

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]).

February 3, 2021

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**Rulings on Motions to Strike Prefiled Direct Testimony**

**Proceedings**

With a scheduling order dated October 19, 2019, I directed the parties to prefile direct testimony and exhibits from the parties' respective witnesses related to the issues identified in the Siting Board's Third Interim Decision dated September 10, 2019. Some of the initial dates outlined in the October 19, 2019 scheduling order were duly amended. Amy Witryol submitted prefiled direct testimony and associated exhibits from Patrick J. Whalen, Ronald J. Rubino, Nicolas O. Rockler, Ph.D., and Timothy Masters. The Residents for Responsible Government, Inc. (RRG), the Lewiston-Porter Central School District, and the Niagara County Farm Bureau<sup>1</sup> jointly submitted prefiled direct testimony and associated exhibits from Jim Bittner, Kent D.

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<sup>1</sup> The jointly filed reply dated June 19, 2020 from these intervenors will be referenced herein as RRG's reply.

Messer, Ph.D., and Kenneth Acks. CWM submitted prefiled direct testimony and associated exhibits from Jonathon Rizzo, and jointly from James Berlow and Michael N'dolo, as CWM's public interest panel.<sup>2</sup>

By email dated April 6, 2020, Ms. Witryol advised that she wanted to file a motion to strike the prefiled direct testimony of CWM's public interest panel. The parties' representatives and I discussed this request during a telephone conference call on April 6, 2020. Applicant's counsel advised that CWM would move to strike portions of the prefiled direct testimony by the intervenors. During the telephone conference call, I established a schedule for filing motions, and outlined the schedule in a memorandum dated April 6, 2020. As anticipated, I timely received motions under cover of letters dated May 29, 2020 from Ms. Witryol and applicant's counsel.

I authorized replies from the other parties, including the amicus parties. With cover letters dated June 19, 2020, I timely received replies from CWM's counsel, Ms. Witryol, counsel for the Tuscarora Nation, RRG's counsel, counsel for the Buffalo-Niagara Waterkeeper, and counsel for Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (the Municipalities).

In response to an email request dated June 19, 2020, from applicant's counsel, I authorized CWM and Ms. Witryol, in an email dated June 22, 2020, to file a sur-reply, which was due by July 17, 2020. I timely received sur-replies from applicant's counsel and from Ms. Witryol.

#### I. Ms. Witryol's Motions

With a cover letter dated May 29, 2020, Ms. Witryol filed motions seeking the following relief. First, Ms. Witryol moves to strike the prefiled direct testimony offered by CWM's panel concerning whether the proposed RMU-2 landfill is otherwise necessary or in the public interest pursuant to ECL 27-1105(3)(f) and the October 2010 Siting Plan.

Ms. Witryol references 6 NYCRR 624.9 (Evidence, burden of proof and standard of proof), and argues that the standards for the qualifications of a witness and for testimony are outlined at 6 NYCRR 624.9(a)(1), (2), and (4) (*see* Ms. Witryol's motion at 3). According to these regulations, all evidence must be relevant and hearsay evidence is admissible if it is reliable (*see* 6 NYCRR 624.9[a][1]); relevant evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of repetitious or duplicative evidence (*see* 6 NYCRR 624.9[a][2]); and an object of testimony must be properly identified as relevant, and it must be shown that it has not changed substantially due to the passage of time or any other reason (*see* 6 NYCRR 624.9[a][4]). Ms. Witryol notes further that the applicant has the burden of proof (*see* 6 NYCRR 624.9[b][1]). (*See* Ms. Witryol's motion at 3.)

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<sup>2</sup> These rulings do **not** apply to the prefiled direct testimony submitted by Timothy Masters, Kenneth Acks, and Jonathon Rizzo. However, as discussed below, portions of the prefiled direct testimony of Nicholas O. Rockler, Ph.D. are stricken.

Ms. Witryol argues further that testimony may be stricken under the following circumstances:

1. It is not from a witness qualified as an expert on the topic, or lacks foundation;
2. The testimony is not based on fact;
3. It does not require specialized knowledge to clarify or helpful to a determination (and therefore unnecessarily or improperly intrudes on the province of the jury);
4. The testimony does not rest on a basis of established facts accepted in the expert's field as reliable;
5. It speculates rather than states a reasonable probability; and
6. The testimony is based on data so scanty that inferences are based on insufficient knowledge. (*See Ms. Witryol's motion at 3.*)

To support these grounds to strike testimony, Ms. Witryol cites many cases where the parties moved for summary judgment pursuant to either Civil Practice Law and Rules (CPLR) § 3212, or the related rule at CPLR § 4401. That latter rule provides for a motion for judgment during trial. (*See Ms. Witryol's motion at 3-5, notes 8 through 23, inclusive.*)

If Ms. Witryol prevails on the first motion, Ms. Witryol seeks summary judgment in the form of a determination from the Siting Board that CWM failed to demonstrate that the proposed RMU-2 landfill is otherwise necessary or in the public interest. Accordingly, Ms. Witryol argues that such a determination would allow the Siting Board to deny the pending application for a Certificate of Environmental Safety and Public Necessity, filed pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) former Part 361, thereby obviating the need for any further proceedings about the proposed RMU-2 landfill.

## II. CWM's Motion to Strike

With a cover letter dated May 29, 2020, from its counsel, CWM moves to strike the prefiled direct testimony submitted by Patrick J. Whalen, Jim Bittner, and Kent D. Messer, Ph.D., as well as a portion of the prefiled testimony submitted by Ronald J. Rubino. Contrary to the representations that Ms. Witryol presented at the July 10, 2018, issues conference, CWM contends that the prefiled direct testimony of Mr. Whalen exceeds the scope of the issue identified for adjudication concerning second home purchases. With respect to the direct testimony offered by Mr. Bittner and Dr. Messer on behalf of RRG, CWM objects on the following grounds. First, RRG did not identify these individuals as witnesses as part of the initial offer of proof in the November 2014 petition for full party status. CWM notes that neither witness has comparable experiences and qualification to the witnesses originally identified in the intervenors' joint petition for full party status. Second CWM contends that the proffered testimony lacks a factual foundation and is, therefore, speculative. With respect to the prefiled testimony submitted by Mr. Rubino, CWM objects to Mr. Rubino's response to Question No. 17 (*see Rubino at 6-7*). CWM characterizes the response as speculative, and argues that Mr. Rubino lacks the qualifications to offer an opinion. (*See CWM's motion at 3-4.*)

Citing prior administrative decisions,<sup>3</sup> CWM asserts that the ALJ may strike irrelevant testimony that exceeds the scope of the issues identified for adjudication (*see* CWM's motion at 5). CWM asserts further that when the prefiled direct testimony of a witness is inconsistent with the initial offer of proof presented in a petition for full party status, the ALJ may exclude the prefiled direct testimony from the evidentiary record as irrelevant (*see* CWM's motion at 13).

Furthermore, CWM argues that a lay witness may not offer opinions on matters requiring a specialized knowledge that the witness does not possess. In addition, opinions of a proposed expert witness must be based on facts in the record or on the personal knowledge of the witness, which are absent here, according to CWM. (*See* CWM's motion at 20-21, 26-27).

## Discussion and Rulings

### I. Standard of Review

Pursuant to 6 NYCRR 624.9 (a)(1), all evidence must be relevant. However, the other rules of evidence concerning admissibility need not be strictly applied to the Department's administrative permit hearings. For example, hearsay evidence may be admitted when a reasonable degree of reliability can be shown.<sup>4</sup> To be considered relevant, the evidence must relate to the issues identified for adjudication (*see* 6 NYCRR 624.8[a][4]). A full party has the right to present relevant evidence and to cross-examine the other parties' witnesses (*see* 6 NYCRR 624.5[e][1][ii]).

