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February 3, 2025

VIA HAND DELIVERY

Village of Fort Edward
ATTN: Board of Trustees
118 Broadway
P.O. Box 345
Fort Edward, NY 12828

**Re: Village of Fort Edward Public Hearing - February 3, 2025
Proposed Local Law 1 of 2025**

Dear Board of Trustees:

We represent Environmental Soil Management of New York, LLC, doing business as ESMI, a Clean Earth Company (“ESMI” or “Clean Earth”). We are in receipt of the notice of public hearing, dated January 6, 2025, for a meeting of the Village of Fort Edward Board of Trustees (the “Board”), on February 3, 2025, at 6:00 p.m., regarding the proposed adoption of Local Law 1 of 2025, titled *A Local Law Enacting a Moratorium on the Treatment, Treatment Testing, Disposal, Storage or Deposit of Media Contaminated With Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) in the Village of Fort Edward* (the “Proposed Local Law”). We write to request that the Village of Fort Edward (the “Village”) delay acting on the Proposed Local Law until Clean Earth, the Village, and other stakeholders have had an opportunity to meaningfully discuss and address the impacts of the Proposed Local Law and the constitutional concerns raised by its current wording.

As you may know, Clean Earth is a specialty waste management company that has operated a soil treatment facility in Fort Edward, New York since 1995. The facility uses a process called thermal desorption to clean and remediate contaminated soil, which involves tumbling soil in a rotating cylinder where heat separates contaminants from the soil. The contaminants are then destroyed in a thermal oxidizer, and the cleaned soil is reused in residential, commercial, and industrial applications. Clean Earth currently treats soil contaminated with fuels, lubricants, oils, and PCBs (up to 45 parts per million), but does not handle hazardous waste, liquids, biosolids, or nuclear materials. The facility maintains strict protocols for soil testing, handling, treatment, and storage. All facility operations, including air emissions, are comprehensively and stringently regulated by the New York State Department of Environmental Conservation (“DEC”) pursuant to the New York State Environmental Law (“ECL”) and its implementing regulations. In the approximately 29-year operating history in the Village, Clean Earth has had a stellar compliance record, which was provided in full for review in its Public Participation Plan.

Clean Earth is now seeking a Research, Development & Demonstration (“RD&D”) permit from the DEC to conduct a short-term project treating PFAS-contaminated soil. This important

research will answer questions to help the DEC prepare for compliance with upcoming federal regulations and allow the DEC to develop its own state-specific PFAS policies, guidance, and regulations. Importantly, this research will help ensure that PFAS contamination in New York communities can be cleaned up safely. The project would involve treating up to 5,000 tons of PFAS-contaminated soil over approximately two weeks to validate whether the facility's thermal desorption process can effectively clean PFAS from the soil. This project builds on previous U.S. Environmental Protection Agency and Department of Defense research showing thermal treatment can work for PFAS remediation, and Clean Earth has successfully completed similar small-scale PFAS treatment tests at this facility in the past under DEC approval. The proposed project would include extensive monitoring, air emissions testing, and laboratory analysis of the soil before and after treatment.

Currently, relative to the RD&D permit, Clean Earth is in the public participation phase of its permit application process with DEC. Clean Earth has completed the initial steps of submitting a permit application and incorporating DEC's review comments. The project is now in the public engagement stage, which included a public information meeting held on December 4, 2024, followed by written responses to public comments issued on January 9, 2025 (note, Clean Earth is in the process of finalizing these responses, with Part 3 expected for publication within the next 2 weeks). The next step in the permit process is for the DEC to make a completeness determination. Upon that positive determination, the DEC would issue a public notice for written comments, address those comments, and then make a final decision on whether to issue an RD&D permit to Clean Earth. This structured application process is a lengthy one designed to ensure thorough regulatory review while providing opportunities for community input before final determinations are made. Notably, the DEC has not yet even made an application completeness determination; and, assuming a positive completeness determination, it will take many months to complete the RD&D permitting process briefly described above.

As you can see, Clean Earth is many months away from engaging in any activities targeted by the Proposed Local Law. During this period of time, there will be many opportunities for stakeholders to make comments and engage with Clean Earth and the DEC concerning the pending RD&D permit application. Clean Earth is obligated to respond to any comments received, and the DEC considers all such feedback when deciding whether to issue an RD&D permit. This, in our view, provides ample opportunity for community engagement and is the proper method to address any of the Village's concerns with Clean Earth's permit application. Indeed, through the RD&D permitting process, the Village also will be afforded complete technical information regarding the project. Clean Energy respectfully maintains that any legislative decision-making by the Village will benefit from that full factual record. *See* ECL 19-0103 (declaration of policy, stating that regulation of air emissions "should be clearly premised upon scientific knowledge of causes as well as of effects").

