

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Applications for Permits pursuant to Articles 17, 19, 24, and 27 of the Environmental Conservation Law (ECL); Parts 201-5 (State Facility Permits), 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  
   9-2934-00022/00233  
   9-2934-00022/00232  
   9-2934-00022/00249

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NEW YORK STATE FACILITY SITING BOARD

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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]).

July 22, 2022

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**Municipalities Motion to Admit Documents  
(Geology and Hydrogeology)**

By email from Mr. Abraham dated May 27, 2022, the municipalities served a motion to include documents related to the geology and hydrogeology issues into the evidentiary joint hearing record of the captioned matters.<sup>1</sup> According to the municipalities, CWM and Department staff circulated some of these documents with their respective papers in support of the pre-filed direct testimony of their witnesses, and as part of discovery.

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<sup>1</sup> The municipalities' motion papers consist of the following documents: (1) cover letter dated May 27, 2022 from Mr. Abraham; (2) a motion dated May 27, 2022 with enclosure; and (3) an affirmation by Mr. Abraham in support of the motion dated May 26, 2022, with Exhibits A and B.

In separate emails dated June 13, 2022, I received timely responses from Mr. Kuhn,<sup>2</sup> on behalf of CWM, from Ms. Mucha,<sup>3</sup> on behalf of Department staff, and from Ms. Witryol.<sup>4</sup>

During the June 15, 2022, conference,<sup>5</sup> I requested clarification from Mr. Abraham about the municipalities' motion. The municipalities' motion includes an enclosure that lists 15 documents consisting of 25 files. Mr. Abraham's May 27, 2022, cover letter included a link to the 25 files. With the motion, the municipalities seek a ruling where I receive all 25 files into the evidentiary joint hearing record. Attached to an email dated July 1, 2022, Mr. Abraham added Document 16.

Initially, I intended to address this motion during the July 6, 7, and 8, 2022, hearing session.<sup>6</sup> However, during the July 8, 2022, session, I said that I would issue a written ruling with respect to the municipalities' motion.

## I. The Documents

The following is a list of the documents proffered by the municipalities, and a brief description of each.

- Document 1 (DEC Bates Nos. 001312 to 001429): Letter dated March 13, 2015, from J. Banaszak, Technical Manager, CWM Chemical Services, LLC (CWM), to A. Everett, Chief, Hazardous Waste Programs Branch, US Environmental Protection Agency (US EPA), and enclosure. Enclosure - CWM Response to Technical Comments, March 13, 2015.
- Document 2: Letter dated April 2, 2015, from A. Everett, US EPA to J. Banaszak, CWM. EPA identifies an enclosure, and requests a response by May 15, 2015.
- Document 2.a: Technical Document Review (REPA5-2217-004, March 23, 2015). (Enclosure to letter dated April 2, 2015, from A. Everett.)

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<sup>2</sup> CWM's response is a memorandum of law in opposition from Mr. Kuhn dated June 13, 2022.

<sup>3</sup> Department staff's response is a cover letter from Ms. Mucha dated June 13, 2022, and a reply brief dated June 13, 2022, with Exhibits 1, 2, and 3. Exhibits 1 through 3 are a set of affidavits from the following members of Department staff: (Exhibit 1) David Denk, sworn to June 6, 2022; (Exhibit 2) Thomas J. Killeen, sworn to June 6, 2022, and Michael Cruden, sworn to June 6, 2022; and (Exhibit 3) Peter Grasso, sworn to June 6, 2022, Bidjan Rostami, sworn to June 8, 2022, and Gerard Burke, sworn to June 6, 2022.

<sup>4</sup> Ms. Witryol's reply is dated June 13, 2022, and includes a copy of the second page of Document 12.

<sup>5</sup> See Twelfth Order after Pre-hearing Conference, dated June 24, 2022, at 2.

<sup>6</sup> See Twelfth Order, at 3.

