NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Applications for Permits pursuant to Articles 17, 24, and 27 of the Environmental Conservation Law (ECL); Parts 373 (Hazardous Waste Management Facilities), 663 (Freshwater Wetlands Permit Requirements), 750 (State Pollutant Discharge Elimination System [SPDES] Permits) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR); Section 401 of the federal Clean Water Act (CWA); and 6 NYCRR 608.9 (Water Quality Certifications),

by

CWM Chemical Services, LLC,

Applicant (RE: Residuals Management Unit – Two [RMU-2]).

DEC Permit Application Nos.: 9-2934-00022/00225
9-2934-00022/00231
9-2934-00022/00232
9-2934-0022/00249

NEW YORK STATE FACILITY SITING BOARD

In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR Part 361 (Siting of Industrial Hazardous Waste Facilities)

by

CWM Chemical Services, LLC,

Applicant (RE: Residuals Management Unit – Two [RMU-2]).

CWM's REPLY TO ISSUES RULING APPEALS BY RRG, LEWISTON-PORTER SCHOOL DISTRICT, THE NIAGARA COUNTY FARM BUREAU, NIAGARA COUNTY, THE TOWN AND VILLAGE OF LEWISTON, THE VILLAGE OF YOUNGSTOWN, WITRYOL, AND THE DEPARTMENT STAFF

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Preliminary Statement

There are four (4) separate administrative appeals from the December 22, 2015 RMU-2 Issues Ruling ("Ruling"). Appeals were filed by:

(1) RRG, the Lewiston-Porter School District, and the Niagara County Farm Bureau (collectively "RRG");

(2) Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (collectively the "Municipalities");

(3) Ms. Witryol ("Witryol"); and

(4) The Department Staff ("Staff").

CWM Chemical Services, LLC ("CWM") submits this combined reply to those appeals. Where the same issues ruling is appealed by multiple parties, a single combined response is provided. Otherwise, each Party's appeal is addressed separately. Where an issue ruling relates to both permit requirements and siting criteria, no attempt was made to address the issue separately.

I. The Standards For An Adjudicable Issue

The standards for an adjudicable issue have been well established by a number of Department administrative decisions. An issue is adjudicable if it is raised by a potential party, and it is both substantive and significant. 6 NYCRR § 624.4(c)(1)(iii). An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would inquire further. In determining whether such a showing has been made, the ALJ must consider the proposed issue in light of the permit application and related documents, the draft permits, the content of any petitions filed for party status, the record of the Issues Conference, and any subsequent written argument authorized by the ALJ. An issue is significant if it has the potential to result in the denial of a

permit, a major modification to the project, or the imposition of significant permit conditions in addition to those contained in the draft permit. § 624.4(c)(2), (3).

Where the Department Staff has reviewed an application and found that the project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of the statute and regulations, the burden of persuasion is on the potential party proposing the issue to demonstrate that the issue is both substantive and significant. § 624.4(c)(4). Department administrative decisions establish that adjudication of issues should occur only where the ALJ has sufficient doubt about an applicant's ability to meet all statutory and regulatory criteria and where, in the ALJ's judgment, there is a reasonable likelihood that adjudication would result in amended permit conditions or project denial.

Where the Department Staff and the applicant agree on the terms and conditions of the permit, the burden on the intervening party is not a superficial one. Conducting an adjudicatory hearing where offers of proof, at best, raise uncertainties or where such a hearing would amount to an academic debate is not the intent of the Department's hearing process. While the intervenor's offer of proof need not be so convincing as to prevail on the merits at the Issues Conference, its offer must amount to more than mere assertions or conclusions. The purpose of adjudication is not to develop or refine information concerning the project, but rather to aid in decision-making.

Judgments about the strength of the offer of proof must be made in the context of the application materials, the analysis by Staff, the draft permits and the Issues Conference record. Offers of proof submitted by a perspective intervenor may be completely rebutted by reference to any of the above, alone or in combination. In such a case, it would be a disservice to the applicant and the public at large to proceed any further with time consuming and costly

litigation. Where Department Staff and the applicant are in agreement over the terms and conditions of the proposed permit, the permit application and the draft permit prepared by Department Staff are *prima facie* evidence that a proposed project will meet all of the relevant statutory and regulatory criteria. *See, e.g., Oneida-Herkimer Solid Waste Management Authority (Ava Landfill)* – Interim Decision, April 2, 2002 and Decisions cited therein.

The Issues Conference is not meant to merely catalogue areas of dispute. Rather, it is intended to make qualitative judgments as to the strength of the offers of proof and related arguments. With respect to the offers of proof, the assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms and conclusory statements are insufficient to raise an adjudicable issue. In areas of Department Staff expertise, its evaluation of the application and supporting documentation is important in determining whether an adjudicable issue has been raised. Where SEQRA issues are being challenged, the question is whether Department Staff identified the relevant areas of environmental concern, took a hard look, and made a reasoned elaboration of the basis for its determination. If the Department's conclusion is "reasonable and supported by the record" it will be upheld. SEQRA does not require the Department to use the adjudacatory forum to resolve or otherwise address comments on the DEIS where substantive and significant issues are not raised. *Matter of Seneca Meadows, Inc.* (Interim Decision, October 26, 2012).

