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

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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]).

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# FIRST INTERIM DECISION OF THE DEPUTY COMMISSIONER

June 23, 2021

**FIRST INTERIM DECISION OF THE DEPUTY COMMISSIONER**[1]

This Interim Decision address appeals from the December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (Ruling) of Administrative Law Judge (ALJ) Daniel P. O'Connell in the matter of the applications for permits by CWM Chemical Services, LLC (CWM or applicant) for the siting, construction and operation of a new hazardous waste and non-hazardous industrial waste landfill (proposed landfill or project).

The proposed landfill, which is referred to as residuals management unit 2 (RMU-2), would be at CWM's Model City facility, which is located at 1550 Balmer Road in the Towns of Porter and Lewiston, Niagara County (site). The proposed landfill would occupy about 43.5 acres of the approximately 710 acres at the Model City facility, with a design capacity of about 3,900,000 cubic yards for the disposal of hazardous and industrial non-hazardous waste, and with a minimum estimated life of about eleven (11) years (see Ruling at 4). The Ruling further provides a description of the proposed landfill and the related reconfiguration (see Ruling at 4-5).

This Interim Decision affirms the ALJ's ruling on the issues to be adjudicated, with the following exception. I concur with the determination of the Facility Siting Board that the sufficiency of the radiological surveys with respect to this project and the adequacy of the soil excavation monitoring and management plan (SEMMP) are issues that are appropriate for adjudication.

## BACKGROUND

CWM is required to obtain various permits and approvals for the proposed landfill from New York State, as well as federal and local authorities (see Ruling at 5-6). CWM has applied to the New York State Department of Environmental Conservation (Department or DEC) for a modification of its site-wide 6 NYCRR part 373 permit to incorporate the proposed landfill and related modifications. In addition, it has submitted permit applications for a 6 NYCRR part 663 freshwater wetlands permit, a 6 NYCRR 608.9 water quality certification, a 6 NYCRR subpart 201-5 air State facility (ASF) permit modification, and a 6 NYCRR part 750 State pollutant discharge elimination system (SPDES) permit modification.

In addition to CWM's application for permits from DEC, this proceeding addresses CWM's application for a Certificate of Environmental Safety and Public Necessity (Siting

[1] By memorandum dated December 21, 2015, then Acting DEC Commissioner Basil Seggos delegated decision-making authority with respect to the applications for permits subject to the jurisdiction of the DEC in this matter to me (see Ruling at 152 n 48). The delegation includes but is not limited to decision making authority relating to the consideration of the terms and conditions of permit applications, the application of the State Environmental Quality Review Act, and the preparation and execution of interim and final decisions. A copy of this delegation was provided to presiding Administrative Law Judge Daniel P. O'Connell and subsequently circulated to DEC staff, applicant, and petitioners in this proceeding.

Certificate) pursuant to 6 NYCRR former part 361 (renumbered as part 377, effective as of November 5, 2017) which application is being simultaneously considered by a Facility Siting Board. Any person seeking to commence construction or operation of designated industrial hazardous waste treatment, storage and disposal facilities (which includes the project subject to this proceeding), must receive a Siting Certificate from a Facility Siting Board as provided for in the New York State Environmental Conservation Law (ECL) (see ECL 27-1105[1]). The Facility Siting Board is comprised of eight members, five state agency representatives and three ad hoc members appointed by the Governor (see ECL 27-1105[3][d]). The five state agency representatives include the Commissioners of the Departments of Transportation, Environmental Conservation, Economic Development, and Health, and the Secretary of State.

CWM's landfill proposal is subject to review pursuant to the New York State Environmental Quality Review Act (ECL article 8 [SEQRA]). On October 12, 2005, the DEC issued a positive declaration stating that CWM's proposal constitutes a Type I action and that an environmental impact statement was required (see Ruling at 7). The positive declaration identifies, the DEC, the Facility Siting Board, the Town of Porter, and the New York State Department of Health as "involved agencies" under SEQRA, with the DEC serving as lead agency for purposes of the SEQRA review (see id.). A draft environmental impact statement for the project has been prepared and is under consideration in this proceeding.