- Document 3: Letter dated May 15, 2015, from M. Mahar, District Manager, CWM, to A. Everett, US EPA. CWM responds to Technical Document Review (*see* Document 2.a).
- Document 4: Letter dated April 2, 2015, from A. Everett, US EPA, to J. Banaszak, CWM. EPA identifies an enclosure, and requests a response by August 24, 2015. Enclosure - Technical Review Facility Response Comments (REPA5-3217-006v1, July 14, 2015).
- Document 5: Letter dated August 24, 2015, from J. Banaszak, CWM, to A. Everett, US EPA, and enclosures. Enclosure - CWM Response to July 14, 2015 Technical Comments, dated August 24, 2014. Attachment A – 2008 Water Supply Well Inventory (Golder Associates, Inc., July 17, 2008). Attachment 1 – EDR GeoCheck Report for 1550 Blamer Road, Youngstown, New York 14174. Attachment 2 - Niagara County Health Department Summary Report for Private Water Well Project, Towns of Lewiston and Porter, Niagara County, New York. Appendix A – Results Table. Appendix B.1 – Sample Water Well Initial Survey Cover Letter. Appendix B.2 – Survey Form. Appendix B.3 – Sample Water Well Follow-up Survey Cover Letter. Appendix C – Regulatory Reference Standards. Appendix D – Private Water Supply Disinfection Procedure. Appendix E – Additional Information Regarding Parameters that Exceeded MCL Standards. Appendix F – Private Water Well Sampling Protocols and Tables (Tables 1-4).
- Document 6: Letter dated September 10, 2015, from G. Abraham (Counsel for Municipalities) to A. Everett, US EPA. Municipalities respond to CWM’s revised request for RMU-2 TSCA<sup>7</sup> approval, and CWM’s August 24, 2015, response to July 14, 2015, Technical Comments.
- Document 6.a: Memorandum from Anirban De, Ph.D., P.E., to G. Abraham, dated June 9, 2015, Review of Revised Hydrostatic Uplift Factors of Safety. (Enclosure to letter dated September 10, 2015, from G. Abraham to A. Everett.)
- Document 6.b: Memorandum from Andrew Michalski, Ph.D., CGWP, LSRP, to G. Abraham, dated August 17, 2015, Comments on Environmental Monitoring Report for April 2015. (Enclosure to letter dated September 10, 2015, from G. Abraham to A. Everett.)
- Document 6.c: Section of Sheet 2 (enlarged) from Figure 4, Golder Associates, GSS Potentiometric Surface Contours, December 2014. (Enclosure to letter dated September 10, 2015, from G. Abraham to A. Everett.)
- Document 6.d: Sheet 2 from Wehran 2007. (Enclosure to letter dated September 10, 2015, from G. Abraham to A. Everett.)

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<sup>7</sup> TSCA is the federal Toxic Substance Control Act (*see generally*, 15 USC Ch. 53, subch. §§ 2601-2629, and implementing regulations at 40 CFR Parts 700-766).

- Document 7.1: Letter dated June 30, 2016, from A. Everett, US EPA, to M. Mahar, CWM. EPA identifies three enclosures, and requests a response by August 15, 2016.
- Document 7.1.a: Technical Review, CWM's August 24, 2015, Response to Comments (REPA5-3217-009v1, March 31, 2016). (Enclosure to letter dated June 30, 2016, from A. Everett to M. Mahar.)
- Document 7.1.b: Supplemental Technical Document Review (REPA5-3217-007v1, September 25, 2015). (Enclosure to letter dated June 30, 2016, from A. Everett to M. Mahar.)
- Document 7.1.c: Hydrostatic Uplift Summary and Recommendations (REPA5-3217-008v2, Revised May 5, 2016). (Enclosure to letter dated June 30, 2016, from A. Everett to M. Mahar.)
- Document 7.2: Letter dated June 30, 2016, from A. Everett, US EPA, to G. Abraham. EPA identifies an enclosure.
- Document 7.2.a: Technical Review, Municipal Stakeholders' September 10, 2015, letter (*see* Document 6) regarding CWM's August 24, 2015 Response to EPA Comments (*see* Document 5) (REPA5-3217-016, March 31, 2016). (Enclosure to letter dated June 30, 2016, from A. Everett to G. Abraham.)
- Document 8: Technical Review, 2016 RMU-2 Geotechnical Borings and Monitoring Well Installation Report (REPA5-4217-020v1, August 30, 2016).
- Document 9 (DEC Bates Nos 000721-000818): Letter dated September 29, 2016, from M. Mahar, CWM, to A. Everett, US EPA, and three enclosures. Enclosure No. 1 – CWM Response to Technical Review CWM's August 24, 2015, Response to Comments Revised Toxic Substances Control Act Application for Residuals Management Unit 2, CWM Chemical Services, LLC, Model City, New York (REPA5-3217-009v1, March 31, 2016). Attachment A – NYSDEC Water Well Database in the Town of Porter. Attachment B – Summary of Detection in the RMU-1 Detection monitoring Wells since 1992. Attachment C – Summary of Detections in monitoring well R102S, R108S, and R110S since 1992. Attachment D – Summary of the Detection in TW24S, TW 29S, and W1002S. Enclosure No. 2 – CWM Response to Supplemental Technical Document Review CWM Chemical Services Model City TSD Facility Model City, New York (REPA5-3217-007v1, September 25, 2015). Figures. Attachment 1 – Transmittal Letter to CWM on 2014 WDA Report Isopotential Map Revisions (09-29-16). Revised Figures. Attachment 2 – Proposed RMU-2 Monitoring Well Figure. Enclosure No. 3 – CWM Response to Technical Review 2016 RMU-2 Geotechnical Borings and Monitoring Well Installation Report, Proposed RMU-2 Footprint CWM Chemical Services, LLC Model