A participant in an Issues Conference cannot raise new issues after its petition for party status is submitted and the Issues Conference is held, unless it seeks and is granted permission by the ALJ. Otherwise, any new issue is untimely and unauthorized and cannot be considered on appeal. *Id.*

These standards apply also to proposed issues for Siting Board determination.

In this matter, the Department Staff issued draft permits indicating that proposed RMU-2 would meet all of the applicable statutory and regulatory requirements for the requested permits.

Neither RRG, the Municipalities, nor Witryol have challenged the aforesaid standards for an adjudicable issue, which standards were summarized in the Ruling at 26-27.[1]

Applying these standards to the issues rulings identified in the RRG, Municipalities and Witryol appeals, it should be determined that the ALJ properly concluded that those issues did not meet the standard for raising an adjudicable issue.

II. Common Issues Rulings

A. The Record of Compliance Issue

The Ruling determined that CWM's record of compliance is an issue for adjudication. (Ruling at 64-76). The Ruling determined the scope of CWM's record of compliance disclosures. The Ruling further indicated, at 75-76, that testimony on the issue was not anticipated but that the parties would have the opportunity to present arguments concerning CWM's record of compliance. RRG and Witryol appeal that Ruling asserting that it imposed inappropriate limits on the scope of CWM's compliance history to be reviewed by the Siting Board in its consideration of the "history of facility operations" as part of its assessment of RMU-2's consistency with the Siting Plan. The Ruling imposes on CWM expanded record of compliance disclosure requirements as compared to what is specified in the Department's Guidance on the subject, as well as the scope of review adopted in *Waste Management of New York LLC (Towpath Environmental and Recycling Center)* (Interim Decision, May 15, 2000) (the

[1] *See also* the summary contained in the March 4, 2016 appeal brief submitted by Staff at 8-9.

Commissioner determined that WMNY's record of compliance did not constitute an adjudicable issue).[2]

The Ruling requires CWM to provide, in advance of the hearing, two consolidated, revised record of compliance disclosure forms, one listing all fines or civil penalties of $25,000 or more for the period from January 1, 1993 to the present (22 years) for the Model City hazardous waste disposal facility and the other listing the same from January 1, 1995 to the present (20 years) for any Waste Management-owned hazardous waste facilities located in other states. The Ruling indicates that matters beyond that scope, as proposed by RRG, the Municipalities, and Witryol, would not be considered, citing the *Waste Management Towpath* decision as the basis for that determination.

Staff argued that a balanced and realistic review of the Model City facilities record of compliance requires a consideration of the extensive regulatory requirement applicable to the facility, as well as the complexity of its operations. Staff concluded that, on balance, the operations at Model City reflect capable and conscientious performance. Moreover, there are two full-time Department monitors and the permit requirement for self-reporting of violations which provide an enhanced level of oversight and scrutiny. (Ruling at 69).

The Ruling interpreted the 2010 Siting Plan (at 9-4) as indicating that the Siting Board could "consider the history of facility operations" in determining whether a proposed hazardous waste management facility would be consistent with the Siting Plan. The Ruling concluded that CWM's record of compliance was potentially relevant to the pending application for a Siting Certificate. (Ruling at 74). While the Siting Plan suggestion does not describe the scope of such

[2] The Commissioner's decision regarding record of compliance review was affirmed by Supreme Court, Albany County in *Matter of STOP POLLUTING ORLEANS COUNTY, Inc. v. Crotty,* 2004 NY Slip Op. 50568(U) (finding that the Commissioner clearly articulated a rational basis for rejecting the ALJ's recommendation on the fitness issue).

consideration of the facility's operations, the Siting Plan reference is to operation at the location of the proposed **"facility"** seeking the Siting Certificate, not the operations of applicant's affiliates at other locations.[3] There is no basis for expanding the scope of the Siting Board's potential discretionary review of CWM's record of compliance beyond the broad scope specified in the Ruling.

Wityrol's appeal asserts that CWM's Record of Compliance disclosures should include all Waste Management related facilities, both solid and hazardous waste, arguing that the *Towpath* decision did not address the "high managerial agent" issue. *Towpath* squarely addressed that issue: "SPOC has alleged that the compliance history of Applicant's parent company raises an adjudicable issue."[4] In reversing the ALJ's determination that the compliance history presented an adjudicable issue, the Commissioner described the appropriate approach for addressing any applicant's compliance history. The compliance review must be applied on a case-by-case basis. The evaluation is situation specific and requires a careful balancing of facts and policy considerations.

The Commissioner identified two questions as particularly relevant to a fitness determination. The first focusses on the applicant or permittee and whether its actual compliance history warrants permit denial or imposition of special conditions. This review seeks to ensure that the applicant is fit to engage in the permitted activity. "In the case of large publicly held corporations, particularly those with offices, affiliates or related entities across the nation, the

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[3] The Siting Plan states that:

> The Siting Board should consider local impacts of any particular types of facility…the Board may choose to consider the history of facility operations in an area…

Id. at 9-4. Thus, fitness is not a mandatory siting consideration.

[4] In that proceeding, at the ALJ's request, WMI submitted a compliance disclosure identifying 37 incidents, including 5 criminal matters. The ALJ identified the applicant's compliance history as an adjudicable issue.

analysis of an applicant's compliance history should focus initially and chiefly on the applicant's compliance record within New York."