The sworn testimony of a witness is a form of evidence (*see* 6 NYCRR 624.2[p]). There are two types of witnesses. A lay witness is one who observed certain events, and describes them. Although lay witnesses are not precluded from offering opinion, the scope of lay opinion is limited to matters that fall within ordinary perceptions and experiences such as color, weight, height, taste, and smell, for example (*see* *Barker & Alexander*, § 7:2; *Jerome Prince, Richardson on Evidence* §§ 7-201 to 7-202 [Farrell 11<sup>th</sup> ed 1995]). A lay witness may not offer opinions about matters calling for a specialized knowledge that the witness does not possess (*see* *Larsen v Vigliarolo Bros., Inc.*, 77 AD2d 562, 562 [2d Dept], *lv denied* 52 NY2d 702 [1980]; *Viacom Intl. v Midtown Realty Co.*, 193 AD2d 45, 55 [1st Dept 1993]).<sup>5</sup>

An expert witness is qualified by knowledge, experience, and training, and may give an opinion about the issues in dispute. The testimony provided, however, must be based upon

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<sup>3</sup> *Matter of Waste Management of New York, LLC (Towpath)*, Decision of the Commissioner and SEQRA Findings Statement, dated February 10, 2003, attached Hearing Report at 6-7; *Matter of Waste Management of New York, LLC (Towpath)*, Ruling of the Administrative Law Judge, dated March 7, 2001 at 2; and *Matter of Peckham Materials, Corp.*, Decision of the Commissioner, dated January 28, 1994, attached Hearing Report at 9.

<sup>4</sup> For regulatory definitions of the terms, *evidence*, *hearsay*, and *relevant*, *see* 6 NYCRR 624.2(p), (r), and (cc), respectively.

<sup>5</sup> *See Matter of US Energy Development Corporation*, Rulings of the Chief Administrative Law Judge on Pre-Hearing Motions, dated February 23, 2016 at 5-6.

reliable facts or data. The admissibility of expert testimony about a particular issue is at the discretion of the trial court or tribunal. (*See De Long v County of Erie*, 60 NY2d 296, 307 [1983]). After a witness's background and qualifications are placed on the record, New York law does not require a party to formally request a ruling stating that the witness is an expert (*see People v Grajales*, 294 AD2d 657, 659 [3d Dept], *lv denied* 98 NY2d 697 [2002]; *People v Gordon*, 202 AD2d 166, 167 [1st Dept], *lv denied* 83 NY2d 911 [1994]; *see also People v Lamont*, 21 AD3d 1129, 1132 [3d Dept 2005], *lv denied* 6 NY3d 835 [2006] [criticizing the practice of formally certifying experts in jury trials]). Generally, a formal determination whether a witness qualifies as an expert occurs only when and if an opposing party challenges the expert's credibility or qualifications and, even then, the determination need only be implicit (*see People v Gordon*, 202 AD2d at 167).<sup>6</sup>

## II. The Siting Board's Third Interim Decision

On September 10, 2019, the Siting Board issued the Third Interim Decision. After duly considering appeals and replies from the February 14, 2019 supplemental rulings, the Siting Board identified issues for adjudication related to the siting certificate. They are:

1. Property values and tax receipts;
2. Second home purchases;
3. Impacts on other economic development; and
4. Impacts on marketability of agricultural products (Third Interim Decision, dated September 10, 2019 at 16).

## III. Motion to Strike CWM's Prefiled Testimony by Messrs. Berlow and N'dolo

Ms. Witryol moves to strike the prefiled direct testimony and related exhibits jointly submitted by James Berlow and Michael N'dolo. CWM offers this panel to supplement and, where necessary, update portions of the former Part 361 certificate application, and the DEIS for the proposed RMU-2 landfill at the Model City facility.<sup>7</sup> Mr. Berlow prepared a report titled, *Public Interest Benefits of Construction and Operation of Residuals Management Unit 2 at the Model City Facility in Niagara County, New York* (the Berlow Report). Mr. N'dolo prepared an update to the 2010 Bonadio Report concerning the potential economic and fiscal impacts of applicant's proposal (the MRB Report). (*See Berlow and N'dolo* at 4-5, 8-9, and 12-13.)

Ms. Witryol contends that Mr. Berlow is not qualified to testify about issues concerning whether CWM's proposal would be in the public interest. Ms. Witryol contends further that Mr.

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<sup>6</sup> *See Matter of US Energy Development Corporation*, Rulings of the Chief Administrative Law Judge on Pre-Hearing Motions, dated February 23, 2016 at 6-8.

<sup>7</sup> CWM also offered the prefiled testimony of Jonathon Rizzo. The purpose of Mr. Rizzo's testimony is to introduce the 6 NYCRR former Part 361 Application for a Certificate of Environmental Safety and Public Necessity, and the DEIS (Rizzo at 1-2). In the motion, Ms. Witryol reserves the right to object to Mr. Rizzo's testimony (Ms. Witryol's motion at 30).

Berlow's work experiences do not "clarify any relevant information" (Ms. Witryol's motion at 11). The Berlow Report is identified as Exhibit B to the panel's prefiled direct testimony. Mr. Berlow's curriculum vitae (CV) is Exhibit C to the Berlow Report. According to Ms. Witryol, Mr. Berlow's CV does not demonstrate how his work experiences, related to federal environmental statutes, serve as the bases to opine on the economics of waste management or the public interest issues at issue in this matter. Also, Ms. Witryol notes that Mr. Berlow's CV neither identifies any past clients, nor gives examples of prior consulting projects. (See Ms. Witryol's motion at 11, and Ms. Witryol's sur-reply at 13.)

In the motion to strike, Ms. Witryol provides a detailed analysis and critique of the proffered testimony and the Berlow Report.<sup>8</sup> According to Ms. Witryol, statements in the Berlow Report are not true, not relevant, and speculative.<sup>9</sup> Ms. Witryol references the exhibits attached to the motion to further support her analysis of the Berlow Report. (See Ms. Witryol's motion at 12-17; see also Exhibits 3-A, 3-B, 4-A, and 4-B).<sup>10</sup> Based on these various examples outlined in the motion, Ms. Witryol contends that the proffered testimony and the Berlow Report do not meet the evidentiary standards outlined at 6 NYCRR 624.9(a)(1), (2), and (4) (see Ms. Witryol's motion at 18, Table).

As noted above, Michael N'dolo is the second member of the CWM panel who jointly prefiled direct testimony with Mr. Berlow. With his testimony, Mr. N'dolo provides an update to the 2010 Bonadio Report, which is identified as the MRB Report (see Berlow and N'dolo at 8-9). The 2010 Bonadio Report addressed the potential economic and fiscal impacts of the proposed RMU-2 landfill. Appendix F to the MRB Report is a copy of Mr. N'dolo's CV.

Because Mr. N'dolo's degree is in public administration rather than economics or accounting, Ms. Witryol contends that his experiences, and those of his firm, do not qualify Mr. N'dolo to assess or otherwise opine about potential impacts from the proposed RMU-2 landfill. Ms. Witryol notes that Mr. N'dolo's firm, the MRB Group, is a municipal engineering firm that specializes in municipal wastewater facilities. Exhibit 5 to Ms. Witryol's motion is a list of projects identified on the MRB Group's website. In the motion, Ms. Witryol lists nine questions, which she asserts are generally relevant to the public interest issue, and states that Mr. N'dolo's prefiled direct testimony does not address any of them. (See Ms. Witryol's motion at 19-20.)

Ms. Witryol asserts that Mr. N'dolo's prefiled direct testimony is irrelevant because his Year 1 2020 forecast data do not comply with the standards outlined in the October 2010 Siting Plan. Ms. Witryol asserts further that the MRB Report does not address the criteria identified in

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<sup>8</sup> Citing her May 29, 2020 motion, Ms. Witryol summarizes her critique and analysis of the prefiled direct testimony of CWM's public interest panel and associated exhibits in the sur-reply (see Ms. Witryol's sur-reply at 1-6, 12-13).

