NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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
9-2934-00022/00232
9-2934-00022/00233
9-2934-00022/00249

NEW YORK STATE FACILITY SITING BOARD

In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR Part 377 (Siting of Industrial Hazardous Waste Facilities) by

CWM Chemical Services, LLC,

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

FIFTH INTERIM DECISION

OF

THE FACILITY SITING BOARD

Introduction

By motion dated May 27, 2022, Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities) requested permission to offer exchanges between CWM Chemical Services, LLC (CWM) and the United States Environmental Protection Agency (EPA) regarding CWM's application for a Toxic Substances Control Act (TSCA) permit and related to the hydrogeological setting of CWM's site (hereinafter TSCA documents) into evidence. The Municipalities argued that documents provided by the New State Department of Environmental Conservation (DEC) staff and referenced by CWM's witnesses only tell part of the story. Therefore, the Municipalities seek to offer the TSCA documents as a more complete series of written exchanges between CWM, the Municipalities and EPA's consultant, Booz Allen Hamilton (Booz Allen). The Municipalities assert the TSCA documents are relevant because the hydrogeological and geological issues addressed in EPA's review of CWM's application for a TSCA permit are identical to the issues joined for adjudication in this proceeding. The Municipalities further assert that the analysis conducted by Booz Allen agrees with CWM and DEC staff in some instances and agrees with the Municipalities in others. According to the Municipalities, "Booz Allen narrows the dispute in a manner that is likely to be helpful to the ALJ and the Siting Board" (*see* motion at 7).

On June 13, 2022, CWM and DEC staff filed papers in opposition to the motion and Amy Witryol filed papers in support of the motion. CWM argued that offering the anonymous opinions of unknown experts contained in the TSCA documents violates 6 NYCRR 624.7(e) because expert opinions must be attested to at the adjudicatory hearing and the author made available for cross-examination. CWM also argued that the TSCA documents are unreliable hearsay opinions and, therefore, are not admissible pursuant to 6 NYCRR 624.9(a)(1). CWM

further asserted that it is impossible to determine the qualifications, education, or experience of the unknown authors of the TSCA documents, and CWM cannot question the authors regarding how Booz Allen's opinions were affected by CWM's responses or what EPA's current position is on the topics discussed in the TSCA documents. CWM argued that the Municipalities' motion is an improper attempt to bolster the opinion of the Municipalities' witness with anonymous hearsay opinions.

DEC staff objected to the introduction of the TSCA documents in large part because those documents were not considered in and are not relevant to the review of CWM's permit applications that were referred to the Office of Hearings and Mediation Services for adjudication. DEC staff argued that EPA's review of CWM's TSCA permit application and the TSCA documents have no bearing on DEC's review of the Part 373 application. Just because DEC staff was copied on some of the TSCA documents does not make the documents relevant to this proceeding. DEC staff also asserted that the Municipalities did not offer a witness to testify and be cross-examined related to the context of the TSCA documents, whether such opinions are final and how much weight should be given to the documents.

Ms. Witryol supported the Municipalities' motion for the reasons stated by the Municipalities and argued that the TSCA documents are relevant because the TSCA permit is referenced in CWM's certificate application.

On July 22, 2022, Administrative Law Judge Daniel P. O'Connell issued a ruling denying the Municipalities' request to include the TSCA documents into the evidentiary hearing record. ALJ O'Connell found that the TSCA records were not part of DEC staff's review of the applications that are the subject to this proceeding. Accordingly, the TSCA documents are not relevant to these proceedings. The ALJ also found that the TSCA documents are not DEC

business records, therefore DEC staff cannot provide a proper foundation for the documents. As a result, the ALJ ruled that a witness should have been offered to lay the required foundation of the TSCA documents and concluded no witness had been proposed. Regarding the Municipalities' argument that witnesses to the hearing relied upon other experts' reports, and therefore, the TSCA documents should be received into the record, the ALJ found that Mr. Michalski did not reference the TSCA documents in his testimony. To the extent that Mr. Michalski, or other witnesses relied on expert reports, the ALJ noted that the witness may be cross-examined about whether the witness relied on those reports and, if so, how the witness relied upon the information presented in the reports. The ALJ concluded that the Municipalities must produce an expert witness who either authored the TSCA documents or relied upon the documents in developing that expert's opinions and conclusions.