In May 2014, the Office of Hearings and Mediation Services received a permit hearing referral concerning the captioned matter from Region 9 (Buffalo) Department staff, and Administrative Law Judge (ALJ) Daniel P. O'Connell was assigned to the matter. Governing this proceeding are the permit hearing procedures of 6 NYCRR part 624.[2]

**FACILITY SITING BOARD and DEC REVIEW**

The Facility Siting Board and the Hearing Officer for this proceeding (ALJ O'Connell)[3] entered into a Memorandum of Agreement effective as of July 9, 2014 (MOA) to establish responsibilities and procedures in the conduct of the proceeding on the proposed landfill. The MOA recognizes that this proceeding may involve matters that are exclusively permit-related (and within the jurisdiction of the Department), matters that are exclusively certificate-related (and within the jurisdiction of the Facility Siting Board) and matters relevant to both the permit and certificate applications (see MOA at 2). In addressing these circumstances, the MOA provides as follows:

[2] Department staff referred the draft SPDES permit and draft ASF permit for the project to the Office of Hearings in 2017. Those permits were the subject of the ALJ's Supplemental Rulings on Proposed Issues for Adjudication dated February 14, 2019 (Supplemental Rulings). Appeals from the Supplemental Rulings will be addressed in the Second Interim Decision of the Deputy Commissioner.

[3] Mr. O'Connell serves both as the ALJ for the Department and the Hearing Officer for the Facility Siting Board.

> "The Hearing Officer shall exercise his judgment to refer certificate-related matters to the Siting Board, permit-related matters to the DEC Commissioner, and matters that are relevant to both the certificate and permit applications to both the DEC Commissioner and the Siting Board. In the latter category, it shall be left to the Siting Board and the DEC Commissioner to resolve any differences" (see id. at 2).

The hearing is a joint proceeding addressing the application for the Siting Certificate and the applications for the DEC permits, together with any issues raised pursuant to SEQRA. As set forth in the MOA, the provisions of 6 NYCRR part 624 are applicable to the joint proceeding to the extent those provisions are not inconsistent with title 11 of ECL article 27 and 6 NYCRR part 361[4] (see MOA at 1).

## LEGISLATIVE PUBLIC COMMENT HEARING

For this project, the Department provided a public comment period for the receipt of written comments as well as an afternoon and evening public comment hearing session on July 16, 2014. At the public comment hearing session, the public had the opportunity to provide unsworn statements relating to the project, the permit applications, and the draft environmental impact statement. Notices were published in the Department's *Environmental Notice Bulletin* and local newspapers, and also distributed to organizations and local residents who had expressed interest in the project, the chief executive officer of each municipality in which the proposed project would be located, and property owners within one-half mile of the facility, among others. Radio announcements were also broadcast. See Ruling at 9-10.

For this matter, I have reviewed the July 16, 2014 transcripts of the public comment hearing as well as the written comments submitted during the comment period. These oral and written comments, in large part, addressed local and regional concerns and considerations with respect to the proposed landfill.

## ISSUES CONFERENCE AND PETITIONS FOR PARTY STATUS

Subsequent to the comment period, ALJ O'Connell scheduled a Part 624 issues conference to consider the project. The issues conference, by regulation, has certain identified purposes: (i) to hear argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and if so, to hear argument on the merits of those issues; and (v) to decide any pending motions (6 NYCRR 624.4[b][2][i]-[v]).

[4] As previously noted, Part 361 has been renumbered as Part 377.

By regulation, Department staff and the applicant are mandatory parties. In addition, the regulations provide that any person who has filed a petition for party status may participate in the issues conference (see 6 NYCRR 624.4[b][3]). The submission of a petition for party status is not a pro forma exercise. The petition must, among other things, identify the precise grounds for opposition and support (see 6 NYCRR 624.5[b][1][v]). The petition must identify an issue for adjudication that meets the regulatory criteria and present an offer of proof that specifies the witness(es), the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to that issue (see 6 NYCRR 624.5[b][2][i]&[ii]).

In this proceeding, petitions for full party status were filed by: (1) Amy Witryol (Ms. Witryol); (2) Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (collectively, the Municipalities); and (3) Residents for Responsible Government, Inc., the Lewiston-Porter Central School District, and the Niagara County Farm Bureau (collectively, RRG). In addition, a petition for amicus status was filed by the Honorable Rick Dykstra, a member of the Canadian Parliament.

Ms. Witryol's petition, dated November 20, 2014 (Witryol Petition), provided a listing of issues with respect to the permit applications and siting criteria (see Witryol Petition at 6-8), with attached documentation. The issues that Ms. Witryol raised included, among others, the proposed landfill's proximity to the Niagara Falls Storage Site, validity of the noise and traffic studies, public participation, growth-reducing impacts of the proposed landfill, monitoring concerns, contingency plan considerations, inconsistency with the hazardous waste facility siting plan and hierarchy, and impacts on the health, safety and welfare on neighboring populations.