<sup>9</sup> The Municipalities agree that Mr. Berlow's prefiled direct testimony is speculative, and support Ms. Witryol's motion to strike (see Municipalities' reply at 2).

<sup>10</sup> Among others, Ms. Witryol attached the following exhibits to the motion to strike. Exhibit 3-A is a table titled, *New York Waste Shipped from Land Disposal 2018 by TSDf*. Exhibit 3-B is a table titled, *New York Waste Shipped from Land Disposal 2017 by TSDf*. Exhibit 4-A is titled, *CWM Ten Year Plan Excerpts*, and consists of a set of three tables that present data related to capital spending at the Model City facility. Exhibit 4-B is titled, *Summary of Ten-Year Plans CWM Submitted to DEC – Excerpts*, for the years 2005, 2006, 2007, and 2008.

Chapter 9 of the Siting Plan.<sup>11</sup> For example, the MRB Report does not identify potential impacts associated with the construction and operation of the proposed RMU-2 landfill, according to Ms. Witryol. (See Ms. Witryol's motion at 20-22.)

In addition, Ms. Witryol contends that portions of the MRB Report are based on unreliable hearsay information. To refute the unreliable hearsay information presented in the MRB Report, Ms. Witryol offers Exhibit 2 to the motion. Exhibit 2 is an affidavit by Ms. Witryol sworn to May 28, 2020, in which she states that information provided by CWM, which was initially presented in a draft version of the Siting Plan, was not accurate. (See Ms. Witryol's motion at 22-23; Exhibit 2.) Ms. Witryol asserts there are additional errors in the MRB Report that render it inaccurate. Based on these circumstances, Ms. Witryol argues that Mr. N'dolo's testimony and the MRB Report are irrelevant and, therefore, should be stricken. (See Ms. Witryol's motion at 23-29, and Ms. Witryol's sur-reply at 14.)

In its reply, CWM opposes Ms. Witryol's motion to strike the prefiled testimony of Messrs. Berlow and N'dolo as its public interest panel, and argues that the motion has no merit (see CWM's reply at 2-3). According to CWM, Mr. Berlow's testimony and the associated Berlow Report are relevant to the issue of whether the proposed RMU-2 landfill would comply with the public interest criteria outlined in the Siting Plan. These criteria include, among other things, transportation distances, and changes in greenhouse gas emissions. CWM contends that the Siting Board must determine whether the proposed RMU-2 landfill would comply with the public interest criteria in the October 2010 Siting Plan, and argues that the best way for the Siting Board to make the required determination is to consider a complete record developed at the adjudicatory hearing. CWM concludes that a pre-hearing motion to strike is not the proper forum to resolve any significant disputes about the potential public interest benefits of the proposed RMU-2 landfill. (See CWM's reply at 21-24.)<sup>12</sup>

Contrary to Ms. Witryol's assertion, CWM contends that Mr. Berlow has the requisite qualifications to offer expert testimony in this proceeding. To support this contention, CWM references Mr. Berlow's CV (see Exhibit C to the Berlow Report [CWM Panel, Exhibit B]), which shows that he has obtained degrees in engineering, and has 28 years of experience in EPA's Office of Solid Waste and Emergency Response. Based on these credentials, CWM argues that Mr. Berlow is one of the nation's leading experts on hazardous waste management logistics, as well as the costs and benefits associated with constructing and operating hazardous waste disposal and treatment facilities. (See CWM's reply at 27-28; see also *Riccio v NHT Owners, LLC*, 79 AD3d 998, 1000 [2d Dept 2010].)

According to CWM, Mr. N'dolo's testimony and the associated MRB Report are relevant. CWM argues that the potential economic and fiscal benefits of its proposal demonstrate that it would comply with the criteria outlined at ECL 27-1105(3)(f) and the October 2010 Siting Plan. (See CWM's reply at 4). As noted above, CWM contends that the Siting Board must determine the significance of any potential economic and fiscal benefits

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<sup>11</sup> Chapter 9 of the October 2010 Siting Plan is titled, *Guidance for State Agencies and Authorities and Facility Siting Boards*.

<sup>12</sup> CWM refutes Ms. Witryol's analysis of the Berlow Report (see CWM's reply at 24-27, and 30-34).

associated with the construction and operation of the proposed RMU-2 landfill, and argues that the best way for the Siting Board to make such a determination is to consider a complete record developed at the adjudicatory hearing. CWM reiterates its conclusion that a pre-hearing motion to strike is not the proper forum to resolve any significant disputes about the potential public interest benefits of the proposed RMU-2 landfill. (See CWM's reply at 7-8.)<sup>13</sup>

CWM argues that Mr. N'dolo should be allowed to offer expert testimony in this proceeding. To support this argument, CWM references Mr. N'dolo's CV (see Exhibit F to the MRB Report [CWM Panel, Exhibit A]). Based on these credentials, CWM contends that Mr. N'dolo has the requisite education and work experiences to offer expert testimony about the potential economic and fiscal impacts associated with constructing and operating hazardous waste disposal and treatment facilities. (See CWM's reply at 11-13.)

In a jointly filed reply dated June 19, 2020, RRG supports Ms. Witryol's motion to strike the prefiled direct testimony of CWM's public interest panel and associated exhibits. According to RRG, CWM did not offer any significant prefiled direct testimony about whether the proposed RMU-2 landfill would be in the public interest. RRG argues that the anticipated financial impacts associated with the Model City facility, as well as estimated transportation costs and potential reductions to greenhouse gas emissions do not reflect the resulting conditions subsequent to the closure of the RMU-1 landfill. As a result, RRG concludes that the proffered testimony of CWM's public interest panel is not relevant, and should be stricken. (See RRG's reply at 5-6.)

For the reasons outlined in the Tuscarora Nation's June 19, 2020 response, the Nation supports Ms. Witryol's motion to strike the prefiled direct testimony of CWM's panel concerning whether CWM's proposal is otherwise necessary or in the public interest. First, the Tuscarora Nation asserts that the testimony of CWM's witness panel and the associated exhibits do not account for the economic harm that may result from the Model City facility's wastewater discharges to local surface waters. The local surface waters of the Niagara River, Four Mile Creek, Six Mile Creek, and Twelve Mile Creek are the Tuscarora Nation's historic fishing waters, and the Nation depends on these waters for subsistence fishing. The Tuscarora Nation notes that its members continue the centuries-old practice of spear fishing at specific locations along the Niagara River, which the United States has recognized with a federal designation in the National Register of Historic Places. (See Tuscarora Nation's reply at 2-5; see also Exhibit A [US Department of the Interior, National Park Service, National Register of Historic Places, Registration Form – *Lower Niagara River Spear Fishing Docks Historic District*] and Exhibit B [Affirmation of Neil Patterson, Jr., dated June 19, 2020].)

Second, the Tuscarora Nation also asserts that the prefiled direct testimony of Messrs. Berlow and N'dolo does not address potential environmental justice impacts as part of the public interest issue. According to the Tuscarora Nation, the proximity of the proposed RMU-2 landfill to the Tuscarora Nation raises environmental justice concerns that can only be addressed through consultation, and an assessment of potential impacts to the Nation. The Tuscarora Nation agrees with Ms. Witryol's argument that the testimony offered by CWM's panel is irrelevant, in part, because it does not discuss potential environmental justice impacts. The Tuscarora Nation notes

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<sup>13</sup> CWM refutes Ms. Witryol's analysis of the MRB Report (see CWM's reply at 8-11, and 14-20).

that an assessment of potential environmental justice impacts is required by State and federal policies.<sup>14</sup> According to the Tuscarora Nation, neither the Department nor EPA has adequately consulted with the Nation about CWM's proposal. (*See* Tuscarora Nation's reply at 5-10.)