By email dated July 29, 2022, the Municipalities requested permission to appeal the ALJ's ruling and attached a letter of the same date constituting the appeal. CWM opposed the request by email dated August 4, 2022. On August 8, 2022, the Facility Siting Board granted the Municipalities' request and accepted the appeal as filed and directed the parties to submit papers in support of or opposition to the appeal on or before August 18, 2022.

On appeal, the Municipalities argue, in addition to the arguments in the May 27, 2022 motion, that the ALJ's ruling should be reversed and the TSCA documents admitted into the record because: (1) the Municipalities have further opportunity to develop their hydrogeological issues and failure to consider the TSCA documents would be unfairly prejudicial, (2) the TSCA documents include relevant information not provided in this proceeding, (3) the Booz Allen documents are not anonymous hearsay, (4) Booz Allen reports have been admitted and relied upon by the DEC Commissioner in a previous matter, (5) CWM's further investigation and

proposed new monitoring wells were requested by EPA, and therefore the Municipalities should be allowed to rebut CWM's claim that the hydrogeological issues have been resolved, (6) CWM's proposal to install new groundwater monitoring wells is intended to resolve an issue to be adjudicated in this proceeding, whether the hydrogeological characteristics of the site warrant a siting certificate, (7) witnesses for DEC, CWM and the Municipalities have been questioned on the substance of the TSCA documents, and the Municipalities propose to provide a sufficient foundation for receiving the documents into evidence through Mr. Michalski when the hearing resumes, and (8) declining to allow testimony regarding the TSCA documents and the entry of the documents into the evidentiary hearing record is contrary to the Siting Board's first interim decision.

CWM opposes the Municipalities' appeal on the grounds expressed in CWM's opposition to the Municipalities' motion, namely that the attempt to introduce the expert opinions expressed in the TSCA documents is inadmissible pursuant 6 NYCRR 624.7(e) and SAPA § 306(3) because the authors of the expert opinions are not available to attest to their respective opinions and conclusions and are not available for cross-examination. CWM further asserts that the TSCA documents constitute inadmissible hearsay (*citing* 6 NYCRR 624.9[a][1]). CWM argues that the evidentiary ruling should be upheld because the Municipalities repeat the same arguments on appeal that have already been rejected by the ALJ and fail to provide any legal basis to reverse the ALJ's ruling.

CWM further argues that the Municipalities' reliance on a previous decision that referenced a Booz Allen report (*see Matter of Applications of SCA Chemical Waste Services, Inc.* [*SCA*], Decision of the Commissioner, April 21, 1981, at 1 [adopting the ALJ's hearing report at 46]) does not support allowing the TSCA documents into the record of this proceeding. CWM

argues that the *SCA* Decision does not indicate whether Booz Allen experts were made available for cross-examination, and that the *SCA* Decision was issued thirteen years before the adoption of the current part 624 regulations. CWM also takes issue with the Municipalities' argument that the ALJ's ruling is inconsistent with the Siting Board's First Interim Decision. Furthermore, CWM argues that the TSCA documents are unreliable anonymous hearsay opinions that should not be admitted pursuant to 6 NYCRR 624.9(a)(1) and draws a distinction between the TSCA documents and other reports that have been admitted into evidence that were relied upon by witnesses testifying in this proceeding. Moreover, CWM claims that Mr. Michalski cannot provide a proper foundation for the TSCA documents.

Lastly, CWM argues that the Municipalities' attempt to introduce the TSCA documents into the record to rebut a 2017 assertion, by CWM's then attorney, that the hydrogeological issues joined for adjudication had been resolved is an erroneous assertion. First, the 2017 assertion is not part of the evidentiary record and as a result cannot be prejudicial to the Municipalities. Secondly, the ALJ ruled that compliance with the federal TSCA criteria is not an adjudicable issue or relevant to this proceeding.

DEC staff opposes the Municipalities' appeal, arguing that the Municipalities are basing the appeal on the same unsupported and meritless arguments rejected by the ALJ. DEC staff asserts that the TSCA documents are not relevant to this proceeding, and staff has no regulatory role in EPA's review of CWM's TSCA application. Furthermore, the TSCA documents were not part of the Part 373 permit application and were not referred to the Office of Hearings and Mediation Services to be part of this joint proceeding. DEC staff points out that EPA acknowledged the distinction between the respective applications and stressed the importance of each application standing alone for demonstration of compliance with the applicable laws and

regulations.