If there is a related entity holding a substantial interest in the applicant, such as a parent corporation, the question is whether that interest amounts to a "substantial influence" over the management of the applicant's site, *i.e.,* the degree of control which the parent exercises over the applicant's operation of the Site in question. Where there is no proof that the applicant's compliance activities are "substantially controlled" by its parent or where it appears that local management is responsible for day-to-day operations, the substantial influence concern diminishes.

Based on those principles, in *Towpath*, the Commissioner concluded that WMNY's record of compliance did not constitute an adjudicable issue. There was no offer of proof that the personnel of WMNY's parent would be substantially involved in the proposed project, or that the compliance history of the applicant's local management is suspect. The Commissioner also noted that the draft permit contained conditions addressing any compliance concern. Those conditions included on-site Department monitors, monthly reporting, and a financial assurance mechanism. The record here is fundamentally the same. There is no genuine proof that any Waste Management affiliates are involved in the day-to-day operations at Model City. The draft permit provides for on-site Department monitors, monthly reporting by the Permittee, including self-reporting requirements, and financial assurance.[5]

The ALJ's Ruling regarding the scope of CWM's required disclosures goes well beyond what is contemplated by established Department administrative precedent. The Ruling properly

[5] Witryol's claim that the $100 million in financial assurance for the Model City facility is not "evergreen" is simply wrong. As required by the regulations, *see e.g.,* 6 NYCRR § 373-2.8(j)(2), the bond form authorizes the Commissioner to call for payment of the bond within 120 days of the Surety's required notice of intent to cancel or not renew.

determined that other alleged "compliance" issues proposed by Wityrol and RRG were not within the scope of consideration contemplated by the law, the Department's policy and the *Towpath* decision. Therefore, the RRG and Witryol appeals regarding the compliance history Ruling should be denied. In reviewing this Ruling, the Siting Board should conclude that CWM's record of compliance does not raise an adjudicable issue.

B. The Hazardous Waste Management Hierarchy Issue

RRG and Witryol contend that the RMU-2 siting certificate application should be denied because RMU-2 would be inconsistent with New York's hazardous waste management hierarchy in ECL 27-0105. RRG's appeal purports to quote ECL 27-0105, which it incorrectly cites as ECL 27-1105. Significantly, RRG's quotation from 27-0105(d) is inaccurate in that it omits the word "except" contained in the statutory text:

> d. Land disposal of industrial hazardous wastes, **except** treated residuals posing no significant threat to the public health or to the environment, should be phased out as it is the least preferable method of industrial hazardous waste management.

(Emphasis added).[6] The Witryol appeal also misquotes the statutory language and ignores the word "except" contending that § 27-0105.d "requires phasing out" of land disposal of treated residuals posing no significant threat to public health or to the environment.

Including "except" in the statutory text makes it clear that the hierarchy provides for continued land disposal of treated residuals. RRG's and Witryol's arguments, based on a mis-reading of 27-0105, fail because they do not reflect what is in the complete statutory text, *i.e.,* the hierarchy fully contemplates the continued land disposal of treated residuals and other wastes that cannot be otherwise managed. Moreover, the federal and state land disposal

[6] The Practice Commentary to § 27-0105 notes that the legislative findings include "the assurance of adequate and sound disposal capacity for wastes that cannot be eliminated or recycled," *i.e.,* treated residuals.

restriction rules ("LDRs") and the draft permit limit land disposal to treated residuals and certain types of remedial wastes not otherwise readily managed.

Witryol further argues that the wastes treated to meet LDRs do not constitute the treated residuals referenced in § 27-0105.d. This argument lacks any merit. Finally, Witryol argues that if hazardous wastes were fully treated they would no longer be classified as hazardous waste subject to regulation. That is simply incorrect. While RCRA characteristic hazardous wastes can be treated to eliminate the characteristic and thereby be declassified, that is not the case with RCRA listed hazardous wastes which are subject to the "derived from rule," which provides that treated listed wastes must continue to be managed as a hazardous waste unless delisted through an EPA administrative petition process.[7] Moreover, without a land disposal facility, there would not be an appropriate method for managing treated residuals. Thus, RMU-2 would advance the § 27-0105.d. goal of phasing out the land disposal of untreated hazardous wastes.

Chapter 9 of the 2010 Siting Plan, at 9-5, indicates that, in implementing ECL 27-0105, the preferred hierarchy is to be used to guide for all hazardous waste policies and decisions. The Plan, at 9-4, also recognizes that:

> Any decision regarding hazardous waste facility siting must not result in the state's delegated hazardous waste management program becoming inconsistent with federal requirements pursuant to 40 CFR 271.4(b), including the requirement that '[a]ny aspect of…the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.' New York's requirements for the siting of any new or expanded hazardous waste facilities in the state must accordingly be read in the context of the federal requirement.

[7] *See* 40 CFR 261.3(c) and (d).

The Ruling concluded that moving up the hazardous waste management hierarchy is not a requirement in § 27-1105(3)(f) and that CWM's burden is to establish consistency with the provisions in § 27-1105(3)(f).

It is true, as RRG contends, that more wastes were land disposed at Model City in the 1990's as compared to the early-1970's. The reasons for that include:

1. The RCRA cradle to grave hazardous waste management program did not go into effect until November 1980; and

2. CERCLA was not enacted until December 1980, and CERCLA resulted in the cleanup of thousands of inactive hazardous wastes sites driving the demand for permitted land disposal capacity for remedial wastes.