City, New York (REPA5-4217-020v1, August 30, 2016). Attachment 1 – RMU2-W39 Boring Log.

- Document 10: Letter dated December 23, 2016, from A. Everett, US EPA, to M. Mahar, CWM. EPA identifies an enclosure, and requests a response by February 23, 2017. Enclosure – Technical Review (REPA5-4217-023v1, December 22, 2016) (*see* Document 9).
- Document 11 (DEC Bates Nos. 000819-000831): Letter dated February 23, 2017, from M. Mahar, CWM, to A. Everett, US EPA, with enclosure. Enclosure – CWM Response to December 23, 2016, Technical Comments.
- Document 12: Meeting Agenda, dated April 10, 2017, RMU-2 Application, and CWM/USEPA with sign-in sheet.
- Document 13 (DEC Bates Nos. 000641-000647): Letter dated July 12, 2017, from M. Mahar, CWM, to A. Everett, US EPA, requesting a supplement to CWM’s TSCA application, as well as an enclosure outlining issues and concerns. Enclosure – Summary: Technical Issues, Comments and Discussions regarding CWM’s TSCA application for RMU-2.
- Document 14 (DEC Bates Nos. 000832-000855): Letter dated September 15, 2017, from M. Mahar, CWM, to A. Everett, US EPA, providing two enclosures. Enclosure No. 1 - CWM Response to Comments Revised Toxic Substances Control Act Application for Residuals Management Unit 2, CWM Chemical Services, LLC, Model City, New York, July 12, 2017. Enclosure No. 2 - Supplement to the Revised Toxic Substances Control Act Application For Residuals Management Unit 2, CWM Chemical Services, LLC, Model City, New York, March 13, 2015 (Section 3.0 – Site Stratigraphy and Hydrogeology; Section 6.0 – Protection of Groundwater and Groundwater Monitoring; Section 10.0 – Request for Variance from Requirements of 40 CFR 761.75; and Section 12.0 – References).
- Document 15: Letter dated October 24, 2017, from G. Abraham to A. Everett, US EPA. Municipalities respond to CWM’s revised request for RMU-2 TSCA approval and proposal for additional groundwater monitoring wells. Enclosure – Memorandum from A. Michalski, dated October 19, 2017, Comments on CWM’s Proposed Additional Monitoring Wells.
- Document 16: Letter dated September 19, 2017, from D. Darragh (Cohen & Grigsby [Counsel for CWM]) to D. O’Connell, ALJ,<sup>8</sup> with three enclosures. Letter dated September 15, 2017, from M. Mahar, CWM, to A. Everett, US EPA, providing two enclosures (*see* Document 14). Enclosure No. 1 - CWM Response to Comments Revised

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<sup>8</sup> Mr. Darragh also sent copies of the September 19, 2017, cover letter and enclosures to the parties on the service list.

Toxic Substances Control Act Application for Residuals Management Unit 2, CWM Chemical Services, LLC, Model City, New York, July 12, 2017. Enclosure No. 2 - Supplement to the Revised Toxic Substances Control Act Application For Residuals Management Unit 2, CWM Chemical Services, LLC, Model City, New York, March 13, 2015 (Section 3.0 – Site Stratigraphy and Hydrogeology; Section 6.0 – Protection of Groundwater and Groundwater Monitoring; Section 10.0 – Request for Variance from Requirements of 40 CFR 761.75; and Section 12.0 – References) (*see* Document 14).