DEC staff also argues that the ALJ's ruling must be upheld because no legal foundation for the admission of the contested documents has been provided. According to DEC staff, the business record exception to the hearsay rule is not applicable simply because DEC may have been copied on the TSCA documents. Staff asserts that the TSCA documents contain expert opinion, and Mr. Michalski is not a proper witness to provide a foundation for admission of the documents into the evidentiary record. Staff also argues that any attempt to introduce the TSCA documents through rebuttal testimony is not permissible.

Ms. Witryol supports the Municipalities' appeal and argues the TSCA documents focus on the same hydrogeological issues adjudicated in this proceeding and will help narrow the issues and inform the ALJ and Siting Board. Ms. Witryol argues that the ALJ's ruling overlooks the fact that the compliance between the federal and state permit applications is identical and the permits are by their terms intertwined. Ms. Witryol further asserts that the ALJ's ruling inaccurately states that DEC staff does not review application materials related to the federal criteria for a TSCA permit because the EPA references the Part 373 permit application in the TSCA application. Furthermore, CWM's Part 377 (formerly 361) certificate application and DEIS reference the TSCA permit.

Ms. Witryol also claims CWM's hearsay objections are misleading because CWM knows who authored the TSCA documents, CWM does not dispute that Booz Allen is a reliable consultant contracted by EPA, and the TSCA documents are owned and sponsored by EPA. According to Ms. Witryol, documents provided by an agency official with the responsibility for the transmission and accuracy of the documents is an exception to the hearsay rule. Ms. Witryol takes issue with the ALJ's depiction of the TSCA documents and argues the business record

exception obviates the need for a witness to testify and be subject to cross-examination regarding the TSCA documents, and further argues that Rule 807 of the Federal Rules of Evidence support the admission of the TSCA documents into the evidentiary record. Lastly, Ms. Witryol claims that precluding the Municipalities from introducing the TSCA documents is prejudicial because the TSCA documents support the contention that CWM has not properly characterized the site.

The Facility Siting Board conducted a *de novo* review of the ALJ's evidentiary ruling, the TSCA documents referenced in the ruling, the papers submitted on the Municipalities' motion and papers submitted on appeal.

DISCUSSION

As an initial concern, the Facility Siting Board must address whether an appeal from a ruling on admissibility of evidence at or prior to hearing should be considered on an expedited or interlocutory basis in this proceeding. Pursuant to 6 NYCRR 624.8(d)(2), leave to appeal was required for the Municipalities' appeal to be heard, and the Facility Siting Board granted permission based on the Municipalities' claim that failure to decide the appeal would be unduly prejudicial to the Municipalities. Part 624, however, is silent as to what constitutes a permissible subject to be appealed and provides "any other ruling of the ALJ" except for those appeals that may be taken as of right, "may be appealed on an expedited basis where it is demonstrated that the failure to decide such an appeal would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary" (6 NYCRR 624.8[d][2][v]).

Similarly, CPLR 5701(c) "Appeals by permission" provides, "An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating

in the supreme court or a county court by permission of a judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application." Notwithstanding the plain language that any order may be appealed by permission, the case law regarding appeals from evidentiary rulings and orders is clear. "The provisions of CPLR 5701(c) for obtaining permission to appeal from an order which is not appealable as of right were not intended to permit intermediate appeals from evidentiary rulings during trial. Entertaining appeals from such orders, which consist only of procedural and evidentiary rulings during trial, would interfere with and impede the trial process." (*Kopstein v City of New York*, 87 AD2d 547 [1st Dept 1982] [internal citations omitted]; *see also Cotgreave v Public Adm'r of Imperial County [Cal.]*, 91 AD2d 600 [2nd Dept 1982], *MaGuire v Rebaglia*, 232 AD2d 380 [2nd Dept 1996], *City of Elmira v Larry Walter, Inc.*, 111 AD2d 553 [3rd Dept 1985], *Strait v Arnot Ogden Medical Center*, 246 AD2d 12 [3rd Dept 1998].) However, an order or ruling that "limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable." (*Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 139 AD3d 1192 [3rd Dept 2016]).

There is no DEC administrative precedent addressing appeals from evidentiary rulings. Therefore, the Facility Siting Board will follow court precedent and apply the same analysis to the present administrative interlocutory appeal.

We find that the ALJ's ruling adjudicates the evidence admissible at trial and does not limit the scope of the issues to be tried and does not affect the merits of the controversy or the substantial rights of the Municipalities. The ruling does not limit the issues that were joined for adjudication in the ALJ's December 22, 2015, Ruling on Proposed Issues for Adjudication and

Petitions for Full Party Status and Amicus Status, or affect the merits of those issues raised by the Municipalities. The Municipalities have not identified any substantial right affected by the ruling.