For these reasons and the reasons contained in the Ruling at 78-79, RRG and Witryol failed to raise an adjudicable issue regarding RMU-2's consistency with the hazardous waste management hierarchy.

C. <u>The Alleged Danger to Local Populations</u>

The Ruling determined that the 2008 NYSDOH Niagara County cancer study and the proffered testimony of Drs. Hughes and Carpenter did not raise a substantive issue as to whether RMU-2 would endanger residential and contiguous populations. (Ruling at 35-39). RRG and Witryol appealed that determination.

In assessing RRG's reliance on the 2008 cancer study, the Ruling notes that the DOH report does not show a cause and effect relationship between the operation of CWM's Model City Facility and the number of cancer cases identified in the study areas in question. Nor does it conclude that the number of cancer cases in those study areas would increase if CWM were to obtain all approvals for RMU-2. (Ruling at 37).

The Ruling further noted that the report indicates that cancer is a common disease that most often occurs in middle-aged and older people; that most types of cancers have many possible causes, including genetics, lifestyle and occupational factors, as well as environmental exposures; and that little information about these factors was available at the time of the study to evaluate any possible contribution of these factors to the excess cancer cases found in the study areas. Further, the report stated that it is not possible to exclude chance as a factor in the excess cancers. (Ruling at 38).

The Ruling determined that RRG's proposed issue, based on the DOH cancer study, is not substantive because the DOH report does not show a causal link between the CWM facility and the incidents of cancer. Moreover, Dr. Hughes, the proffered expert witness, acknowledges the lack of a causal link. In addition, Dr. Carpenter's proffer, concerning the carcinogenic nature of some of the chemicals disposed of at the site, does not raise a factual dispute that requires adjudication.

While rejecting RRG's proposed issue for adjudication, the Ruling does indicate that, at the conclusion of the adjudicatory hearing, the parties will have the opportunity to offer argument about whether CWM has met its burden of proof with respect to the first required finding set forth in the ECL 27-1105(3)(f) as to whether RMU-2 would endanger residential and contiguous populations. (Ruling at 38-39).[8]

The arguments in Witryol's appeal related to the DOH study were not raised in her Petition. That study is referenced as Appendix C to her Petition under Section "1.2.2 Growth-Reducing Aspects of RMU-2," p. 14. The Petition does not otherwise discuss the DOH Study. Moreover, Witryol's appeal admits that the DOH study "did not evaluate causal effects,"

[8] In 1993, the CWM RMU-1 Siting Board decision determined that RMU-1 would not endanger residential areas and contiguous populations. (Ex. 2 to CWM's Response to the Petitions for Party Status).

that the Study, at most, identifies uncertainties; and that the "Results and Interpretation" section of the Study are not necessarily relevant to the issues raised in her Petition. Those admissions demonstrate that Wityrol's Petition failed to meet the applicable standard for raising an adjudicable issue.

D. The RMU-2 SEMMP Issue

The Municipalities assert, *inter alia*, that the RMU-2 Soil Excavation Monitoring and Management Plan ("SEMMP") is inadequate and that there should be a more thorough radiological characterization of the soils in areas of the Site that will be impacted by construction of the RMU-2 project before any construction of RMU-2 begins. The Witryol appeal also challenged the adequacy of the RMU-2 SEMMP. The ALJ determined that this issue was not substantive because the Municipalities' and Witryol's offers of proof were not sufficient to warrant further inquiry. (Ruling at 137).[9]

Because the Department Staff determined that the application was complete and it issued draft permits, there is *prima facie* evidence that the RMU-2 project meets the applicable statutory and regulatory requirements and that the burden of persuasion is on the Municipalities and Witryol to show that there was good reason to inquire further as to whether RMU-2 would meet all of the applicable requirements related to excavation of the site soil. In making that assessment, the ALJ was required to consider the permit applications and related documents, the draft permits, and the content of the petitions. Judgments about the strength of the Petitioners' offers of proof were to be made in the context of the application materials, Department Staff's

[9] On appeal, the Municipalities also assert that the May 2015 RMU 2 SEMMP would allow CWM to illegally stockpile contaminated soil on Site. The Municipalities do not cite to any part of the Issues Conference record or the Ruling to show that this issue was raised and considered during the Issues Conference. As such, this issue should not be considered, in the first instance, on an interim appeal. Therefore, this issue should be rejected.

analysis, the draft permits, and the Issues Conference record, all of which could be considered as rebutting the offers of proof.

While a substantial part of the Municipalities appeal challenges the accuracy or reliability of the historic radiological surveys and the nature and extent of related remedial actions taken at the Site, there is no dispute that there is a recognized potential for scattered areas of possible residual legacy radioactive contamination in the RMU-2 project footprint. The application documents and draft permit address that potential through the May 2015 SEMMP, the Site Health and Safety Plan, the Fugitive Dust Control Plan, the related site-wide Part 373 permit conditions, and the draft modified Part 373 permit conditions. Thus, the only potential issue raised by the Petitioners is whether the May 2015 SEMMP, approved by both Department Staff and DOH staff, and accepted by CWM, is adequate to address the potential for excavation of residual radiological contamination in the footprint of RMU-2 and related project areas.

The ALJ addressed the legacy radiological contamination and related SEMMP issues at length in the Ruling at 116-137. In addition to initially describing the information contained in the Municipalities' offer of proof, the ALJ described other materials in the Issues Conference record, making, *inter alia*, the following observations.