In a reply dated June 19, 2020, the Buffalo-Niagara Waterkeeper supports Ms. Witryol's motion to strike the prefiled direct testimony of CWM's public interest panel. Waterkeeper notes that the testimony offered by Messrs. Berlow and N'dolo is generally limited to potential economic issues, and fails to address discharges to the Niagara River pursuant to the terms and conditions of a draft SPDES permit. According to Waterkeeper, discharges from the Model City facility would include PCBs, which would be contrary to the federal Great Lakes Initiative, among other legal authorities. (*See* Waterkeeper's reply at 1.)

In its July 17, 2020 sur-reply, CWM argues that the June 19, 2020, reply filed by the Tuscarora Nation does not state a basis to strike the prefiled direct testimony of CWM's public interest panel. CWM notes that none of the issues identified in the Siting Board's Third Interim Decision dated September 10, 2019, relate to the concerns outlined in the Tuscarora Nation's reply. CWM explains that the prefiled direct testimony of Mr. Rizzo references CWM's application materials including those related to its request to modify the current SPDES permit for the Model City facility. Referring to the February 14, 2019 supplemental rulings (at 6-16), CWM argues that it has adequately addressed all water quality issues proposed in the May 2, 2018, petition for amicus status filed by the Tuscarora Nation. (CWM's sur-reply at 6-9.)

CWM argues further that the environmental justice arguments outlined in the Tuscarora Nation's June 19, 2020, reply are unsupported and without merit. To support its argument, CWM references the December 22, 2015, issues ruling (at 62-64), a ruling dated April 21, 2016 (at 9) concerning Ms. Witryol's motion to reconvene the issues conference, and the supplemental rulings, dated February 14, 2019 (at 29-30).

According to CWM, the June 18, 2020 reply filed by Buffalo-Niagara Waterkeeper does not state a basis to strike the prefiled direct testimony of CWM's public interest panel because the Siting Board's Third Interim Decision dated September 10, 2019, does not identify any issues for adjudication concerning water quality. As noted above, CWM explains that the prefiled direct testimony of Mr. Rizzo references CWM's application materials including those related to its request to modify the SPDES permit for the Model City facility. Referring to the February 14, 2019 supplemental rulings (at 6-16), among other things, CWM reiterates that it has adequately addressed all water quality issues proposed in the May 2, 2018 petition for amicus status filed by the Buffalo-Niagara Waterkeeper. (*See* CWM's sur-reply at 2-6.)

In the July 17, 2020 sur-reply, Ms. Witryol states that the intervenors did not offer any new arguments in their respective replies. According to Ms. Witryol, the intervenors restate arguments previously presented in these proceedings. For example, Ms. Witryol notes that the

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<sup>14</sup> New York State policies include Commissioner Policy 29, dated March 19, 2003, titled, *Environmental Justice and Permitting* (CP-29), and Commissioner Policy 42, dated March 27, 2009, titled, *Contact, Cooperation, and Consultation with Indian Nations* (CP-42). With respect to applicable federal policies, the Tuscarora Nation attached Exhibit C to the response. Exhibit C is a copy of a letter dated December 5, 2015 from John Filippelli, Director, Clean Air and Sustainability Division, U.S. Environmental Protection Agency, Region 2, to Chief Leo Henry.

Tuscarora Nation, in its petition for amicus status, expressed concerns about potential economic harm, and adverse impacts associated with pollution to historic fishing sites, among others. Ms. Witryol notes further that the Tuscarora Nation discussed the lack of consultation, and the Nation's environmental justice status during the July 10, 2018, issues conference. Ms. Witryol agrees with the argument presented by Buffalo-Niagara Waterkeeper that discharges from the proposed RMU-2 landfill would cause unnecessary damage to the natural resources of the State. With respect to the Municipalities, Ms. Witryol references a letter dated October 2, 2015, in which the Municipalities commented about the draft SPDES permit. (*See* Ms. Witryol's sur-reply at 8-9, 11.)

**Ruling and Discussion:** Ms. Witryol's motion to strike the prefiled direct testimony and related exhibits jointly submitted by James Berlow and Michael N'dolo on behalf of CWM is denied.

Mr. Berlow's prefiled direct testimony is relevant to the issue of whether the proposed RMU-2 landfill would comply with the public interest criteria outlined in ECL 27-1105(3)(f) and the October 2010 Siting Plan. Mr. Berlow's prefiled direct testimony references the application materials including the former Part 361 certificate application (*see* Berlow and N'dolo at 6-7), and the DEIS (*see* Berlow and N'dolo at 7). With the prefiled direct testimony, the witness is sponsoring a document (Berlow Report [Berlow and N'dolo Exhibit B]) that addresses topics discussed in the certificate application materials (*see* Berlow and N'dolo at 13).

Mr. N'dolo's prefiled direct testimony is also relevant to the issue of whether the proposed RMU-2 landfill would comply with the public interest criteria outlined in ECL 27-1105(3)(f) and the Siting Plan. The focus of Mr. N'dolo's prefiled direct testimony is on the potential economic and fiscal benefits of the proposed RMU-2 landfill to the local community and the State (*see* Berlow and N'dolo at 8). With the prefiled testimony, the witness is sponsoring a document (MRB Report [Berlow and N'dolo Exhibit A]) to update the 2010 Bonadio Report (*see* Berlow and N'dolo at 8-12), which is part of the certificate application materials.

Ms. Witryol's assessment of the prefiled direct testimony filed by Messrs. Berlow and N'dolo, and CWM's response to that assessment, are arguments, which are not evidence. At this stage of the proceeding, these arguments cannot be relied upon to evaluate the veracity of the panel's prefiled direct testimony. Rather, during the cross-examination of these witnesses at the hearing, the parties will have the opportunity to question each witness about his knowledge, experience, and training<sup>15</sup> to develop a record about whether the witnesses may offer testimony. In addition, the parties will have the opportunity to inquire about the factual information that the witnesses relied upon as the bases for their respective opinions and conclusions.

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<sup>15</sup> Mr. Berlow's CV is Exhibit C to the Berlow Report, and Mr. N'dolo's CV is Appendix F to the MRB Report.

#### IV. CWM Motions to Strike

As noted above, CWM moves to strike the prefiled direct testimony submitted by Patrick J. Whalen, Jim Bittner, and Kent D. Messer, Ph.D., as well as a portion of the prefiled testimony submitted by Ronald J. Rubino.

##### A. Patrick J. Whalen

Patrick J. Whalen prefiled direct testimony on behalf of Ms. Witryol. Mr. Whalen is the Director of the Niagara Global Tourism Institute in Niagara Falls, New York. As stated in his prefiled submission, the purpose of Mr. Whalen's testimony is to identify economic alternatives to CWM's proposed RMU-2 landfill in the tourism sector of economic development, and whether CWM's proposal would impact the purchase of second homes (*see* Whalen at 2).

CWM notes that Ms. Witryol initially proposed a broadly framed issue related to tourism, but the Siting Board affirmed my December 22, 2015 issues ruling to limit the issue to second home purchases as a measure of tourism spending (*see* CWM's Motion at 6, *citing* Interim Decision dated August 11, 2016 at 18). CWM notes further that Ms. Witryol moved for reconsideration of the December 22, 2015, issues ruling at the July 10, 2018 issues conference, and sought to include testimony from Mr. Whalen about a report titled, *Niagara Falls Prospect Survey* (December 2015). I ruled that Mr. Whalen may testify about the December 2015 report as it relates to whether CWM's proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts, as well as the related subtopic concerning potential effects on second home purchases as a measure of tourism spending (*see* Supplemental Rulings dated February 14, 2019 at 25.)<sup>16</sup>

CWM emphasizes that the scope of the issue was not otherwise expanded, and argues that Mr. Whalen's prefiled direct testimony exceeds the issue as framed in my February 14, 2019 supplemental rulings and affirmed by the Siting Board in the Third Interim Decision dated September 10, 2019. Accordingly, CWM seeks to strike Mr. Whalen's prefiled direct testimony because it is irrelevant. (*See* CWM's motion at 9-12.)