The Facility Siting Board concludes that the Municipalities' appeal of the ALJ's ruling on the admissibility of the TSCA documents is not appealable as of right or by permission. Accordingly, the appeal is dismissed on the grounds discussed above.

Based on the discussion above, the Facility Siting Board does not need to reach the merits of the appeal. The Siting Board did, however, grant the Municipalities permission to appeal, and in the interest of judicial economy, the Siting Board also reaches the merits of the appeal and upholds the ALJ's ruling subject to our comments below. First, the Siting Board notes that any conclusions reached by Booz Allen were not subject to an adjudicatory proceeding and therefore are not entitled to any res judicata or collateral estoppel effect. Whether Booz Allen's expert opinion and conclusions may agree with the position of CWM or the Municipalities regarding the hydrogeological characteristics of the site has no bearing on this proceeding unless an expert from Booz Allen is called to testify in this proceeding. The Municipalities offer the TSCA documents for the truth asserted therein and argue that the TSCA documents narrow the disputes among the parties.

ALJ O'Connell joined the following factual geological and hydrogeological issues for adjudication:

- contours of the bedrock, including whether the contours of the bedrock include any ridges, and if so, the location and configuration of those ridges;
- the characteristics of the various units of unconsolidated deposits that may overlie the bedrock, as well as the physical properties of each unit;
- permeability, or hydraulic conductivity of the unconsolidated units that overlie the bedrock, upon which the proposed RMU-2 landfill would be situated, including the

permeability or hydraulic conductivity of each unit in the vertical and horizontal direction;

- the direction, or directions, that ground water flows on the site of the Model City facility, as well as the rate of flow;
- presence of volatile organic compounds (VOCs) and dense, non-aqueous phase liquids (DNAPL), including what type or types of contaminants are present in which units of the unconsolidated deposits, as well as the concentration of any of these contaminants; and
- whether the scope of the current corrective action program effectively addresses the ground water contamination. (*See* Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status, December 22, 2015, at 99-100.)

The ALJ concluded that resolution of those factual disputes is necessary to determine compliance with the following regulatory requirements:

> "1. Whether the pending application to modify the 2013 site-wide Part 373 renewal permit includes adequate information to protect ground water pursuant to 6 NYCRR 373-1.5(a)(3);
>
> "2. Whether CWM has provided an adequate ground water monitoring and response program to respond to any release of hazardous constituents from the proposed RMU-2 landfill given the ongoing implementation of the corrective action program associated with legacy contamination at the site of the Model City facility pursuant to 6 NYCRR 373-2.6; and
>
> "3. Whether the soil underlying the footprint of the proposed RMU-2 landfill has a hydraulic conductivity of $1x10^{-5}$ cm/s or less, as required by 6 NYCRR 373-2.14(b)(1)." (*See* Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status, December 22, 2015, at 100.)

The Facility Siting Board and Commissioner of DEC upheld the ALJ's ruling on those issues. The Municipalities now argue that because CWM has stated in the past that the TSCA documents have resolved the issues joined for adjudication that the TSCA documents must be received into evidence to rebut CWM's claim. We conclude that such an argument is without merit. None of the issues referenced above have been resolved, narrowed, or eliminated in this proceeding.

Moreover, if the Facility Siting Board accepted the Municipalities' argument that the TSCA documents narrow the disputes, the Siting Board would effectively be surrendering the

decision-making authority of the ALJ, Commissioner and Siting Board and replacing that decision making authority with the conclusions reached by a consultant for EPA, who is not a party to this proceeding. Here, the conclusions of Booz Allen constitute an expert opinion, rendered for EPA, not DEC or the Siting Board. DEC staff stated that it has not relied upon the TSCA documents in its review of the DEC permit applications. The Municipalities want the TSCA documents and expert opinions expressed therein entered into the evidentiary record of this proceeding, in part, to bolster the opinion of the Municipalities' expert, Mr. Michalski. CWM objects on the ground that the expert opinion expressed in the TSCA documents is hearsay evidence and the expert has not been made available for examination. DEC administrative precedent confirms that any party who wishes to offer an expert opinion into evidence, must make the expert available for testimony and cross-examination (*see e.g. Matter of Brian Zazulka*, Decision of the Commissioner, December 27, 2005, at 1 [adopting the ALJ's hearing report, at 17).