Accordingly, our request to the Board is simply to delay acting on the Proposed Local Law until the DEC permit application process is complete and a determination has been made as to whether (or not) a permit will be issued to Clean Earth. Clean Earth respectfully maintains that it is not in the Village's best interest to pass a law prematurely, without the benefit of information necessary for reasonable and informed decision-making, particularly where (as here) the concerns asserted by the Village are not yet ripe. As outlined below, hasty passage of the Proposed Local

Law would place unnecessary burdens on the community and Village (including necessary services and facilities), without any corresponding public health or safety benefit. It would also have the unintended consequence of infringing upon the authority/jurisdiction of the State of New York. For these and other reasons, if the Village proceeds with the adoption of the Proposed Local Law, we believe that action would be subject to challenge on numerous grounds and would impede important progress in the effort to safely clean PFAS in New York State.

First, the DEC has exclusive domain over, and is responsible for, the oversight and compliance of RD&D permits relating to solid waste management research facilities like the one operated by Clean Earth in Fort Edward. *See* 6 NYCRR § 360.18. This includes, among other stringent requirements, ongoing monitoring and inspections by the DEC. *See* 6 NYCRR § 360.16. Despite this, the Proposed Local Law, if enacted, would infringe upon the rights and powers expressly reserved to the DEC – i.e., by declaring it unlawful for anyone to engage in activities governed by RD&D regulations within the Village, thus usurping the DEC’s jurisdiction to make these determinations itself. *Compare* Proposed Local Law, with 6 NYCRR § 360.18. Additionally, it cannot escape notice that if any locality could unilaterally prohibit activities that are subject to the DEC’s RD&D permitting process, such would toll the death knell for research and development projects statewide. Accordingly, there is a direct conflict between the Proposed Local Law and DEC regulations, as well as a conflict with statewide policy promoting research and development activities to provide innovative solutions for waste management problems. These conflicts render the Proposed Local Law invalid on preemption grounds alone. *See Matter of Chwick v. Mulvey*, 81 A.D.3d 161, 168 (2d Dep’t 2010) (“conflict preemption occurs when a local law prohibits what a state law explicitly allows”); *see also Lansdown Entertainment Corp. v. NY City Dept. of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989) (“a head-on collision between” a local law and state law renders the former preempted). Put simply, local governments cannot usurp the State’s power and regulate in a manner inconsistent with State law.

Second, the Proposed Local Law is unconstitutional and facially invalid due to its impairment of the powers of other municipal corporations. While local governments have the power to adopt certain local laws under Article IX of the New York State Constitution (the “Constitution”), they have no power to adopt laws that impair the powers of any other local government. *See* N.Y. Const. Art. IX, § 2(d). This prohibition also applies to impairment of powers of any public corporation. *See* N.Y. Mun. Home Rule Law § 10(5). The term “public corporation” includes “municipal corporations,” like counties and school districts. *See* Gen. Const. Law §§ 66(1)-(2). The Proposed Local Law, as written, blanketly prohibits “any actions consisting of treatment, treatment testing, disposal, storage or deposit of PFAS contaminated media or materials at any property within the Village of Fort Edward, for a nine (9) month period” *See* Proposed Local Law § 4. The foregoing language applies to and would impair the powers of, among other public and municipal corporations, the Washington County Sewer Plant and the Fort Edward School District, both located within the Village and engaged in the “disposal [and/or] storage” of PFAS.¹

¹ It is well-documented that “[n]early all municipal wastewater treatment plants have measurable levels of PFAS in their discharge. The vast majority of that PFAS comes from upstream sources — such as industries, household products, and human waste — and flows through the facilities.” *See* [https://ecology.wa.gov/waste-toxics/reducing-toxic-chemicals/addressing-priority-toxic-chemicals/pfas/wastewater#:~:text=Nearly%20all%20municipal%20wastewater%20treatment,technologies%20do%](https://ecology.wa.gov/waste-toxics/reducing-toxic-chemicals/addressing-priority-toxic-chemicals/pfas/wastewater#:~:text=Nearly%20all%20municipal%20wastewater%20treatment,technologies%20do%20)