According to Ms. Witryol, an expert's presentation about the potential effects of CWM's proposal on attracting other economic development projects in the Towns of Lewiston and Porter would be incomplete unless the testimony addressed tourism and agriculture, among other things. Ms. Witryol argues that tourism has become the most important and fastest growing sector of the economies of Niagara County as well as the Towns of Porter and Lewiston beyond residential real estate. As a result, tourism growth represents one of the primary alternatives to the proposed RMU-2 landfill. (*See* Ms. Witryol's reply at 2-3.) Ms. Witryol contends that Mr.

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<sup>16</sup> At the July 10, 2018, issues conference, Board Member Benoit expressed interest in the report titled, *Niagara Falls Prospect Survey*, and inquired whether the members of the Siting Board could review it (*see* July 10, 2018 Tr. at 178-179). In the Third Interim Decision dated September 10, 2019 (at 5, 14-15), the Siting Board affirmed the ruling.

Whalen's expertise in strategic planning for the tourism sector of the economy qualifies him to offer an opinion about "what is appropriate and possible in Lewiston and Porter, as well as negative influences on economic development efforts" (Ms. Witryol's response at 3). Ms. Witryol notes the following. First, the exhibits offered with Mr. Whalen's prefiled direct testimony are important to the prefiled direct testimony of the other witnesses offered by the intervenors. Second, Exhibit 4 to Kenneth Acks' prefiled direct testimony (Cost Benefit Group [CBG] Report) considers the potential impacts of CWM's proposals on tourism. (See Ms. Witryol's reply at 4.)

With reference to the July 10, 2018 issues conference (Tr., at 118-122), Ms. Witryol states that she anticipated that Mr. Whalen would be allowed to testify about the Love Canal Survey regarding tourism, leaving real estate issues to others. Ms. Witryol contends that if the intervenors are prevented from discussing the factors that increase or reduce the pool of potential buyers, then the issue becomes wholly divorced from tourism and would become a matter of residential primary or secondary real estate. Ms. Witryol maintains that she never sought to bifurcate tourism issues because it is not possible to do so. Finally, Ms. Witryol notes that the October 2010 Siting Plan (at 9-6) identifies potential impacts on tourism as relevant to the issue of public interest. (See Ms. Witryol's reply at 5.)

RRG opposes CWM's motion to strike Mr. Whalen's prefiled direct testimony. In the reply, RRG argues that Mr. Whalen's prefiled direct testimony and associated exhibits are relevant to the economic development issues, and overlap with the marketing of agricultural products from this part of Niagara County. (See RRG's reply at 13.)

**Ruling and Discussion:** CWM's motion to strike the prefiled direct testimony of Patrick J. Whalen and the associated exhibits is granted in part, and denied in part.

Portions of Mr. Whalen's prefiled direct testimony exceed the scope of the issues joined by the Siting Board, and are therefore not relevant.<sup>17</sup> As stated in his prefiled submission, the purpose of Mr. Whalen's testimony is to identify economic alternatives to CWM's proposed RMU-2 landfill in the tourism sector of economic development, and whether CWM's proposal would impact the purchase of second homes (see Whalen at 2). The Siting Board did not join any issue related to tourism (see Third Interim Decision, dated September 10, 2019 at 16). Accordingly, those portions of Mr. Whalen's prefiled direct testimony that discuss tourism and the related exhibits will be stricken.

Mr. Whalen's prefiled direct testimony is stricken from page 2, line 39, beginning with Question No. 6, to the conclusion of the response to Question No. 11 on page 6, line 8. The exhibits referenced in the stricken portions of Mr. Whalen's prefiled direct testimony are Exhibits 2, 3, 4, and 5. These exhibits will also be excluded because they relate to topics not relevant to the issues identified in the Siting Board's Third Interim Decision.

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<sup>17</sup> See *Matter of Waste Management of New York, LLC (Towpath)*, Decision of the Commissioner and SEQRA Findings Statement, dated February 10, 2003, attached Hearing Report at 6-7; *Matter of Waste Management of New York, LLC (Towpath)*, Ruling of the Administrative Law Judge, dated March 7, 2001 at 2; and *Matter of Peckham Materials, Corp.*, Decision of the Commissioner, dated January 28, 1994, attached Hearing Report at 9.

The remaining portions of Mr. Whalen's prefiled direct testimony will be considered. They are the responses to Questions Nos. 1, 2, 3, 4, 5 on page 2 from lines 1 to 37, and Questions Nos. 12 and 13 on page 6 from lines 10 to 26.

Based on the discussion at the July 10, 2018 issues conference, I granted Ms. Witryol's motion to include a report authored by Mr. Whalen titled, *Niagara Falls Prospect Survey*, dated December 2015. As noted above, members of the Siting Board expressed interest in reviewing the document (*see* July 10, 2018 Tr., at 178-179), and I ruled that Mr. Whalen could testify about this report (*see* Supplemental Issues Rulings dated February 14, 2019 at 25-26). The Siting Board affirmed this ruling in the Third Interim Decision (at 5, 14-15).

However, Ms. Witryol did not include this document, or any questions related to it as part of Mr. Whalen's prefiled direct testimony.<sup>18</sup> Given the Siting Board's expressed interest in this document, I direct Ms. Witryol to provide copies of it before the hearing convenes, and to make Mr. Whalen available during the hearing to answer questions about it. Within 30 days from the date of this ruling, Ms. Witryol shall advise the parties and me about whether the report titled, *Niagara Falls Prospect Survey*, dated December 2015, has been revised or updated since the discussion held at the July 2018 issues conference. If the document has been revised or updated since July 2018, Ms. Witryol shall produce copies of those revision or updates to the December 2015 report before the hearing convenes.

**B. Jim Bittner and Kent Messer, Ph.D.**

In the December 22, 2015 issues ruling (at 90-91), I determined that the Niagara County Farm Bureau (Farm Bureau)<sup>19</sup> raised a substantive and significant issue for adjudication about whether CWM's proposal would impact the marketability of agricultural products raised on farms located in the vicinity of the Model City facility. In its jointly filed petition for full party status, the Farm Bureau offered Thomas Freck and Thomas Tower as witnesses. Messrs. Freck and Tower own and operate farms in the Town of Porter. According to the petition for full party status, they would testify about the perceptions that consumers have about the purity of the agricultural products grown on their respective farms, and about the marketability of these products.

However, the Farm Bureau submitted prefiled direct testimony from Jim Bittner and Kent D. Messer, Ph.D. Mr. Bittner is the past-President of the Niagara County Farm Bureau, and the President and General Manager of Bittner-Singer Orchards located in Appleton, New York.<sup>20</sup> Dr. Messer is the S. Hallock du Pont Professor of Applied Economics in the Department of

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<sup>18</sup> Dr. Rockler reviewed the December 2015 report as part of his prefiled direct testimony. The December 2015 report is not an exhibit to Dr. Rockler's submission. (*See* Rockler at 11, Question No. 17.)

<sup>19</sup> The Niagara County Farm Bureau (Farm Bureau) is a member of the consolidated group of intervenors whose other members are RRG, and the Lewiston-Porter Central School District. As noted above, these intervenors jointly filed a reply dated June 19, 2020, which is referenced herein as RRG's reply.