1. The terms and conditions of the 2013 Site-Wide Part 373 Renewal Permit require CWM to comply with the Department-approved Soil Monitoring and Management Plans in order to control and prevent any migration of legacy chemical and radiological contamination associated with soil excavations or soil disturbance activities anywhere at the Site. Those terms and conditions have been incorporated into the draft permit modification for RMU-2 and the related modifications to the facility. In accordance with the approved Plans, if contamination is detected during excavation or soil disturbance, any wastes generated must be managed and

disposed of in accordance with all applicable federal and state regulations. A project-specific SEMMP is required for projects where the area of soil excavation or disturbance will be greater than 1,000m^2 or the volume of excavated or disturbed soil would exceed 150 cubic meters. (Ruling at 119). Thus, a project-specific SEMMP is required for RMU-2.

2. The Municipalities offered similar comments about legacy contamination during the public comment period for the 2013 Site-Wide Part 373 Renewal Permit. In that proceeding, Department Staff found no substantive and significant issues concerning legacy contamination, and the Municipalities did not seek judicial review of the 2013 Site-Wide Part 373 Renewal Permit. (Ruling at 122).

3. CWM's February 2015 Response to Petitions for Party Status contained, *inter alia*, a response to the Municipalities' petition prepared by AECOM. That response indicated that no difference exists between the *in situ* scanning requirement for the generic small-project SEMMP, and the proposal in the project-specific RMU-2 SEMMP to evaluate any truckloads of soil that exceed the action level. Implementing the scanning protocol outlined in the SEMMP would include application of the Fugitive Dust Control Plan as necessary. (Ruling at 123).

4. The February 2015 Department Staff response to the Municipalities' petition states that the historic radiological investigative surveys and monitoring undertaken at the Site have not shown any significant source of radioactive constituents that could pose an airborne hazard. In addition, Staff notes that CWM routinely samples the groundwater and surface water at the facility for radioactive constituents and that the current monitoring programs would not change if CWM obtains all approvals for proposed RMU-2. (*Id.*).

5. Department Staff noted that MARSSIM is not a prescriptive document. Rather, it contains guidance for designing final status radiological surveys. Department Staff emphasized that the Site had been the subject of several radiological surveys and that the probability of locating large areas of unknown slag on the site is very low. CWM would be required to implement dust suppression measures during the excavation of RMU-2, regardless of the size of the area disturbed. (*Id.*).

6. The Ruling describes in detail the May 2015 RMU-2 project-specific SEMMP which was approved by both Department Staff and the Department of Health. (*See* Ruling at 124-127). The May 25, 2015 RMU-2 SEMMP requires, *inter alia*:

a. For clearing and grubbing activities, the vegetation, brush and stumps will be excavated, placed in trucks, driven to the stockpile area, and placed and graded, if possible, in 6" lifts. Each such lift in the stockpile area will then have a surface scan walkover. Once the excavation area is cleared of vegetation, that area will have a walkover scan before excavation begins.

b. For mass excavation activities, there will be an initial complete walkover survey of the areas not previously scanned during the Sitewide Survey. Once that is completed without any elevated rad readings, excavation will begin.

c. Excavated soil will be placed in haul trucks and then placed in the stockpile in 6" to 9" lifts to be graded by a bulldozer followed by a surface scan walkover for each lift.[10]

d. For excavated soils used for construction, the soil will be placed in 6" to 9" lifts, graded with a dozer, compacted to 6 inches, followed by a surface scan walkover.

[10] Contrary to the Municipalities' comment regarding the use of "portal monitors" to scan truckloads of soil going to the stockpile, the May 2015 revision to the RMU-2 SEMMP provides, instead, for a surface walkover scan for each lift put in the stockpile.

e. Upon completion of the mass excavation to the final subgrade, a final walkover scan will be completed.

f. There are separate, specific procedures for scanning deep and shallow trench excavations to accommodate worker safety issues.

The SEMMP also describes the actions to be taken if elevated readings are found in a lift in the stockpile. Those actions include identification of the area of the excavation where the contaminated soil came from.

Based upon an extensive and detailed review of the Issues Conference record materials, the ALJ made the following determinations:

1. The Model City Facility has been the subject of numerous investigative surveys undertaken by the federal government and by various consultants on behalf of CWM. The investigative surveys and their results are described in the DEIS and in the attachments to the Municipalities' petition. (Ruling at 133).

2. While Department Staff and CWM did not dispute the Municipalities' contention that the distance between the survey instrument and the surface to be surveyed, among other factors, may impact the results of the survey, the lack of compliance with the recommendations in MARSSIM does not render the results of those surveys unreliable. The ALJ concluded that differing expert opinions about conducting investigative surveys consistent with the guidance outlined in MARSSIM is not an issue for adjudication. MARSSIM is not a rule or regulation. It offers guidance. Thus, the ALJ concluded that the proposed issue regarding compliance with MARSSIM was not substantive. (Ruling at 134).

3. In addressing the radiological questions posed by the Municipalities, the ALJ considered whether the review required pursuant to SEQRA and its implementing

regulations was sufficient with respect to this topic. The ALJ concluded that it was because of the various surveys that had been conducted historically and because the 1972 and 1974 DOH orders remain in effect, requiring DOH to approve all soil displacements or excavations. The ALJ further noted that DOH had determined that industrial and commercial development at the site, including RMU-2 and the related modifications, may be undertaken in a manner consistent with the DOH orders. Thus, the ALJ concluded that CWM should not be required to undertake any further radiological investigative survey in the manner proposed in the Municipalities' petition. (Ruling at 134-135).