## II. Municipalities’ Motion

According to the municipalities, the basis for their motion is that the issues considered by EPA with respect to CWM’s application for a federal Toxic Substance Control Act (TSCA) permit are identical to the geology and hydrogeology issues certified for adjudication in the captioned proceedings. The municipalities state that the issues are whether the physical properties of the site would protect against offsite migration of pollutants, and whether the facility could monitor and intercept any pollutants to prevent offsite migration. (*See* Municipalities’ Motion at 2).

The municipalities argue that the proffered documents must be part of the evidentiary joint hearing record. The documents are limited to a series of exchanges among CWM, the municipalities, and EPA’s consultant Booz Allen Hamilton (Booz Allen), from 2015 through 2017. The municipalities explain that CWM filed an application for a federal TSCA permit to dispose of PCBs at the proposed RMU-2 landfill. To obtain the requested approval, CWM must demonstrate that the proposed site could be adequately monitored and, if necessary, effectively remediated. EPA’s final determination is pending. (*See* Municipalities’ Motion at 3-4.)

The municipalities contend that in the proffered documents Booz Allen addresses whether the results of groundwater studies that CWM undertook, subsequent to the 2014 issues conference, resolve the municipalities’ claims about a buried alluvial valley flowing west beneath the site of the proposed RMU-2 landfill. (*See* Municipalities’ Motion at 4.) According to the municipalities, Booz Allen is an independent expert in hydrogeology, among other things. The municipalities note that other independent expert analyses of the relevant issues are already in the hearing record. For example, they include reports prepared by HGL (December 2007), Wehran (October 1977), and Golder Associates (March 1985). With respect to the previously mentioned reports, the municipalities reference Dr. Michalski’s pre-filed direct testimony as well as CWM’s pre-filed direct panel testimony (*see* Motion at 6, notes 4, 5, 6, and 7). The municipalities conclude that including the proffered documents in the evidentiary hearing record would narrow the factual disputes among the parties regarding geology and hydrogeology in the captioned proceedings (*See* Municipalities’ Motion at 8).

Mr. Abraham’s affirmation, dated May 26, 2022, recounts the communications that he had with counsel for Department staff and CWM about the proffered documents, and the municipalities’ request to include them in the evidentiary joint hearing record (*see also* Exhibit A to Abraham Affirmation).

### III. Ms. Wityrol's Reply

Ms. Wityrol supports the municipalities' motion. With respect to the proffered documents, Ms. Wityrol notes that the analyses and related communications from EPA's consultants, Booz Allen, focus on the same hydrogeological concerns being adjudicated here and would narrow the issues, and inform the record. Ms. Wityrol notes further that the pre-filed direct testimony of CWM's witness panel refers to reports prepared by the US Army Corps of Engineers and Modern Landfill, which are not related to the proposed RMU-2 landfill (*see* WSP 2022 Update, at 7-8, 18). (*See* Wityrol Reply at 1.)

With her reply, Ms. Wityrol includes a copy of the sign-in sheet from the April 10, 2017, meeting, which included representatives from CWM, EPA, and Booz Allen (*see* Document 12). Among the attendees were Michele Bentouk from Booz Allen, and Rick Kuhlthau from Mabbett & Associates. According to Ms. Wityrol, Mabbett & Associates is also an EPA contractor. In the reply (at 1), Ms. Wityrol provides references to Ms. Bentouk's and Mr. Kuhlthau's LinkedIn profiles to demonstrate their respective credentials and hydrogeologic expertise.<sup>9</sup>

### IV. Department Staff's Reply

Department staff opposes the municipalities' motion for three reasons. First, staff argues that the proffered documents are not relevant. Staff observes that most of the documents provide opinions by members of EPA staff and its consultant, Booz Allen, based on their respective review of documents filed by CWM as part of the pending federal TSCA permit application. The other documents consist of modified drawings, memorandums from Dr. Michalski dated August 2015 and October 2017, as well as an agenda for a meeting held in April 2017, between EPA staff, its consultants, and representatives from CWM. (*See* Staff Reply at 4.)