<sup>20</sup> Appleton is a hamlet in the Town of Newfane, Niagara County. The Town of Newfane is located east of the Towns of Porter and Wilson.

Applied Economics and Statistics in the College of Agriculture and Natural Resources at the University of Delaware in Newark, Delaware. Both witnesses prefiled testimony with respect to whether CWM's proposed RMU-2 landfill would impact the marketability of agricultural products from farms located in the vicinity of the Model City facility. (See Bittner at 2, and Messer at 2.)

CWM objects to the prefiled direct testimony submitted by Mr. Bittner for the following reasons. First, the Bittner-Singer Orchards are not located in the Town of Porter, but in the Town of Newfane, which is over 20 miles from the Model City facility. CWM contends that the Bittner-Singer Orchards are not in the vicinity of the Model City facility. In contrast, Mr. Freck's farm is located on Balmer Road in the Town of Porter, and Mr. Tower's farm is located less than a mile from the Model City facility. Second, Mr. Bittner's prefiled direct testimony does not address the issue identified for adjudication. Generally, Mr. Bittner offers background information about the Bittner-Singer Orchards and unsubstantiated opinions about agricultural markets in Niagara County, according to CWM. CWM argues that Mr. Bittner's prefiled direct testimony should be stricken because his experiences and opinions do not relate to farming operations in the vicinity of the Model City facility in the manner anticipated by the proffer from Messrs. Freck and Thomas. CWM argues further that the opinions offered in the prefiled submission are speculative. CWM observes that Mr. Bittner's testimony does not link customers' perceptions about the agricultural products from his orchard to the Model City facility. (See CWM's motion at 15-19; and 26-29.)

CWM also objects to the prefiled direct testimony submitted by Dr. Messer. CWM notes that Dr. Messer is a professor of Economics at the University of Delaware, who offers expert opinions, rather than the factual information anticipated from Messrs. Freck and Tower. CWM notes further that Dr. Messer does not describe any personal experiences in his prefiled direct testimony related to owning or operating a farm in the vicinity of the Model City facility. CWM argues that Dr. Messer's prefiled direct testimony does not include any data gathered from customers who purchased agricultural products from farms located in the vicinity of the Model City facility. Based on this circumstance, CWM characterizes the opinions offered in Dr. Messer's prefiled direct testimony as lacking a factual foundation and are, therefore, speculative. (See CWM's motion at 22-24.)

Exhibit D to Dr. Messer's prefiled direct testimony is a copy of a notarized letter dated January 23, 2020, from Thomas Tower, and an article from the *Buffalo News*. CWM objects to Mr. Tower's January 23, 2020 letter as hearsay, and notes that Mr. Tower did not offer any prefiled direct testimony and, therefore, would not be available for cross-examination about the statements made in the letter. According to CWM, the January 23, 2020 letter from Mr. Tower is not reliable. (See CWM's motion at 24-25.)

In its reply, RRG opposes CWM's motion to strike the prefiled direct testimony of Mr. Bittner and Dr. Messer (see RRG's reply at 6; see also Ms. Witryol's sur-reply at 13). RRG observes the following. In anticipation of an adjudicatory hearing about CWM's proposal, RRG began to search for witnesses eight years ago. I released an issues ruling five years ago, and a supplemental issues conference convened two years ago this summer. As a result, RRG states that some witnesses, initially identified in its November 2014 joint petition for full party status

are no longer available for various reasons. Based on the foregoing circumstances, RRG argues Mr. Bittner's and Dr. Messer's prefiled direct testimony represent the best qualified witnesses available to address the marketability of agricultural products. In his capacity as past-President of the Niagara County Farm Bureau, Mr. Bittner knows Messrs. Freck and Tower, and is familiar with farms in Niagara County. RRG argues that Mr. Bittner's experiences qualify him to offer competent testimony. (See RRG's reply at 7-9, 11-12).

RRG contends that Dr. Messer is qualified to offer expert testimony about the marketability of agricultural products produced in Niagara County. To support this argument, RRG references Dr. Messer's CV (see Messer at 2, Exhibit A). RRG argues that testimony from qualified academic experts, such as Dr. Messer, is fundamental to administrative and judicial proceedings, such as this one. RRG contends further that Dr. Messer's education and research provide the necessary foundation to support the opinions offered in his prefiled direct testimony. (See RRG's reply at 9-10)

In the reply, Ms. Witryol objects to CWM's characterization about the distance of the Bittner-Singer Orchards from the Model City facility compared to the locations of the farms owned and operated by Messrs. Freck and Tower. Ms. Witryol notes that Messrs. Berlow and N'dolo live in Washington, DC, and Saratoga Springs, New York, respectively, and observes that both cities are hundreds of miles away from the Towns of Lewiston and Porter. Ms. Witryol inquires why intervenors' witness, who lives only 20 miles away from the Model City facility, would be too far to offer relevant testimony. (See Ms. Witryol's reply at 8.)

Ms. Witryol argues that Dr. Messer's education and work experiences qualify him to offer expert testimony about the potential impacts that the proposed RMU-2 landfill would have on the marketability of agricultural products. According to Ms. Witryol, Mr. Tower is among the most respected individuals in the Town of Porter. Mr. Tower serves on the Steering Committee for the Town's Comprehensive Plan, and is a widely respected member of the local farming community. Ms. Witryol notes that the New York Farm Bureau initiated a policy in 2006, which opposes the siting of any hazardous waste management facility in New York State. (See Ms. Witryol's reply at 8-9.)

In their reply, the Municipalities object to CWM's motion to strike the prefiled direct testimony of Mr. Bittner and Dr. Messer. They argue that the proffered testimony and associated exhibits are relevant to the question about the potential impacts that CWM's proposal may have on the marketability of agricultural products produced in Niagara County. (See Municipalities' reply at 6-7.)

In its sur-reply, CWM reiterates its argument that the prefiled direct testimony of Mr. Bittner and Dr. Messer should be stricken because they do not have comparable experiences and qualifications to the witnesses that RRG initially identified in its November 2014 joint petition for full party status. CWM observes that RRG states that some of the original witnesses have become unavailable, but does not explain how Messrs. Freck and Tower became unavailable. CWM observes further that Mr. Tower was available to write a letter dated January 23, 2020, which is offered as Exhibit D to Dr. Messer's prefiled testimony. (See CWM's sur-reply at 14-15.)

CWM maintains that Mr. Bittner lacks the qualifications to offer opinions. According to CWM, RRG did not identify any factual foundation for Mr. Bittner's opinions in its June 19, 2020 reply to the motion to strike. CWM contends that opinion evidence must be based on facts in the record or known to the witness. (*See* CWM sur-reply at 8-19; *see also Imran v R. Barany Monuments, Inc.*, 167 AD3d 992, 993-994 [2d Dept 2018].)

According to CWM, Dr. Messer's prefiled direct testimony lacks a proper, factual foundation. CWM argues that Dr. Messer speculates about consumer reactions to the construction and operation of the proposed RMU-2 landfill, and does not base his opinions on any factual data. For, example, CWM notes that Dr. Messer has not provided any interview results or other data from consumers regarding their perceptions about the agricultural products produced on farms located in the vicinity of the Model City facility. (*See* CWM sur-reply at 16-18).

**Rulings and Discussion:** CWM's motion to strike the prefiled direct testimony of Jim Bittner and the associated exhibits is denied. CWM's motion to strike the prefiled direct testimony of Kent D. Messer, Ph.D., and the associated exhibits is granted.

Mr. Bittner is the past-President of the Niagara County Farm Bureau, and the President and General Manager of Bittner-Singer Orchards located in Appleton, New York. The location of the Bittner-Singer Orchards is not as close to the Model City facility as the farms owned and operated by Thomas Freck and Thomas Tower, the originally proffered witnesses. Though perhaps not the best evidence to address the potential impacts on the marketability of agricultural products, I find that the prefiled direct testimony of Mr. Bittner is relevant.