4. The ALJ further concluded that the Municipalities' offer of proof with respect to the revised May 2015 RMU-2 project-specific SEMMP was not sufficient to lead to the need for further inquiry. The ALJ found that the offer of proof had been rebutted by the record of the Issues Conference, which included, among other things, a review of the terms and conditions of the revised May 2015 RMU-2 project-specific SEMMP, and the acceptance of that SEMMP by Department Staff as well as DOH Staff. Thus, the ALJ concluded that the proposed issue was not substantive. (Ruling at 137).

The ALJ's determination that the Municipalities' and Witryol failed to meet their burden of persuasion in establishing a substantive issue requiring further inquiry is fully supported by the Issues Conference record and by the analysis contained in the Ruling. A hearing on the proposed issue would amount to nothing more than an academic debate. The ALJ's determinations should be affirmed.

While the Municipalities' belated attempt to assert an illegal storage issue should be rejected as untimely, it should also be rejected as without merit. The RMU-2 project-specific SEMMP and the draft permit modification require that any storage of waste materials conform to

all applicable federal and state regulations. The SEMMP calls for all radiological wastes to be containerized. If the soil is rad waste only with no chemical contamination, storage up to two (2) years without a license is typically permitted. If chemical contamination is found, the LDRs limit storage to one (1) year. If the soil contains both rad waste and chemical waste, the one (1) year limit would apply.

III. RRG's Appeal

The Ruling concluded, *inter alia*, as follows:

a. In light of the undisputed student population decline statistics for Western New York, the undisputed truck route, and the RRG parties' failure to make any offer of proof to substantiate their assertion regarding the cause for enrollment decline, there is no substantive issue requiring adjudication (Ruling at 88-89); and

b. In light of the Niagara County Farm Bureau's failure to submit an offer of proof to show that PCBs and/or heavy metals from the CWM facility have contaminated local agriculture lands and in light of the contents of Exhibit 12 in CWM's February 2015 Response to the Petitions, there is no substantive issue for adjudication (Ruling at 89-90).

A. The Decline in Student Enrollment

The sole basis offered for RRG's appeal with regard to the decline in student enrollment is that RRG should not have the burden of persuasion with regard to the issues that it seeks to raise. There is no legal support or precedent for that argument, and RRG cites none. RRG and the School District admit the similar statistics regarding student population declines across most of the Western New York school districts. This proposed issue is not substantive and was properly rejected.

B. The Alleged Impact to Farm Products

The Niagara Farm Bureau also bases its appeal on the argument that it should not have the burden of persuasion with regard to alleged potential contamination of agriculture lands. The Ruling properly rejected that issue.

RRG's Replacement Appeal asserts that the Farm Bureau's offer of proof raised a second proposed issue for adjudication related to the impacts on a local farmer due to floods in Four Mile Creek and dust from clay truck traffic on Balmer Road. The Ruling did not address this alleged issue which RRG contends is contained in its petition at 48-50. The "offer" from two local farmers is described in RRG's Petition at 50-51, but that offer is specifically tied to the proposed issue regarding the alleged negative impact on the reputation of the farmers' food products – an issue identified for adjuduciation in the Ruling at 90. The "other" Farm Bureau issue was not separately addressed in the Ruling because it was not raised in RRG's petition. Moreover, the offer did not specify the nature and extent of any alleged impacts.

IV. Witryol Appeal

The Ruling, at 152, states that appeals should address the ALJ's rulings directly rather than restating a party's appeal contentions; that new materials included in the appeal will not be considered; and that parties must reference the transcript and the participants' submissions identified throughout the Ruling.

Witryol's March 9, 2016 appeal transmittal states that copies of her appeals are enclosed, and she then lists eight "General Topic of Appeal." Witryol's listed appeal topics appear to relate to the following Rulings:

1. That CWM should not be required to redo its traffic and noise studies.

2. That the municipal/economic impact analysis should not include the public revenue/expense items proposed by Witryol's petition.

3. That CWM's compliance history review should not include all Waste Management affiliates, including solid waste disposal facilities.[11]

4. That the Department's public participation procedures met the statutory requirements.

5. That the NYSDOH 2008 Niagara County cancer study does not raise a substantive issue regarding endangerment to residential areas and contiguous populations.[12]

6. That the proximity of the CWM facility to the NFSS site does not raise a substantive issue.

7. That the asserted surface and groundwater, air, and endangered species impacts did not raise a substantive issue.

8. That the preferred hazardous waste management hierarchy does not prohibit siting RMU-2.[13]

This appeal's shotgun style and fragmented method of presentation makes it difficult to clearly identify whether other specific Rulings are being appealed. In a number of instances, there is no citation to any specific evidentiary proffer in the record as the basis for asserting an such issue is both substantive and significant. The appeal fails to recognize that petitioner has the burden of persuasion to establish that an issue is both substantive and significant and that simply asserting that a reasonable person would accept any factual assertion as substantive does not necessarily make it so. Moreover, the appeal contains arguments not included in her petition. There are only limited references to the Issues Conference transcript and/or the participants' submissions. In several instances, it appears that petitioner is attempting to rely on materials that are not included in the record.

