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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (“Department”) submits this brief in response to certain sections of the appeals filed by Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (the Municipalities) and Ms. Amy Witryol in which those parties seek a reversal of Judge O’Connell’s holding that the proposed issues raised by both parties, under the general topic “legacy contamination and project-specific excavations,” are not adjudicable issues as set forth in the December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (Issues Ruling) relating to CWM Chemical Services, LLC’s (CWM) permit modification applications for the proposed Residual Management Unit-Two (RMU-2) landfill at its Model City facility. Specifically, the Issues Ruling notes that the Municipalities raised proposed issues regarding the radiological investigative surveys, the project-specific soil excavation monitoring and management plan (“SEMMP”) and the closure of facultative ponds (“Fac Ponds”) 8 and 3. IR at 132. Ms. Witryol raises proposed issues relating to the Niagara Falls Storage Site (“NFSS”), the project-specific SEMMP, and the closure of Fac Pond 8.

As discussed in greater detail below, Administrative Law Judge O’Connell correctly applied the appropriate standard for determining that the issues that comprise the topic “legacy contamination and project-specific excavations” are not adjudicable issues. The appeals filed by the Municipalities and Ms. Witryol fail to assert any new argument or legal basis to challenge that ruling nor did the parties assert that Judge O’Connell failed to properly apply the appropriate standard for determining adjudicable issues. Consequently, the appeals filed by the Municipalities and Ms. Witryol pertaining to that topic should be denied.

ARGUMENT

Judge O’Connell correctly held that the Municipalities and Ms. Witryol failed to proffer sufficient evidence to meet their burden of persuasion to demonstrate that the proposed issues under the topic of “legacy contamination and project-specific excavations” are both substantive and significant and that further inquiry is needed as to CWM’s ability to meet applicable regulatory standards or criteria or that modifications should be made to the current draft Part 373 modified permit.

I. Standards Applicable to an Appeals of an Issues Ruling

A Commissioner’s task in an Interim Appeal is to determine whether the Administrative Law Judge adhered to the applicable standard for adjudicable issues as enumerated in 6 NYCRR 624.4(c). See Matter of Ontario County, Decision of the Acting Commissioner and SEQRA Findings Statement, November 19, 2015 at 2 and Matter of Saratoga County Landfill, Second Interim Decision, October 3, 1995 at 2. Where the contested issues are not between the Department and applicant, but proposed by third parties, as is the case here, 6 NYCRR 624.4(c)(1)(iii) requires that an issue must be both substantive and significant to warrant a hearing. See also Ontario

County, *id.* at 2 and Saratoga County Landfill, *id.* at 2. Regarding legal and policy matters, the Commissioner is to consider "...whether law and policy have been properly applied, and the Commissioner may offer guidance 'to optimize the permitting process and focus the hearing.'" See Ontario County, *id.* at 2, citing Saratoga County Landfill, *id.* at 3).

A substantive issue is defined as an item that raises "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR 624.4(c)(2). To be significant, a proposed issue must meet a threshold level of importance. Only those issues that "have the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" are considered significant. 6 NYCRR 624.4(c)(3). Not every substantive issue is automatically deemed a significant issue.

Pursuant to 6 NYCRR 624.4(c)(4), where Department staff reviews a permit application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the party proposing the issue to demonstrate that it is both substantive and significant. This burden has been upheld by the Third Department in Matter of Citizens for Clean Air v. New York State Dep't of Env't'l Conservation, 135 A.D.2d 256 (3rd Dept. 1988). In upholding the Commissioner's decision to exclude certain issues from adjudication, the court stated that the burden on the intervenors was "...to provide a clear explanation of the issues sought to be adjudicated." *Id.* at 261.

It is well established that the burden of persuasion by a party raising a proposed adjudicable issue is met with "...an appropriate offer of proof supporting its proposed issue" which must have "...a factual or scientific foundation" and be void of speculation, expressions of concern or conclusory statements." See Matter of Ontario County, *id.* at 3 ("[e]ven where an offer of proof is supported by factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions," citing Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 4-5; Matter of Chemung County Landfill, Decision of the Commissioner, August 4, 2011 at 5-6; and Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 4-9).

II. Judge O'Connell Correctly Ruled that the Comments Regarding the Proximity of the Niagara Falls Storage Site to the Model City facility are not Relevant to this Proceeding.

Judge O'Connell correctly excluded Ms. Witryol's comments in her petition for party status regarding the proximity of the NFSS to the Model City facility, in general, and to the location of the proposed RMU-2 landfill, in particular. Ms. Witryol contends

that the NFSS is relevant to the environmental review required under the New York State Environmental Quality Review Act ("SEQRA") and to various siting criteria, such as surface and groundwater. IR at 133.