RRG, in its undated petition received on November 28, 2014 (RRG Petition), presents several issues. RRG contends that the DEC finding that the proposed landfill is not necessary cannot be reconsidered in this proceeding, the proposed landfill presents unacceptable health risks to the contiguous population, the proposed landfill will have a negative effect on community property values and municipal and school property tax receipts, and the proposed landfill is inconsistent with both New York State's preferred statewide hazardous waste management practices hierarchy and the master plans of the host communities (see RRG Petition at 19-31, 33-46). RRG also raises issues regarding impacts on student enrollment and associated decrease in teaching and non-academic employees and the proposed landfill's impacts on crops, animals, and marketability of local community agriculture (see id. at 31-33, 46-52).

The Municipalities, in their petition dated November 24, 2014 (Municipalities Petition), set forth their specific grounds for opposition to the project, including but not limited to, issues relating to the hydrogeology of the site, the project's engineering plans, existing radiological contamination, site suitability and safety, and compliance history disclosure (see Municipalities Petition at 21-115).

Department staff and CWM both filed responses dated February 27, 2015 in which they addressed in detail the issues and arguments that petitioners raised in their petitions.

## STANDARDS FOR THE IDENTIFICATION OF ISSUES

The purpose of an issues conference is not meant to merely catalogue areas of dispute, but rather to make qualitative judgments as to the strength of the offers of proof and related arguments. It provides a mechanism to determine what, if any, issues will proceed to adjudication and serves, in effect, as a "gatekeeper" function.

In this matter, the contested issues do not rise from any disagreement between Department staff and applicant over the terms or conditions of the draft permits nor has Department staff cited any matter as a basis to deny the draft permits (see 6 NYCRR 624.4[c][1][i] and [ii]). Where contested issues, as is the case here, are not the result of a dispute between an applicant and Department staff but are proposed by third parties, an issue must be both "substantive" and "significant" to be adjudicable (see 6 NYCRR 624.4[c][1] [iii]).

The regulations define both of these terms. An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

With respect to the offers of proof, any assertions that a potential party makes must have a factual or scientific foundation. The qualifications of the expert witnesses that a petitioner identifies may also be evaluated at the issues conference stage (see Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 26, 2012 at 4). That a consultant or expert for a potential party takes a position opposite to that of the applicant or Department staff does not of itself raise an issue for adjudication (see e.g. Matter of Jay Giardina, Interim Decision of the Commissioner, September 21, 1990, at 2). Otherwise, every issue on which differing views are expressed would be adjudicable and the issues conference would not fulfill its function of limiting and defining, as appropriate, the subject matter of the adjudicatory hearing (see 6 NYCRR 624.4[b][2]).

Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. Conducting an adjudicatory hearing "where 'offers of proof, at best, raise uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [citing Matter of AKZO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]).

Where Department staff has reviewed an application and "finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant" (6 NYCRR 624.4[c][4]).

With respect to SEQRA, the Department as lead agency has required the preparation of a draft environmental impact statement on the project. The determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the Department to make findings required pursuant to SEQRA will be made in accordance with the same standards that apply to the identification of issues generally (see 6 NYCRR 624.4[c][6][i][*b*]). The SEQRA regulations direct that an environmental impact statement is to be analytical, not encyclopedic (see 6 NYCRR 617.9[b][1]), and there is no requirement that every conceivable possibility be addressed.

Furthermore, SEQRA does not require the Department to use the adjudicatory forum to resolve or otherwise address comments on the DEIS where substantive and significant issues are not raised (see Matter of Crossroads Ventures, LLC, Decision and Ruling of the Commissioner, July 10, 2015 at 15). Where a participant in the Part 624 hearing process seeks simply to add to information on a topic for which the DEIS contains sufficient information, no adjudicable issue is raised. However, such SEQRA-related information may be considered in any ongoing SEQRA process.

## THE DECEMBER 22, 2015 RULING

The Ruling of ALJ O'Connell provides a comprehensive review of the project. Among other things, the Ruling initially describes the components of the proposed facility, lists the permits and approvals required, discusses the proceedings that preceded the issuance of the Ruling, and reviews the underlying legal authorities relevant to the project. The Ruling also reviews the standards that determine whether an issue is adjudicable as well as the completeness determinations of Department staff.