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[11] *See* Compliance History addressed *supra*.
[12] *See* Alleged Danger to Local Populations addressed *supra.*
[13] *See* Hazardous Waste Management Hierarchy addressed *supra*.

A. The Traffic Studies Ruling

The traffic studies and related noise issues are addressed in the Ruling at 39-46. The siting criteria at issue specifically relate to the transport route "to be used by ***site-bound*** motor vehicles to deliver wastes to the site." § 361.7(b)(2)(i) (emphasis added). "The paramount concern is the extent to which ***an accident occurring in transit will result in exposure and injury to populations along the route***." *Id.* (Emphasis added). In addition, the Board is to evaluate the risk associated "with the transportation of hazardous wastes ***to the proposed site***." § 361.7(b)(3)(i) (emphasis added). Accident risk is function of probability of an accident and the consequences of an accident should one occur. *Id.* Considerations include mode of transport, length of transport route, accident rate on the transport route, structures near the route, transport restrictions (*e.g.,* intersections), and the nature and volume of waste being transported. § 361.7(b)(3)(ii)(a)-(f).[14]

The Ruling, at 39-44, describes in detail the traffic studies included in the RMU-2 application documents, as well as the criticisms contained in Wityrol's petition and expert proffer. The noise studies and related Wityrol criticisms and proffer are described in the Ruling at 44-45. The Department Staff took the position that the application documents were generally sufficient to address the siting criteria noted *supra* and for SEQRA review. (Ruling at 42-43).

The ALJ, at 45, determined that the Witryol petition did not raise a substantive issue regarding CWM's traffic studies because:

(1) The Witryol petition and Ms. Bodewes, the proffered expert, did not explain why the procedures outlined in the NYS DOT Highway Design Manual should be relied

[14] The appeal cites § 617.7(c)(1)(i) for the proposition that SEQRA requires an evaluation of all project-related traffic. However, § 617.7(c) is a list of the criteria to be used by the lead agency for determining the significance of a proposed action, not the content of a DEIS, which is addressed in § 617.9(b)(5). Moreover SEQRA issues can be addressed in the DEIS/FEIS process.

upon to require a redo of the traffic studies presented by CWM. The appeal does not provide any such explanation.

(2) The data related to the number of truck trips, levels of service at intersections along the designated route, and accident reports associated with RMU-1 are either referenced or contained in the DEIS and application materials. The RMU-1 data has been collected since operations began in 1993 and represents a substantial historical record that the Siting Board can rely upon to make the required findings and siting criteria assessments. The appeal does not document why that conclusion is not supported by the record.

(3) The DEIS and application documents state that the level of operations at the facility will not increase if RMU-2 is approved. Therefore, no further inquiry on this issue is required. (Ruling at 45). Witryol's arguments to the contrary have no merit.

The Wityrol appeal criticizes various aspects of the CAC Agreement related to the designated transport route, but it fails to include any record references to support those assertions. The balance of Witryol's arguments are either a rehash of the arguments in her petition or an attempt to rely on new matter not included in the Issues Conference record.

The ALJ properly determined that Wityrol's petition failed to raise a substantive issue related to the usefulness of CWM traffic studies for both Siting Board and SEQRA purposes.

With regard to CWM's noise studies included in the application documents, the ALJ determined that the Wityrol petition raised an ajudicable issue because the parties' experts are in conflict regarding use of the STAMINA and TNM models, finding a need for further inquiry

regarding the CWM studies using STAMINA. The ALJ indicated that this is supported by the "survey" data in Appendix K to Ms. Wityrol's petition. (Ruling at 45-46).[15]

In advance of the adjudicatory hearing, the ALJ directed CWM to "update" its noise studies using the most recent version of TNM and in a manner consistent with the guidance in the Department's *Assessing and Mitigating Noise Impacts (DEP-00-1)*. (Ruling at 46). The inquiry at the hearing will be whether "the updated noise assessment would show sound pressure increases greater than 6dB…" *Id.*

Wityrol's appeal, without any new argument or substantiation, asserts that the noise studies should be entirely redone. That request should be denied.

B. Public Revenue/Public Expense Issue

The Ruling comments that public expense/revenue tradeoffs are a component of the municipal effects siting criterion in 6 NYCRR § 361.7(b)(6)(ii)(c). (Ruling at 49). Section 361.7(b)(6)(i), addressing municipal effects, provides, in part: "Further, the short-and-long-term financial effects of the addition of the proposed facility to the ***municipality*** shall be considered. Both the increased ***tax revenues*** and the ***added burden of providing services to the facility*** are important factors." (Emphasis added). Section 361.1(c)(13) defines: "municipality" as "any town, city, county or village." Therefore, the municipal effects siting criterion, by definition, does not include any state or federal revenues or expenses.

The Ruling, at 51-52, concluded that Ms. Wityrol did not raise a substantive and significant issue for adjudication regarding the balance between public expenses and public revenues because her Petition did not explain how or why she chose the costs and expenditures listed in her Petition, nor did she provide references for the values and costs listed in her Petition.

[15] The Ruling fails to note that all of the residents identified in the survey reside on Creek Road Extension in Lewiston which is the primary route for ingress and egress for waste hauling trucks going to and leaving from the Modern Disposal solid waste landfill facility.

