION WILL BE MADE UPON RECEIPT OF AS-BUILT INFORMATION REGARDING THIS PROPERTY.)

LOT	BLOCK/SECTION	SUBDIVISION	STREET	OUTCOME WHAT WOULD BE REMOVED FROM THE SFHA	FLOOD ZONE	1% ANNUAL CHANGE FLOOD ELEVATION (NAVD 88)	LOWEST ADJACENT GRADE ELEVATION (NAVD 88)	LOWEST LOT ELEVATION (NAVD 88)
Tract One	—	Alligator River Recycling, LLC	New Lake Road	Portion of Property	X (shaded)	7.0 feet	—	7.1 feet

Special Flood Hazard Area (SFHA) - The SFHA is an area that would be inundated by the flood having a 1-percent chance of being equaled or exceeded in any given year (base flood).

ADDITIONAL CONSIDERATIONS (Please refer to the appropriate section on Attachment 1 for the additional considerations listed below.)

LEGAL PROPERTY DESCRIPTION
PORTIONS REMAIN IN THE SFHA
CONDITIONAL LOMR-F DETERMINATION

This document provides the Federal Emergency Management Agency's comment regarding a request for a Conditional Letter of Map Revision based on Fill for the property described above. Using the information submitted and the effective National Flood Insurance Program (NFIP) map, we have determined that the proposed described portion(s) of the property(ies) would not be located in the SFHA, an area inundated by the flood having a 1-percent chance of being equaled or exceeded in any given year (base flood) if built as proposed. Our final determination will be made upon receipt of a copy of this document, as-built elevations, and a completed Community Acknowledgement form. Proper completion of this form certifies the subject property is reasonably safe from flooding in accordance with Part 65.5(a)(4) of our regulations. Further guidance on determining if the subject property is reasonably safe from flooding may be found in FEMA Technical Bulletin 10-01. A copy of this bulletin can be obtained by calling the FEMA Map Assistance Center toll free at (877) 336-2627 (877-FEMA MAP) or from our web site at <http://www.fema.gov/mi/tb1001.pdf>. This document is not a final determination; it only provides our comment on the proposed project in relation to the SFHA shown on the effective NFIP map.

This comment document is based on the flood data presently available. The enclosed documents provide additional information regarding this request. If you have any questions about this document, please contact the FEMA Map Assistance Center toll free at (877) 336-2627 (877-FEMA MAP) or by letter addressed to the Federal Emergency Management Agency, 3601 Eisenhower Avenue, Suite 130, Alexandria, VA 22304-6439.

Doug Bellomo, P.E., Chief
Hazard Identification Section, Mitigation Division
Emergency Preparedness and Response Directorate Version 1.3.3

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Federal Emergency Management Agency Washington, D.C. 20472

ADDITIONAL INFORMATION REGARDING DENIALS OF REQUESTS FOR CONDITIONAL LETTERS OF MAP AMENDMENT AND CONDITIONAL LETTERS OF MAP REVISION BASED ON FILL

When making determinations on requests for Conditional Letters of Map Amendment (CLOMAs) and Conditional Letters of Map Revision based on the placement of fill (LOMR-Fs) the Federal Emergency Management Agency (FEMA) bases its determination on the flood hazard information available at the time of the determination. Requesters should be aware that flood conditions may change or new information may be generated that would supersede FEMA's determination. In such cases, the community will be informed by letter.

Requesters also should be aware that FEMA's conditional denial of a request to remove a property (parcel of land or structure) from the Special Flood Hazard Area (SFHA) means FEMA has determined the property will continue to be subject to inundation by the flooding having a 1-percent chance of being equaled or exceeded in any given year (base flood). As mentioned earlier, this determination is based on the flood hazard information available at the time. If more detailed property or flood hazard information becomes available, and the requester believes the information will support removing the property from the SFHA, the requester may submit the information to FEMA at any time and request that FEMA reconsider its determination. In areas where base flood elevations (BFEs) shown on the effective National Flood Insurance Program (NFIP) map were used for the original determination, new BFEs cannot be used until they have been proposed and finalized through the community appeal process. The appeal process is described in detail in Part 67 of the NFIP regulations.

If FEMA denies a request for a CLOMA because the elevation of the lowest adjacent grade (the lowest ground touching a structure) would be below the BFE and that elevation is raised to or above the BFE by the placement of fill material, the requester may submit the appropriate supporting data and request a LOMR-F in accordance with Paragraph 65.5(a)(4) of the NFIP regulations. In this circumstance, if both the elevation of the lowest ground touching the structure and the elevation of the lowest floor (including basement/crawl space) are at or above the BFE, FEMA will issue a LOMR-F to remove the structure from the SFHA. If fill material is used to elevate the lowest ground touching the structure and the lowest floor (including basement/crawl space) to or above the BFE, the requester also must submit a completed copy of Form 4, "Community Acknowledgement of Requests Involving Fill," from the MT-1 application/certification forms package that must be used for all LOMR-F requests. The application/certification forms package may be downloaded directly from our website at http://www.fema.gov/mit/nd/HM_mochg.htm, or copies may be obtained by calling our Map Assistance Center, toll free, at 1-877-FEMA MAP (1-877-336-2627).