The Ruling then evaluates in detail each of the issues that have been raised in the proceeding, organizing them under two category headings. The first category consists of issues that relate to ECL 27-1105(3)(f). That statutory section sets forth criteria that the Facility Siting Board is to consider in deciding whether to grant an application for a Siting Certificate, deny it, or grant it upon such terms, conditions, limitations, or modifications as the Facility Siting Board deems appropriate. A number of the issues addressed in this first category also fall, in part, within the jurisdiction of the Department either in its consideration of the permit applications or in the agency's SEQRA review. The second category consists of issues raised with respect to the environmental permits for which CWM has applied. Although a number of the issues in this second category are solely within the jurisdiction of the Department, several of the issues overlap with the jurisdiction of the Facility Siting Board.

Following the identification and subsequent analysis of whether these issues are substantive and significant and require adjudication, the Ruling sets forth which of the petitioners are to be granted party status for the adjudicatory hearing.

ALJ O'Connell granted full party status to the Municipalities, RRG and Ms. Witryol (see Ruling 151-152). Mr. Dykstra's petition for amicus status was deemed withdrawn (see Ruling at 151).

In the Ruling, the ALJ identified several issues for adjudication including:

> --impacts from traffic (limited to noise impacts of truck traffic on receptors [local residents] using the designated transportation route) (see Ruling at 46);
>
> --CWM's record of compliance (to be provided as directed in the Ruling although the need for testimony is not anticipated) (see Ruling at 73-76, 80-81);
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> --impacts on property values and property tax receipts (see Ruling at 82-84, 92);
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> --impacts on second home purchases as a measure of tourism spending (see Ruling at 85, 92);
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> --impacts on economic development (with respect to attracting other economic development projects) (see Ruling at 87, 92);
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> --impacts on marketability of agricultural products raised on farms located in the vicinity of the project (see Ruling at 90-91, 92); and
>
> --the adequacy of geological and hydrogeological characterization of the site. The ALJ sets forth a number of factual disputes to be addressed including but not limited to the bedrock contours, the characteristics of the various units of unconsolidated deposits that may overlie the bedrock, as well as the physical properties of each unit, the permeability (or hydraulic conductivity) of each unit, as well as the direction(s) and rate of groundwater flows (see Ruling at 99-100).

The ALJ noted that two types of legacy contaminants appear to be present under the surface of the site of the Model City facility: "[t]he first type consists of volatile organic compounds (VOCs), and the second includes dense, non-aqueous phase liquids (DNAPL)" (Ruling at 100). The ALJ further noted that "[f]actual disputes have been raised about 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" (id.). A related issue is whether "the scope of the current corrective action program effectively addresses the ground water contamination" (id.).

According to the ALJ, resolution of the 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)" (Ruling at 100).

Although the ALJ recognized that these issues are critical in the Department's evaluation of the project, the ALJ indicated that, "[i]n addition, the Siting Board may rely on the factual record that will be developed about these three topics to determine whether CWM's proposal would conform to the siting criterion at 6 NYCRR 361.7(b)(7)([now 6 NYCRR 377.7[b][7]) concerning ground water considerations" (Ruling at 100).

The Ruling also provided the parties, at the conclusion of the adjudicatory hearing, with the opportunity to offer legal argument about several topics relating to the project (see, e.g., Ruling at 39 (whether administrative precedents referenced by CWM concerning how prior Siting Boards have interpreted the meaning of the term "endanger" should similarly apply to this matter and whether CWM has met its burden to demonstrate that the proposed landfill would not endanger residential areas and contiguous populations); 51 (whether *The Niagara Communities Comprehensive Plan 2030* [2030 Plan] is relevant to the municipal effects siting criterion and, if so, whether the proposed landfill is consistent with the 2030 Plan, and whether the proposed landfill would be consistent with the August 2004 Town of Porter comprehensive plan); 60-61, 73-76, and 79-81 (whether the proposed landfill would be consistent with the Department's 2010 Siting Plan[5] with respect to the geographic distribution of hazardous waste landfills in New York State, other non-operating hazardous waste landfills at the site of the Model City facility, and CWM's record of compliance); see also Memorandum of March 25, 2016 Telephone Conference Call at 2 [modifying the Ruling to add a question relating to the project's consistency with the August 2000 comprehensive plan and draft generic environmental impact statement, as well as the 2011 update, for the Town of Lewiston]). These issues are properly framed as legal questions that should be addressed at the close of the adjudicatory hearing as set forth by the ALJ.

## APPEALS

Appeals were taken from the Ruling by Department staff, the Municipalities, RRG and Ms. Witryol. Replies to the appeals were filed by applicant, Department staff, the Municipalities, RRG and Ms. Witryol.