Following a comprehensive analysis of the comments provided by Ms. Witryol, and the response of Department staff, Judge O'Connell held that the proposed issues are not substantive or significant to merit adjudication for several reasons. IR at 133. Judge O'Connell agreed with Department staff that the comments are not relevant since the influence of the groundwater pumping at the Model City facility is limited to the immediate vicinity (less than 25 feet) of the withdrawal system. In addition, the available monitoring data to date shows that the groundwater at the NFSS has not been affected by the groundwater corrective actions at the Model City facility. IR at 133. The NFSS is located on property that is south and upgradient of the Model City facility. Department Staff Response at W-145 and 146. Judge O'Connell properly held that Ms. Witryol's comments "...are in the nature of comments about the DEIS... [and] SEQRA does not require an adjudicatory hearing to address comments on the DEIS." IR at 133. In addition, Judge O'Connell excluded the proposed issue as not relevant to the proceeding since CWM does not own the property where the NFSS is located or otherwise control the activities on the NFSS. IR at 133.

Ms. Witryol does not advance any argument in her appeal that rebuts Judge O'Connell's analysis or demonstrates that he misapplied the substantive and significant standard. See Town of Brookhaven, Second Interim Decision of the Commissioner, August 30, 1996 at 2 (appeal must rebut the ALJ's analysis or show misapplication of the substantive and significant standard) and Matter of Hyland Facility Associates, Interim Decision of the Commissioner, August 20, 1992, at 4-6 (the Commissioner's review on appeal is whether the ALJ properly applied the substantive and significant standard). Rather, in her appeal, Ms. Witryol reargues components of her petition for party status which, as reflected by the Issues Ruling, were found not to be compelling by Judge O'Connell. As no basis has been presented to overturn Judge O'Connell's ruling on this topic, the appeal on this matter should be denied.

III. Judge O'Connell Correctly Ruled that the Proposed Issues Regarding the Radiological Investigative Surveys and CWM's Project-Specific Soil Excavation Monitoring and Management Plans are not Adjudicable Issues.

The Model City facility was part of the federal Lake Ontario Ordnance Works ("LOOW") and certain sections of the LOOW were used for the storage and disposal of low level radioactive wastes derived from certain facilities that were part of the federal nuclear program. Between 1974 and 1978, CWM's predecessor purchased an approximate 710-acre portion of the former LOOW property. This area is comprised of parcels referred to as Vicinity Properties A through G and portions of H, J, K, P, S, T and W. DEIS at 49. As acknowledged in the Issues Ruling, "...the Model City facility has been the subject of numerous investigative surveys undertaken by the federal

government since the early 1970s, and by various consultants since 1984 on behalf of Waste Management, Inc. and CWM.” IR at 133.

a. Radiological Investigative Surveys

The Municipalities claim that additional surface and subsurface investigative surveys are required in the areas to be disturbed for the proposed RMU-2 landfill and in order to address potential adverse impacts for the legacy contamination at the site. The Municipalities also challenge the results of the investigative radiological surveys performed by CWM’s consultants since 2000. The primary concern with the latter proposed issue is the distance between the survey instrument and the surface surveyed, which the Municipalities allege is not in accordance with the Multi-Agency Radiation Survey and Site Investigation Manual (“MARSSIM”). Municipalities Petition at 52-73, Rresnikoff/Travers Report at 1 and 11-13, and IR at 119-121 and 133-134.

The Municipalities proposed issues were thoroughly analyzed by Judge O’Connell, who correctly applied the substantive and significant standard to exclude their concerns. IR at 116, 121 and 133-135. Specifically, Judge O’Connell held that differing expert opinions about the performance of the investigative surveys consistent with the guidance outlined in MARSSIM is not an adjudicable issue as MARSSIM is not a rule or regulation, but merely a guidance document regarding how to conduct such surveys. The proposed issue is not substantive as the Municipalities’ “...criticisms of the investigative surveys do not concern CWM’s ability to meet statutory or regulatory criteria.” IR at 134. Judge O’Connell acknowledged that flexibility is required regarding how the MARSSIM guidance is to be implemented during an investigation, such as using a different distance between the area to be surveyed and the survey instruments due to the presence of vegetation at the site which provides limited access to the surface soils. IR at 134. Department staff are experienced with the design and performance of radiological surveys and are qualified in the review of methods and technologies used. Staff Response at A-40.

Further, Judge O’Connell held that the SEQRA review of this proposed issue was sufficient, and ruled that CWM is not required to undertake an investigative survey in the manner outlined in the Municipalities’ petition. IR at 134. The nature of the potential radiological contamination is well documented and has been addressed successfully at the Model City facility. As discussed in detail below, in addition to the federal remedial projects, the New York State Department of Health (“DOH”) orders and SEMMP adequately address the parties’ concerns.