The NFIP regulations provide a requester with a period of 90 days from the date of a denial letter to submit data and request that FEMA reconsider its determination without repayment of review and processing fees. Data submitted after 90 days, or data which show that a project has been significantly altered in design or scope other than as necessary to respond to findings made in FEMA's original determination, are subject to all submittal/payment procedures.

Effective September 1, 2002, FEMA revised the fee schedule for reviewing and processing requests for conditional and final modifications to published flood information and maps, thereby establishing flat review and processing fees for most types of requests. Effective September 1, 2002, FEMA modified that fee schedule. All new requests will be processed under the current fee schedule.

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Date: July 1, 2005

Case No.: 05-04-3551C

CLOMR-F



Federal Emergency Management Agency
Washington, D.C. 20472

**CONDITIONAL LETTER OF MAP REVISION BASED ON FILL
COMMENT DOCUMENT
ATTACHMENT 1 (ADDITIONAL CONSIDERATIONS)**

LEGAL PROPERTY DESCRIPTION (CONTINUED)

thence S43°32'52"W, 1,386.91 feet; thence S47°21'02"E, 1,000.12 feet; thence S43°32'52"W, 1,120.14 feet; thence S47°21'02"E, 2,930.95 feet; thence S78°14'59"W, 3,675.71 feet to the POINT OF BEGINNING.

PORTIONS OF THE PROPERTY REMAIN IN THE SFHA (This Additional Consideration applies to the preceding 1 Property.)

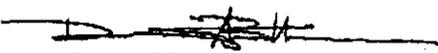
Portions of this property, but not the subject of the Determination/Comment document, may remain in the Special Flood Hazard Area. Therefore, any future construction or substantial improvement on the property remains subject to Federal, State/Commonwealth, and local regulations for floodplain management.

CONDITIONAL LOMR-F DETERMINATION (This Additional Consideration applies to the preceding 1 Property.)

Comments regarding this conditional request are based on the flood data presently available. Our final determination will be made upon receipt of this Comment Document, certified as-built elevations and/or certified as-built survey. Since this request is for a Conditional Letter of Map Revision based on Fill, we will also require the applicable processing fee, and the "Community Acknowledgement" form. Please note that additional items may be required before a final as-built determination is issued.

This letter does not relieve Federal agencies of the need to comply with Executive Order 11988 on Floodplain Management in carrying out their responsibilities and providing Federally undertaken, financed, or assisted construction and improvements, or in their regulating or licensing activities.

This attachment provides additional information regarding this request. If you have any questions about this attachment, please contact the FEMA Map Assistance Center toll free at (877) 338-2627 (877-FEMA MAP) or by letter addressed to the Federal Emergency Management Agency, 3601 Eisenhower Avenue, Suite 130, Alexandria, VA 22304-6439.


Doug Bellomo, P.E., Chief
Hazard Identification Section, Mitigation Division
Emergency Preparedness and Response Directorate

Version 1.3.3

1056349.1CLOMR-F-SL048203551



Federal Emergency Management Agency

Washington, D.C. 20472

July 1, 2005

MR. DON DEVENPORT
COUNTY MANAGER, HYDE COUNTY
P.O. BOX 188
20 OYSTER CREEK ROAD
SWAN QUARTER, NC 27885

CASE NO.: 05-04-3531C
COMMUNITY: HYDE COUNTY, NORTH CAROLINA
(UNINCORPORATED AREAS)
COMMUNITY NO.: 370133

DEAR MR. DEVENPORT:

This is in reference to a request that the Federal Emergency Management Agency (FEMA) determine if the property described in the enclosed document is located within an identified Special Flood Hazard Area, the area that would be inundated by the flood having a 1-percent chance of being equaled or exceeded in any given year (base flood), on the effective National Flood Insurance Program (NFIP) map. Using the information submitted and the effective NFIP map, our determination is shown on the attached Conditional Letter of Map Revision based on Fill (CLOMR-F) Comment Document. This comment document provides additional information regarding the effective NFIP map, the legal description of the property and our comments regarding this proposed project.

Additional documents are enclosed which provide information regarding the subject property and CLOMR-Fs. Please see the List of Enclosures below to determine which documents are enclosed. Other attachments specific to this request may be included as referenced in the Determination/Comment document. If you have any questions about this letter or any of the enclosures, please contact the FEMA Map Assistance Center toll free at (877) 336-2627 (877-FEMA MAP) or by letter addressed to the Federal Emergency Management Agency, 3601 Eisenhower Avenue, Suite 130, Alexandria, VA 22304-6439.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Bellomo", written over a horizontal line.

Doug Bellomo, P.E., Chief
Hazard Identification Section, Mitigation Division
Emergency Preparedness and Response Directorate

LIST OF ENCLOSURES:

CLOMR-F COMMENT DOCUMENT

cc: Mr. Michael W. Robinson PE, PLS