Staff argues that CWM's request for authorization from EPA for a federal TSCA permit is separate and distinct from the pending Part 373 permit modification application, which is the subject of these proceedings. To support this argument, staff references the affidavits filed by David Denk, Thomas Killeen and Michael Cruden. In their affidavits, members of Department staff acknowledge that they received copies of many of the proffered documents. Staff contends, however, that staff has no regulatory role in the federal review process, and these members have no personal knowledge about the status of the pending federal permit application. (*See* Staff Reply at 4-5, and Exhibits 1, 2 and 3.)

Second, assuming the proffered documents are relevant, staff argues further that they must, nevertheless, be excluded due to the potential for unfair prejudice and confusion of the geology and hydrogeology issues being considered here. To support this argument, Department staff references *Matter of Waste Management of New York (Towpath)*, (*see* ALJ Ruling 3, dated

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<sup>9</sup> The intervening parties did not offer Ms. Bentouk and Mr. Kuhlthau as expert witnesses.

March 7, 2001, at 2) where, to maintain the focus of the hearing, testimony and evidence may be restricted to the issues of material fact identified for adjudication. With reference to the affidavits, staff reiterates that the review of the federal TSCA permit application is not within the Department's jurisdiction and agency expertise. (See Staff Reply at 6-7 and Exhibits 1, 2 and 3.)

Staff argues further that the municipalities are inappropriately attempting to introduce these documents in a vacuum. The municipalities have not proffered a witness to testify as to the context and content of the proffered documents. Consequently, no one is available for cross-examination to determine the weight to be given to these documents if admitted into the evidentiary record. To support this argument, staff cites *Matter of 4-C's Development Corporation*, ALJ Ruling 9, dated February 27, 1997, at 5-7. (See Staff Reply at 7.)

Third, staff asserts that the municipalities' motion filed at this point in the proceedings is an improper and untimely attempt to supplement the testimony of their expert witness. Staff notes that all parties agreed to submit the pre-filed direct testimony and associated exhibits of their respective witnesses by January 14, 2022. According to staff, no legal basis exists for the municipalities to indirectly rely on the proffered documents, which include the opinions of EPA staff and Booz Allen as expert testimony with no opportunity for cross-examination. (See Staff Reply at 7-8.)

#### V. CWM's Reply

CWM opposes the municipalities' motion for the following reasons. Pursuant to 6 NYCRR 624.7(e), CWM argues first that expert opinions must be

attested to at the [adjudicatory] hearing and the witness must be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ.

To further support this argument, CWM cites *Matter of Brian Zazulka*, Decision of the Commissioner, dated December 27, 2004,<sup>10</sup> where the ALJ rejected applicant's request at hearing to consider a letter that introduced hearsay expert opinion about the direction of groundwater flow. Applicant proffered only the letter without the purported expert as a witness. The ALJ held that if applicant wanted to offer an expert's opinion, then the expert must present testimony subject to cross-examination (*see* ALJ's Hearing Report at 16-17). In this case, the ALJ also rejected applicant's attempt to introduce the "hearsay expert opinion" because it "would merely bolster the opinion already placed in the record by the Applicant's expert" (*Id.* at 17). Commissioner Erin M. Crotty issued a decision adopting the hearing report in *Zazulka*, which was subsequently affirmed upon judicial review.<sup>11</sup> Here, the municipalities, by their

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<sup>10</sup> See *Matter of Brian Zazulka*, DEC No. 2-6405-00425/00001, 2004 N.Y. ENV LEXIS 89, at \*35-36 (NYSDEC Dec. 27, 2004).

<sup>11</sup> See *Zazulka v NYS Dept. of Env'tl. Conservation*, 25 A.D.3d 719 (2d Dep't 2006), *lv denied* 7 N.Y.3d 713 (2006).



motion, are attempting what 6 NYCRR 624.7(e) and *Zazulka* prohibit, according to CWM. (*See* CWM Reply at 5-6.)

Second, CWM observes that the proffered documents are not signed and are anonymous. CWM contends that, as a result, it is not possible to assess the foundation for the opinions outlined in the documents because the qualifications, experience, and education of the author or authors are unknown. CWM concludes that the proffered documents are anonymous hearsay opinions that are inherently unreliable and, therefore, inadmissible pursuant to 6 NYCRR 624.9(a)(1) (*see also Matter of Thalle Industries, Inc.*, ALJ Ruling, dated December 10, 2003, at 20<sup>12</sup> [finding hearsay statement of rattlesnake sightings by unidentified witnesses were unreliable]). (*See* CWM Reply at 7-8.)