Due to the presence of radioactive contamination at the facility, the DOH issued an Order in 1972 to CWM’s predecessor prohibiting an expansion of the existing use of the land. The Order also prohibited any deliberate movement, displacement or excavation of the soils, as well as any decontamination procedures, unless expressly permitted by DOH after the submission of acceptable plans. The Order provides that such use restrictions are to continue until DOH determines that radioactive emissions from the property have been reduced to levels deemed acceptably safe to DOH. The

Order was later amended in 1974 to allow the use of the property for industrial and commercial development but restricted the construction of future structures to only slab construction. IR at 117-119 and 135-137.

The footprint for the proposed RMU-2 landfill and related modifications to the Model City facility would occupy portions of Vicinity Properties B, C, D, E, E', F, G and K. DEIS, Figure 3-13. In May 1992, the U.S. Department of Energy ("DOE") certified that the Vicinity Properties associated with the Model City facility, with the exception of Vicinity Properties E, E', and G which had inaccessible areas, were in compliance with applicable federal radiological decontamination criteria. IR at 117 and 134.

It is important to note that the DOH 1972 Order and 1974 Amendment to the 1972 Order remain in effect. Thus, DOH, in consultation with the Department, must approve soil displacements or excavations at the Model City facility, including the proposed RMU-2 landfill. Further, DOH has determined that the proposed RMU-2 landfill may be undertaken in a manner consistent with the DOH 1972 Order and 1974 Amendment. In particular, as discussed below, DOH consulted with the Department on, and lent its approval to the SEMMP. IR at 135.

The Municipalities' appeal on this proposed issue fails to rebut Judge O'Connell's analysis discussed above or demonstrate that he misapplied the substantive and significant standard. See Town of Brookhaven, *id.* at 2 and Hyland Facility Associates, *id.*, at 4-6. Rather, the appeal merely reargues the claims from the petition for party status and subsequent submissions following the Issues Conference, which have already been rejected by Judge O'Connell. When an issues ruling is appealed, substantial deference is given to the Administrative Law Judge on factual issues. See Matter of Waste Management of New York, *id.* at 3. See also Saratoga County Landfill, *id.* at 5 (substantial deference is given to an Administrative Law Judge on factual issues on appeal since the Judge personally conducted the issues conference and has the closest awareness of the facts and parties' positions). A hearing where offers of proof only raise potential uncertainties is clearly not the intent of the Department's hearing process. See Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 20, 2012, at 3 (citing Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999 at 8) and Matter of Akzo Nobel Salt Inc.; Matter of Seneca Meadows, Inc., *id.* at 3 ("conducting an adjudicatory hearing 'where offers of proof, at best, raise potential uncertainties' ... is not the intent of the Department's hearing process"). The purpose of an adjudicatory hearing is to hear disputes of material facts, not to test theories and hypotheses of witnesses. Accordingly, the appeal on this topic should be denied.

b. Project-Specific SEMMP

The Municipalities contend that the November 2009 SEMMP, which was subsequently revised in November 2013 and May 2015, will not sufficiently characterize and remediate radiological contamination detected during the excavation work for the proposed RMU-2 landfill. Municipalities Petition at 52-73 and IR at 118.

Again, Judge O'Connell performed a thorough analysis of this proposed issue and correctly applied the substantive and significant standard to rule that the matter does not rise to the level of an adjudicable issue to merit a hearing. Specifically, Judge O'Connell correctly held that Municipalities' claim that the CWM revised May 2015 project-specific SEMMP would not protect human health and the environment is "without merit." IR at 135. The 2013 site-wide permit and the draft permit modification provide for the development of two types of SEMMPs: a generic small-project SEMMP and a project-specific SEMMP. The legal basis for requiring the SEMMPs is the DOH 1972 Order. Pursuant to the revised SEMMP, no excavated materials would be removed from the CWM property and all such materials will be subjected to a radiological scan soon after being stockpiled on-site, in accordance with the procedures outlined in the May 2015 revised SEMMP. The Issues Ruling reflects that both the Department and DOH have determined that the SEMMP is acceptable. In addition, Judge O'Connell acknowledged that DOH staff addressed Ms. Witryol's particular concern about detecting alpha radiation with the survey instruments specified in the May 2015 SEMMP. IR at 137.

Further, in response to Ms. Witryol's concern regarding the presence of plutonium at the site, there is no known source on the LOOW properties that contained any significant amounts of Pu-239. The known locations at the site where some small areas with extremely low amounts of Pu-239 were detected were previously remediated. In addition, the presence of plutonium and wastes from the Knolls Atomic Power Laboratory (referred to as KAPL waste) were evaluated by the DOE in 2013. DOE concluded that while minor KAPL waste residuals remain at the site, in particular Cs-137, they are less than a risk-based screening benchmark and do not pose an unacceptable risk nor require further remediation. Staff Response at A-41.