Third, the Proposed Local Law is unconstitutionally vague and overbroad. To avoid invalidation for vagueness, a statute must be “sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,” and provide “clear standards for enforcement” *People v. Stuart*, 100 N.Y.2d 412, 420 (2003) (internal quotations omitted). “[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Sullivan v. NY State Joint Commn. on Pub. Ethics*, 207 A.D.3d 117, 127-28 (3d Dep’t 2022) (quoting *United States v. Stevens*, 559 US 460, 473 (2010)). The Proposed Local Law fails to adequately inform the average person that typical household activities are prohibited. For example, storage or disposal of non-stick pots, pans, and bakeware; grease-resistant food packaging like microwave popcorn bags and takeout containers; water-resistant paper plates and food wrappers; stain and water-resistant carpets, rugs, upholstery, and furniture; water-resistant clothing and outdoor gear; certain cleaning products; and waterproof electronics cases and accessories (among other things) arguably would be prohibited under the Proposed Local Law. The lack of clarity would enable officials to selectively enforce the Proposed Local Law in an unconstitutional manner. These prohibitions apply to a host of ordinary, common day-to-day activities, making implementation of the Proposed Local Law impossible to police in any consistent or fair manner. The Proposed Local Law, therefore, does not withstand constitutional scrutiny due to its overbreadth and vagueness.

Beyond the legal infirmities of the Proposed Local Law, its far-reaching impact village-wide (to residents, businesses, and municipal departments) should be carefully examined. The Proposed Local Law’s broad prohibition on “treatment, treatment testing, disposal, storage or deposit of PFAS contaminated media or materials” would restrict many ordinary and essential activities, given how ubiquitous PFAS compounds are in products found in almost every home and business. For example, the Proposed Local Law would prevent regular operation of water treatment facilities, as they routinely process water containing PFAS from everyday upstream sources like consumer products. Waste management and recycling services would be disrupted, as many recyclable materials contain PFAS. Street sweeping and maintenance activities would be affected due to PFAS presence in road runoff. Fire departments would face restrictions on the use of common firefighting equipment and materials. Restaurants, food service establishments, and retail businesses would be unable to handle many types of food and product packaging. Manufacturing facilities would be unable to process industrial wastewater. Routine waste disposal by residents would be impacted due to PFAS in common household products like Teflon-coated pans, water-resistant materials, and certain cleaning supplies. All of the foregoing activities, which occur thousands of times each day in the Village, would violate the Proposed Local Law if it were enacted. The underlying issue is that PFAS are ubiquitous in the everyday products that people use and there is simply no “quick fix” to eliminate the existence of PFAS if normal day-to-day functions and services are to continue. Thus, Clean Earth encourages the Board to reconsider enacting the Proposed Local Law to fully consider the consequences and the harm it would cause to each and every resident and business in the Village. Clean Earth respectfully maintains that slowing down the local legislative process would avoid the legal issues presented by the current

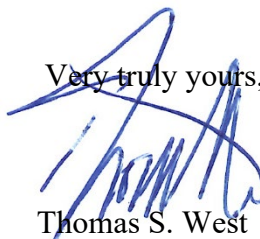
[20not%20destroy%20PFAS](https://ehp.niehs.nih.gov/doi/10.1289/EHP14653). Moreover, “[s]chools historically have used PFAS-laden products, from floor waxes to toilet paper, which can be introduced to the environment via their wastewater systems” See <https://ehp.niehs.nih.gov/doi/10.1289/EHP14653>.

proposal, allow for further information gathering and discourse, and facilitate sound decision-making, all without any adverse consequences to the Village's citizenry.

Clean Earth provides this response in an effort to work cooperatively with the Village to address and resolve its concerns regarding the pending RD&D permit application for the project. Please be advised, however, that this response and any subsequent communications or actions by or on behalf of Clean Earth are made with full reservation of rights and remedies. Nothing contained herein shall be construed as an admission of any assertions, a waiver of any rights or defenses, or an acknowledgment of any liability. Clean Earth expressly reserves all claims, defenses, rights, and remedies available under the Constitution and applicable law.

We believe that Clean Earth and the Village share the same goals: create a cleaner world by removing contaminants, such as PFAS, from the environment. Thank you for your time and attention to this matter. Should you have any questions, please contact our office at (518) 641-0500.

Very truly yours,



Thomas S. West

TSW/mwr

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