The Ruling concluded that the proffer was insufficient to inquire further and that the Petitioner failed to meet her burden of persuasion on the proposed issue.

In addition to the reasons given in the Ruling for rejecting the proposed issue, it is clear that most of the expense items listed in the Tables on pp. 90-91 of the Wityrol Petition involve something other than "municipal" costs and/or burdens as defined in Part 361 and, therefore, are irrelevant to a siting criterion that, by definition, is limited to municipal revenues and burdens. Moreover, the only considerations identified in § 361.7(b)(6)(i) are tax revenues and added burdens of providing services to the proposed facility. The Issues Conference record contains more than sufficient information to enable the Siting Board to assess that criterion.

C. Public Participation

The Ruling, at 6-16, describes all of the proceedings to date related to the pending RMU-2 application, including all of the opportunities for public participation. The record demonstrates that all statutory and regulatory public participation requirements were either met or exceeded.[16]

The Wityrol appeal has not raised an adjudicable issue with regard to the opportunities for public participation.

D. The NFSS Site

The Ruling concluded that the proposed issues in the Witryol Petition related to the NFSS were in the nature of comments on the DEIS, and that SEQRA does not require an adjudicatory hearing to address comments on the DEIS. (Ruling at 133). The Ruling indicates that Department Staff's response to the Wityrol Petition asserted that the Petition did not raise a significant and substantive issue regarding the NFSS Site, noting that the radius of influence of

[16] For example, the public comment periods were extended several times.

the Model City groundwater pumping well system was less than 25 feet and that, based on available monitoring data, that pumping did not affect groundwater at the NFSS.

The Ruling properly determined that Ms. Wityrol failed to raise a substantive and significant issue related to the NFSS. It should be noted that most of Ms. Witryol's arguments on appeal related to the NFSS were not raised in her Petition, and her appeal makes reference to documents that are not included in her Petition or in the Issues Conference record, *e.g.,* the 1995 National Academy of Sciences Report, the 2007 NFSS Remedial Investigation Report, and the 2011 NFSS Remedial Investigation Report – Addendum. Those references and related arguments should be stricken for Witryol's failure to raise them in a timely fashion.

E. Water Impacts and Endangered Species Issues

The Ruling, at 55-56, determined that there are no factual disputes requiring adjudication regarding the flora and fauna on-site at the Model City facility used to assess the criterion outlined in § 361.7(b)(12). The ALJ interpreted Ms. Wityrol's proposed issue as raising a legal question regarding the proper scope of inquiry, *i.e.,* whether the referenced siting criterion includes assessing off-site impacts to surface waters and wetlands. The Ruling concluded that § 361.7(b)(12) is limited to on-site impacts. Further, the Ruling noted that no one asserted that threatened or endangered species are located on the Model City facility, or off-site in Four Mile Creek, Twelve Mile Creek and the Niagara River, and no one contends that those areas are critical habitat. (Ruling at 56).

Moreover, the Ruling noted that the siting criterion in § 361.7(b)(7) relates to surface and groundwater impacts, both on-site and off-site. The Municipalities proposed issue related to groundwater was identified as an issue for adjudication. As a result, a factual record regarding impacts to on-site and off-site surface and groundwaters will be developed during the adjudicatory hearing. That record will enable the Siting Board to assess the criterion in

§ 361.7(b)(7). As to Ms. Witryol's other contentions regarding habitat along Lewiston Road and Creek Road Extension, the Ruling determined that she did not meet her burden of persuasion. Wityrol's appeal does not explain how she met her burden of persuasion.

The ALJ reserved for future consideration, issues related to potential surface water/SPDES related impacts and the potential modification of the facility's Air State Facility Permit. At the time the Ruling was issued, Department Staff had not yet made completeness determinations on the proposed modifications to the SPDES and Air Facility permits.

V. Department Staff Appeal

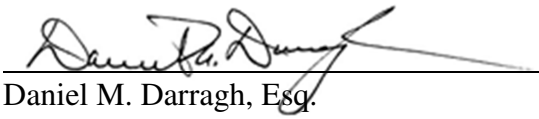
The Staff appeals that part of the Ruling that found an issue for adjudication regarding the Municipalities' claims related to the geologic and hydrogeologic characteristics at the Model City Site, including the bedrock contours, the nature of the unconsolidated deposits, the groundwater flow rate and direction, the nature and extent of historic groundwater contamination at the Site, and the ability to monitor the groundwater related to proposed RMU-2. Staff's appeal is limited to the impact of the aforesaid issues on CWM's application to modify the existing Part 373 Sitewide permit. Staff does not challenge the Ruling regarding the Siting Board's need or ability to consider the related groundwater issues in its evaluation and scoring of the siting criteria in 6 NYCRR § 361.7(b)(7).

In the hopes of expediting the hearing and a final administrative decision on the RMU-2 applications, which have been pending since 2003, CWM elected not to appeal any of the Rulings. However, CWM does agree with Staff's description of the applicable standard for raising a significant and substantive issue for adjudication. CWM also agrees with Staff's argument that the Municipalities' proffer was not sufficient to raise a significant and substantive issue with regard to the regulatory requirements related to the geology, hydrogeology, and groundwater flow at the Site.

Conclusion

For all of the foregoing reasons, CWM respectfully submits that the appeals, submitted by RRG, the Municipalities, and Ms. Witryol should be denied.

DATED: April 5, 2016



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