The Municipalities' arguments to the contrary do not cite any exceptions to the hearsay rule or case law supporting the Municipalities' position, except for the argument that Booz Allen reports were relied upon in the *SCA* decision regarding the Model City facility without testimony from Booz Allen. In the *SCA* matter, the ALJ concluded, in considering alternative sites for a hazardous waste landfill, that it would be impractical to site the landfill on a green site rather than Model City because of Model City's history of use as a hazardous waste disposal facility. The ALJ referenced Booz-Allen reports that were consistent with the ALJ's recommendation that alternatives were considered and the best place to site the proposed landfill was at Model City. The ALJ does not state that he relied upon those reports or that the reports were admitted into evidence. The ALJ references the reports "submitted as court exhibits A-1, A-2 and A-3 in

Phase II," and the ALJ states "[t]hat report recommends siting and operation of hazardous waste management facilities on land subjected to such use in the past by various government agencies." There is no indication in that matter that Booz Allen's recommendation is site specific or a statement regarding hazardous waste management facilities in general. We further note that the ALJ references evidentiary exhibits by exhibit number such as Exhibit 209 or Exhibit 213, not as "court exhibits." (*See Matter of Applications of SCA Chemical Waste Services, Inc.*, Decision of the Commissioner, April 21, 1981, at 1 [adopting the ALJ's hearing report at 7, 19, 46].) In brief, it does not appear that the Booz-Allen reports in the *SCA* matter were being offered as proof, as the TSCA documents are being offered in this matter.

Furthermore, CWM and the Municipalities have their own expert witnesses whose positions regarding the hydrogeological characteristics of the site are the subject of testimony and cross-examination. The conclusions reached by EPA's consultant, however, are not probative of the issues joined in this proceeding, and there is no indication in the testimony of the parties' experts that the TSCA documents were relied upon in developing the respective expert's opinions. Whether CWM has agreed to perform additional monitoring related to the TSCA permit does not resolve any of the issues before the ALJ. The parties must still present their respective positions in relation to the issues joined, and the ALJ, as the finder of fact, will determine whether the parties have met their respective burdens.

Here, the ALJ is conducting the hearing so the parties can present their proof and convince the ALJ, and ultimately the Commissioner and Siting Board, that their positions regarding the hydrogeological issues joined for adjudication are supported by their respective witness's testimony and admissible evidence - not by the unsworn conclusions and opinions of other experts who have not testified or been made available for cross-examination in this

proceeding and who have purportedly reached conclusions that fall within the purview of the ALJ, Commissioner and Siting Board. Accordingly, the ALJ's ruling is affirmed, and the appeal dismissed on the merits.

If the parties agree that any of the hydrogeological issues have been resolved or narrowed by the TSCA documents, then the parties are free to stipulate to those particular issues and remove them from adjudication in this proceeding. Without such a stipulation, it would be inappropriate to substitute the hearing process and judgment of the ALJ on the issues joined for adjudication with the conclusions and opinions expressed in the TSCA documents without the experts whose opinions are expressed in the TSCA documents providing sworn testimony and appearing for cross-examination in this matter.

Remaining Issues on Appeal

The Siting Board has considered the Municipalities' and Ms. Witryol's remaining arguments, including the arguments related to the business record exception to hearsay, and concludes those arguments are unpersuasive.

CONCLUSION

The Municipalities' appeal is dismissed on procedural grounds and on the merits as discussed above, and the ALJ's July 22, 2022 ruling is affirmed.

Facility Siting Board

/s/	August 29, 2022
TIMOTHY P. WALSH, Designee-Chair for BASIL SEGGOS, Commissioner NYS Department of Environmental Conservation	DATE
/s/	August 29, 2022
SARA KOCH, Designee for MARY T. BASSETT, M.D., M.P.H., Commissioner NYS Department of Health	DATE
/s/	August 29, 2022
FRANK CIRILLO, Designee for MARIE THERESE DOMINGUEZ, Commissioner NYS Department of Transportation	DATE
/s/	August 29, 2022
LYNN MARINELLI, Designee for HOPE KNIGHT, Commissioner NYS Department of Economic Development and President & CEO of Empire State Development	DATE
/s/	August 29, 2022
MATTHEW MARAGLIO, Designee for ROBERT J. RODRIGUEZ, Secretary of State NYS Department of State	DATE
/s/	August 29, 2022
JOHN F. BENOIT, Member	DATE
/s/	August 29, 2022
LEE SIMONSON, Member	DATE
/s/	August 29, 2022
A. SCOTT WEBER, Member	DATE