The concerns outlined in CWM's motion papers relate to the weight that should be assigned to the prefiled direct testimony after the parties have developed a complete record. During the cross-examination of Mr. Bittner at the hearing, the parties will have the opportunity to inquire about his knowledge and experiences (*see* Bittner Exhibit 1) to determine the factual information that serves as the bases for any opinions and conclusions presented in the prefiled direct testimony.

Dr. Messer is a Professor of Applied Economics from the University of Delaware. In his prefiled direct testimony, Dr. Messer offers expert opinions about what might influence consumer perceptions and how those perceptions are reflected in consumer behavior. This information is in stark contrast to the more fact-based information anticipated from Messrs. Freck and Tower based on their respective personal experiences. A consideration of the prefiled direct testimony by Dr. Messer would substantially re-frame the issue identified in the Siting Board's Third Interim Decision. Dr. Messer's prefiled direct testimony is beyond the scope of the issue joined by the Siting Board and is, therefore, not relevant. None of Dr. Messer's prefiled direct testimony will be considered, and the associated exhibits will be excluded.

C. Ronald J. Rubino

Ronald J. Rubino prefiled direct testimony on behalf of Ms. Witryol. Mr. Rubino is a member of GAR Associates, LLC, and serves as president of the firm's commercial division. GAR Associates, LLC, provides real estate appraisal and consulting services. The purpose of Mr. Rubino's testimony is to identify potential economic alternatives to the proposed RMU-2 landfill in the Towns of Lewiston and Porter. (*See Rubino at 2-3.*)

CWM objects to Question No. 17 and Mr. Rubino's response. According to CWM, the opinions offered in Mr. Rubino's response lack a factual foundation and are, therefore, speculative. In addition, CWM argues that Mr. Rubino is not qualified to offer these opinions based on the following. CWM explains that Mr. Rubino based his response on comments from Messrs. Whalen and Barufaldi. Exhibit C to Mr. Rubino's prefiled direct testimony is a copy of a letter dated January 23, 2020 from Daniel J. Barufaldi to Nicolas Rockler, Ph.D. Mr. Barufaldi's January 23, 2020 letter includes an Addendum outlining his professional credentials. For the reasons outlined in CWM's motion, CWM contends that Mr. Whalen's testimony is inadmissible. Consequently, Mr. Rubino cannot base his opinion on information exchanged between Messrs. Whalen and Rubino. CWM contends further that Mr. Barufaldi did not offer any prefiled direct testimony. As a result, CWM maintains that the content of Mr. Barufaldi's letter (*see Rubino Exhibit C*) is unreliable hearsay because its author cannot be cross-examined about it. Based on the foregoing, Mr. Rubino's response to Question No. 17 should be excluded from the evidentiary record of this proceeding, according to CWM. (*See CWM motion at 29-32.*)

Contrary to CWM's contentions, Ms. Witryol argues that Mr. Rubino is qualified to offer the opinions provided in his prefiled direct testimony. Ms. Witryol notes that the nature of the work undertaken at Mr. Rubino's firm is not limited to real estate appraisals but also includes consulting. Ms. Witryol argues further that Mr. Rubino may rely upon the information outlined in the prefiled direct testimony of the other witnesses offered by the intervenors and the associated exhibits such as the CBG Report (*see Acks Exhibit 4*) to Mr. Acks' prefiled direct testimony. (*See Ms. Witryol's reply at 6, see also RRG's reply at 14.*)

With respect to Mr. Barufaldi's January 23, 2020 correspondence (*see Rubino Exhibit C*), Ms. Witryol notes, in the reply, that it required more than one witness to replace Mr. Barufaldi. Ms. Witryol notes further that Mr. Barufaldi would provide an affidavit for his January 23, 2020 correspondence, and observes that he signed and dated the letter in contrast to CWM's panel. According to Ms. Witryol, the prefiled direct testimony of Messrs. Berlow and N'dolo relies on conversations with unidentified CWM personnel, which renders it speculative. (*See Ms. Witryol's reply at 8.*)

**Ruling and Discission:** CWM's motion to strike Question No. 17, and the associated response from the prefiled direct testimony of Ronald J. Rubino (*see Rubino at 6, line 24 through 7, line 10*) is granted.

Although not expressly stated by Ms. Witryol, it appears that Mr. Rubino and his prefiled direct testimony have been offered in lieu of testimony from Daniel J. Barufaldi,<sup>21</sup> and Anthony Girasole.<sup>22</sup> The purpose of Mr. Rubino's prefiled direct testimony is to identify potential economic alternatives to the proposed RMU-2 landfill in the Towns of Lewiston and Porter (*see* Rubino at 3).

Mr. Rubino's response to Question No. 17 is based, in part, upon the prefiled direct testimony of Mr. Whalen, which has been substantially stricken, as irrelevant. Also, Mr. Rubino's response is based, in part, on Exhibit C (*see* Rubino at 6, line 4), which is a letter dated January 23, 2020 from Mr. Barufaldi to Dr. Rockler. Though originally proffered as an expert witness, Mr. Barufaldi did not prefile any direct testimony. Consequently, the statements presented in Mr. Barufaldi's January 23, 2020 letter would not be subject to cross-examination. This circumstance substantially undermines the credibility of the information offered in Rubino Exhibit C, and it will be excluded. Based on the foregoing, Question No. 17 from Mr. Rubino's prefiled direct testimony, and his response thereto will be stricken (*i.e.* Rubino from page 6, line 24 to page 7, line 10).

D. Nicholas O. Rockler, Ph.D.

No party moved to strike any portion of Dr. Rockler's prefiled direct testimony. Nevertheless, I find that portions of Dr. Rockler's prefiled direct testimony are not relevant based on the foregoing discussion about the other witnesses' prefiled direct testimony.

Nicholas O. Rockler has a doctorate degree in Urban Studies and Planning from the Massachusetts Institute of Technology (*see* Rockler at 1, and Exhibit 1). The scope of Dr. Rockler's prefiled direct testimony concerns the municipal revenue impacts related to the proposed RMU-2 landfill on the Towns of Lewiston and Porter, as well as property values in the Lewiston-Porter Central School District. In addition, Dr. Rockler discusses potential impacts associated with alternative economic development. To prepare his prefiled direct testimony, Dr. Rockler reviewed information from Mr. Barufaldi, as well as the prefiled direct testimony prepared by Dr. Messer, and Messrs. Whalen, Bittner, and Rubino. (*See* Rockler at 3, and 10-11.)

**Ruling and Discussion:** Because Dr. Messer's prefiled direct testimony has been stricken as irrelevant, I also strike those portions of Dr. Rockler's prefiled direct testimony that either relies on, or references Dr. Messer's. Therefore, Dr. Rockler's prefiled direct testimony is stricken from page 10, line 16, beginning with Question No. 14, to the conclusion of the response to Question No. 16 on page 11, line 14. The exhibit referenced in the stricken portions of Dr.

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<sup>21</sup> *See* Issues Rulings dated December 22, 2015 at 86-88.

<sup>22</sup> *See* July 10, 2018 Issues Conference Tr., at 111, 122-124.

Rockler's prefiled direct testimony is Exhibit 6, which will also be excluded. Exhibit 6 relates to topics not relevant to the issues identified in the Siting Board's Third Interim Decision.<sup>23</sup>

The source of Rockler Exhibits 8, 9, 10, and 11 is from a report titled, *The Economic Impact of Tourism in New York*, prepared by Tourism Economics. Throughout these proceedings, Ms. Witryol has referred to versions of this report. For example, a version was identified as Appendix E to Ms. Witryol's Petition and Comments dated November 20, 2014, and another was identified as Appendix G to Ms. Witryol's Supplemental Petition dated May 2, 2018. On both occasions, I found that the reports were not adequate offers of proof to raise a substantive and significant issue for adjudication,<sup>24</sup> and the Siting Board has affirmed these determinations, most recently in the Third Interim Decision dated September 10, 2019 (at 15-16).