Third, CWM characterizes, as erroneous, the municipalities' claim that CWM's pre-filed direct testimony by Messrs. Martin and Macdonald relies, in part, on the proffered documents. According to CWM, the WSP Report, which is Exhibit A to the Martin/Macdonald pre-filed direct testimony, briefly discusses some of the proffered documents exchanged between CWM and EPA when describing the installation of additional monitoring wells associated with the groundwater monitoring program. CWM maintains, however, that neither the panel's pre-filed direct testimony nor the WSP Report rely upon any content from the proffered documents. (*See* CWM Reply at 8-9.)

Finally, CWM argues that the municipalities cannot rely on 6 NYCRR 624.9(a)(3) to admit Mr. Darragh's September 19, 2017, email and attachments (*see* Document 16) into the evidentiary record. Section 624.9(a)(3) provides that when a portion of a document is offered by one party as evidence, the other parties may offer the entire document as evidence. CWM notes that it has never offered any portion of the documents circulated with Mr. Darragh's September 19, 2017, for the evidentiary joint hearing record. CWM concludes, therefore, that 6 NYCRR 624.9(a)(3) does not apply to any of the proffered documents. (*See* CWM Reply at 9.)

## VI. Ruling and Discussion

For the reasons outlined below, I deny the municipalities' May 27, 2022, motion to include the proffered documents into the evidentiary joint hearing record of these proceedings.

First, compliance with State regulations for the pending certificate and permit modification is separate and distinct from compliance with the federal criteria for a TSCA permit. Department staff does not review application materials related to the federal criteria for a TSCA permit. Rather, staff's review here is limited to the application materials filed pursuant to 6 NYCRR Parts 377 and 373 (*see* Staff Reply Exhibits 1, 2 and 3). Therefore, the documents proffered by the municipalities are not relevant to these proceedings (*see* 6 NYCRR 624.9[a][1]).

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<sup>12</sup> *See Matter of Thalle Industries, Inc.*, DEC No. 3-1330-00049/02001, 2003 N.Y. ENV LEXIS 106, at \*53 (NYSDEC Dec. 10, 2003).

Second, the proffered documents are not the Department's business records. For example, they are not monitoring or inspection reports filed by a permittee or collected by Department staff during an inspection; they are not permits or other authorizations issued by the Department. Rather, the proffered documents are copies of correspondence exchanged among various parties including the municipalities' counsel, CWM, the EPA, and their respective consultants.

Although Department staff received copies of the proffered documents, staff's receipt of them neither bestows business record status upon them, nor conveys a custodial role upon Department staff (*see* Staff Reply Exhibits 1, 2, and 3). Consequently, members of Department staff cannot provide the requisite foundation at a hearing about the proffered documents. (*See* Prince, *Richardson on Evidence* §§ 8-305 and 8-306 [11<sup>th</sup> ed. 1995].)

Third, because the proffered documents are not the Department's business records, the municipalities have not, in the alternative, offered any witness to lay the required foundation for them (*see 4-C's*, at 5-7, *affirmed*, Interim Decision, dated April 7, 1997, at 2-3). I find that the lack of a witness to cross-examine to be inconsistent with SAPA § 306(3).

Fourth, I am not persuaded by the intervening parties' arguments that the proffered documents can be received into the evidentiary record of the proceeding because witnesses at this hearing relied on reports prepared by other experts. When Dr. Michalski references reports prepared by HGL (December 2007), Wehran (October 1977), and Golder Associates (March 1985) in his pre-filed direct testimony, the other parties will have the opportunity to cross-examine Dr. Michalski about whether, and if so, how he relied upon the information presented in these reports. However, the municipalities did not demonstrate that that Dr. Michalski's pre-filed direct testimony references any of the proffered documents. Therefore, if the municipalities wish to offer the technical information and expert opinions outlined in the proffered documents, they must produce an expert witness for cross-examination (*see Zazulka*, ALJ Hearing Report at 17).

Finally, to the extent that the content of some of the proffered documents duplicates information presented by the testimony of the respective parties' expert witnesses and their associated exhibits, I exclude the duplicative evidence pursuant to 6 NYCRR 624.9(a)(2) (*see also Towpath*, ALJ Ruling 3, dated March 7, 2001, at 2).

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/S/  
Daniel P. O'Connell  
Administrative Law Judge

Dated: Albany, New York  
July 22, 2022

To: Service List revised May 27, 2022