Judge O'Connell also held that the Municipalities' and Ms. Witryol's offers of proof on this topic have "...been rebutted by the record of the issues conference, which includes, among other things, a review of the terms and conditions of the revised May 2015 [SEMMP], and the acceptance of it by Department staff as well as DOH staff." In support of his decision, Judge O'Connell cited Matter of Seneca Meadows, Inc., Interim Decision, October 26, 2012 at 4 and Matter of Bonded Concrete, Inc., Interim Decision, June 4, 1990 at 2. IR at 137. As the appeals on this topic do not advance any argument that rebuts Judge O'Connell's analysis or demonstrates that he misapplied the substantive and significant standard, substantial deference is to be provided to his ruling. See Town of Brookhaven, *id.* at 2; Hyland Facility Associates, *id.* at 4-6; and Saratoga County Landfill, *id.* at 5. Accordingly, the appeal on this topic should be denied.

IV. Judge O’Connell Correctly Ruled that the Proposed Issues Regarding the Remediation and Closure of Fac Pond 8, as Required by the Current Sitewide Permit, is not Applicable to this Proceeding.

The Municipalities contend that CWM has not properly remediated Fac Pond 8, which is located within the footprint of the proposed RMU-2 landfill. Ms. Witryol has joined this concern. IR at 119.

Judge O’Connell fully analyzed the concerns raised by the Municipalities and Ms. Witryol regarding this topic and rejected them. The parties’ efforts to reargue their position on appeal should be rejected as substantial deference is to be given to Judge O’Connell’s ruling on these matters. See Town of Brookhaven, *id.* at 2; Hyland Facility Associates, *id.* at 4-6; and Saratoga County Landfill, *id.* at 5. The 2013 sitewide Part 373 permit contains a compliance schedule for the remediation and closure of Fac Pond 8, which requires CWM to perform a radiological investigation and, where necessary, remediation of the soils and sediment in Fac Pond 8 in accordance with an approved SEMMP. The parties are precluded from using this proceeding to interfere with or modify that compliance schedule. Judge O’Connell correctly held that the parties “...time to seek judicial review of [the 2013 sitewide permit] has passed.” IR at 137.

As the appeals of this topic do not advance any argument that rebuts Judge O’Connell’s analysis or demonstrates that he misapplied the substantive and significant standard, substantial deference is to be provided to his ruling. See Town of Brookhaven, *id.* at 2; Hyland Facility Associates, *id.* at 4-6; and Saratoga County Landfill, *id.* at 5. Accordingly, the appeal on this topic should be denied.

V. Judge O’Connell Correctly Ruled that the Municipalities Failed to Proffer any Proof that the Potential Contamination of Fac Pond 3 is an Adjudicable Issue.

Fac Pond 3 is within the footprint of the proposed RMU-2 landfill. Should the requisite approvals be issued, Fac Pond 3 will be closed. The Municipalities are concerned about potential levels of radiological contamination in Fac Pond 3. Municipalities Petition at 72-73.

Judge O’Connell correctly held in the Issues Ruling that the Municipalities failed to “...expressly state that they are proposing any issues for adjudication concerning the closure of Fac Pond 3.” IR at 138. Rather, the Municipalities assert that there is a high probability that Fac Pond 3 is contaminated with radiological constituents and argue that such contamination should be presumed since it was constructed with on-site soils. However, as Judge O’Connell acknowledged, the Municipalities “...make no offer of proof to support this assertion....” IR at 138.

A hearing where offers of proof only raise potential uncertainties or where a hearing would dissolve into an academic debate is clearly not the intent of the Department’s hearing process. See Matter of Seneca Meadows, Inc., Interim Decision

of the Commissioner, October 20, 2012, at 3 (citing Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999 at 8) and Matter of Akzo Nobel Salt Inc.; Matter of Seneca Meadows, Inc., *id.* at 3. The purpose of an adjudicatory hearing is to hear disputes of material facts, not to test theories and hypotheses of witnesses.

Consequently, Judge O'Connell correctly ruled that the proposed issue on this topic is not substantive or significant. As the appeals on this topic do not advance any argument that rebuts Judge O'Connell's analysis or demonstrates that he misapplied the substantive and significant standard, substantial deference is to be provided to his ruling. See Town of Brookhaven, *id.* at 2; Hyland Facility Associates, *id.* at 4-6; and Saratoga County Landfill, *id.* at 5. Accordingly, the appeal on this topic should be denied.

CONCLUSION

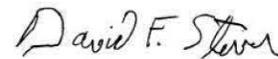
For the reasons expressed above, the appeals filed by the Municipalities and Ms. Witryol challenging the exclusion of the proposed issues under the topic of "legacy contamination and project-specific excavations" are without merit and should be denied. The record in this proceeding supports the Department's position that the Issues Ruling on this topic should be affirmed.

Respectfully submitted,
On behalf of the New York State
Department of Environmental
Conservation



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