Portions of Dr. Rockler's prefiled direct testimony exceed the scope of the issues joined by the Siting Board, and are therefore not relevant. The Siting Board did not join any issue related to tourism (*see* Third Interim Decision, dated September 10, 2019 at 16). Accordingly, those portions of Dr. Rockler's prefiled direct testimony that discuss tourism will be stricken, and the related exhibits will be excluded. Accordingly, Dr. Rockler's prefiled direct testimony is stricken from page 14, line 31, (*see* Question No. 22) beginning with the phrase, "Based on ..." to page 15, line 2, and then from page 15, line 13, to page 16, line 4. The remainder of the response to Question No. 22 on page 16, line 4 beginning with the phrase, "The WNY REDC [Western New York Regional Economic Development Council] plan..." to line 11, will remain in place. The exhibits referenced in the stricken portion of Dr. Rockler's prefiled direct testimony are Exhibits 8, 9, 10, and 11, and will be excluded.

#### V. Ms. Witryol's Motion for Summary Judgment

In the event that Ms. Witryol prevails on the motion to strike the testimony offered by CWM's panel, she moves for summary judgment. Citing *Matter of Finger Lakes LPG Storage, LLC*, Decision of the Commissioner, Final Supplemental Environmental Impact Statement, and SEQRA Findings Statement, dated July 12, 2018 ([*Finger Lakes*] at 9-17 and 28-29), Ms. Witryol seeks a determination from the Siting Board that CWM failed to demonstrate that the proposed RMU-2 landfill is otherwise necessary or in the public interest. Accordingly, Ms. Witryol argues that such a determination would allow the Siting Board to deny the pending certificate application, thereby obviating the need for any further proceedings. (*See* Ms. Witryol's May 29, 2020 cover letter at 1).

With respect to the July 2018 determination in the *Matter of Finger Lakes LPG Storage, LLC*, Ms. Witryol observes that the Commissioner summarily dismissed the permit applications because the "proposed facility, on a site located along the western side of Seneca Lake, would have a significant adverse environmental impact on the local and regional community character"

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<sup>23</sup> Dr. Rockler also refers to Mr. Tower's letter, which is Exhibit D to Dr. Messer's prefiled direct testimony. For the reasons outlined above, Messer Exhibit D has been stricken.

<sup>24</sup> *See* Issues Ruling dated December 22, 2015 at 84-85, 92; *see also* Supplemental Rulings dated February 14, 2019 at 26 *referencing* July 10, 2018 Tr., at 126-130, 134-136.

(*Finger Lakes* at 16), and concluded that “no conditions can be incorporated into the proposal that would avoid or minimize these impacts to the maximum extent practicable” (*Finger Lakes* at 17). The community characteristics considered in the *Finger Lakes* matter that were associated with the adverse environmental impacts included an economy based on agriculture and tourism, as well as the local municipalities’ collective opposition to the proposal. Ms. Witryol contends the circumstances of the captioned matters are similar to the *Finger Lakes* case. For example, Ms. Witryol notes that the Siting Board is considering potential adverse impacts from CWM’s proposal to the local agriculture and tourism economies, among other issues. Ms. Witryol notes further that the local municipalities and the Tuscarora Nation oppose the project. (See Ms. Witryol’s May 29, 2020 cover letter at 1; *see also*, WM’s motion at 1-3.)<sup>25</sup>

In their reply, the Municipalities argue that summary denial of the pending certificate application is appropriate because the October 2010 Siting Plan and annual updates state that additional hazardous waste management facilities are not needed in New York State. The Municipalities argue further that Ms. Witryol has shown that the prefiled testimony of CWM’s public interest panel and associated exhibits do not establish that the proposed RMU-2 landfill is otherwise necessary or in the public interest. For example, CWM’s proposal would not redevelop contaminated land, and would not significantly reduce emissions of greenhouse gases. Furthermore, the Municipalities argue that the proposed RMU-2 landfill would provide fewer economic benefits than the RMU-1 landfill did. (See Municipalities’ reply at 2-5.)

However, in its sur-reply, CWM observes that the Municipalities generally reiterate the arguments made by Ms. Witryol in her May 29, 2020, motion papers. To respond to the Municipalities’ arguments, CWM refers to its June 19, 2020 reply (at 4-11, 16-27, and 30-34). CWM argues that a demonstration that its proposal would be otherwise necessary or in the public interest does not need to address every potential criteria listed in Chapter 9 of the October 2010 Siting Plan, such as redeveloping contaminated land, as argued by the Municipalities. (See CWM’s sur-reply at 13-14.)

In the sur-reply, Ms. Witryol responds to the arguments outlined in the Municipalities’ reply. Ms. Witryol states that the essence of the motion is that the testimony and associated exhibits submitted by CWM’s public interest panel offer “nothing of consequence to a Commissioner or Siting Board finding on public interest, and therefore, should be struck in its entirety” ([emphasis in original] Ms. Witryol’s sur-reply at 7). Ms. Witryol argues that CWM offered no proof that New York hazardous waste generators would be adversely impacted if CWM does not obtain approval to construct and operate the proposed RMU-2 landfill, and contends that CWM should not be authorized to supplement the record about this topic now. Ms. Witryol emphasizes that New York State law and the October 2010 Siting Plan have determined that CWM’s proposal would not be in the public interest or otherwise necessary. Ms. Witryol argues that the Siting Board must consider the viewpoints of the intervening parties when, as here, CWM has offered no compelling benefits to the State from the construction and operation of the proposed RMU-2 landfill. (See Ms. Witryol’s sur-reply at 7-8.)

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<sup>25</sup> Ms. Witryol restates this position in her June 19, 2020 cover letter to her reply, and the July 17, 2020 cover letter to the sur-reply. Waterkeeper supports Ms. Witryol’s motion for summary judgment (*see* Waterkeeper’s reply at 1).

**Discussion and ruling:** New York courts have long held that summary judgment is a drastic remedy, to be granted only where it is clear that no material issues of fact to be adjudicated exist (*see e.g. Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [holding that “[s]ummary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact” (internal quotation marks and citations omitted)]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [holding that “[t]his drastic remedy should not be granted where there is any doubt as to the existence” of material issues of fact]). As the Court noted in *Sillman*, when determining a motion for summary judgment, it is “issue-finding, rather than issue-determination, [that] is the key to the procedure” (*id.* at 404 [quoting *Esteve v Abad*, 271 AD 725, 727 (1st Dept 1947)]).

A prerequisite condition to considering Ms. Witryol’s motion for summary judgment is that the prefiled direct testimony of Messrs. Berlow and N’dolo would be stricken as irrelevant. However, I have determined that the prefiled direct testimony of CWM’s public interest panel is relevant. Therefore, Ms. Witryol’s motion for summary judgment has been rendered moot.

### **Further Proceedings**

Since the parties have filed their respective motion papers, the Department has developed a protocol to conduct public hearings virtually using the WebEx Meetings platform. I will be contacting the parties in the coming weeks to schedule a telephone conference call to discuss the next steps toward scheduling a virtual adjudicatory hearing.

During the April 6, 2020 telephone conference call, I denied requests to serve discovery demands pending the outcome of the parties’ motions to strike. During the upcoming telephone conference call, the parties will have an opportunity to renew requests to serve discovery demands, among other things.

/s/

Daniel P. O’Connell  
Administrative Law Judge

Dated: Albany, New York  
February 3, 2021

To: Service List revised January 29, 2021