With respect to factual issues, my task on this appeal is to determine whether the ALJ adhered to the substantive and significant standard for adjudicable issues as set forth in 6 NYCRR 624.4(c). Although general deference is given to the ALJ on factual issues, the Commissioner retains the authority to re-examine factual issues as appropriate (see Matter of Roseton Generating LLC, Decision of the Commissioner, March 29, 2019, at 11). Where a

[5] For a discussion of the 2010 Siting Plan and subsequent annual reports, see Ruling at 21-25.

Commissioner determines that the substantive and significant standard has not been properly applied, the Commissioner will conduct an independent review. With respect to legal and policy issues, the Commissioner's review is de novo (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 10-11).

This proceeding is procedurally unique in that both the Facility Siting Board and the Office of the Commissioner serve as decision makers on CWM's proposal. As noted previously in this interim decision, and as referenced in the Ruling, certain issues are within the jurisdiction of the Facility Siting Board, certain issues are within the jurisdiction of the Commissioner, and other issues are overlapping. With respect to overlapping issues, the determinations and recommendations of the Facility Siting Board are an important consideration in the deliberations of the Commissioner.

## (FIRST) INTERIM DECISION OF THE FACILITY SITING BOARD

The Facility Siting Board issued its interim decision with respect to appeals from the Ruling on August 11, 2016 (SB Interim Decision). At the outset, the Facility Siting Board outlined the legal standards that apply to its evaluation of the siting criteria under the Facility Siting Certificate as well as its role as a SEQRA involved agency (see SB Interim Decision at 5-8).

RRG and Ms. Witryol, in their appeals from the Ruling, disagreed with the ALJ's determinations on various issues within the jurisdiction of the Facility Siting Board. They contended that the ALJ's determinations concluding those issues were not substantive and significant (and accordingly would not be adjudicated) were in error. The Facility Siting Board however affirmed the ALJ's determinations, and rejected RRG and Ms. Witryol's challenges (see id. at 18-19).

Department staff, in appealing from the Ruling, challenges the joinder of issues related to the adequacy of the geological and hydrogeological characterization of the site including the ability to monitor RMU-2, together with issues related to geologic contours, hydraulic conductivity, direction and rate of flow of groundwater and groundwater contamination and transport. The Facility Siting Board, in its interim decision, noted the conclusions in the Ruling, CWM's support of Department staff's position, and the positions of the Municipalities and Ms. Witryol as set forth in their replies.

Although it acknowledged that the resolution of Department staff's challenges with respect to the Part 373 permit issues were within the jurisdiction of the DEC Commissioner, the Facility Siting Board expressed its disagreement with Department staff's "apparent position that the part 373 and part 361[6] requirements can be divorced from one another in this instance" (SB Interim Decision at 10). The Facility Siting Board further explained that if Department staff were to prevail on its appeal, "the factual record referenced by the ALJ would not be developed, and the Siting Board would be left to determine the ground water considerations based on the

[6] Subsequently renumbered as Part 377.

application materials, post-petition groundwater studies, and the draft part 373 permit without the benefit of examination and cross-examination of witnesses" (id. at 10-11). The Facility Siting Board then recommended that the Commissioner reject Department staff's arguments on appeal (see id. at 11).

The SB Interim Decision also addressed the appeal of the Municipalities which contested the ALJ's conclusion that further radiological surveys of the site were not needed and that the Municipalities did not raise a substantive and significant issue in relation to the project-specific soil excavation monitoring and management plan (SEMMP). The Facility Siting Board analyzed the submissions on this issue (see SB Interim Decision at 12-13), and determined that further development of the record regarding radiological contamination as well as the proposed project-specific SEMMP was necessary. Accordingly, the Facility Siting Board concluded that the sufficiency of the radiological surveys and the adequacy of the SEMMP were issues to be adjudicated (see SB Interim Decision at 14-18).

## DISCUSSION

I will first address the appeals of RRG, Ms. Witryol, and then address the issues raised by the appeals of Department staff and the Municipalities.

### --RRG

The Residents for Responsible Government, Inc., the Lewiston-Porter Central School District [L-P CSD] and the Niagara County Farm Bureau (collectively, RRG) raised nine issues in their petition for party status (see undated RRG Replacement Appeal from the Ruling received on March 11, 2016 [RRG Appeal] at 9). Three of those issues involved whether the finding that the proposed facility was not necessary could be reconsidered in this proceeding. In light of the ALJ's consideration of, and ruling on, that question, RRG does not raise a challenge on those issues (see id. at 10).

With respect to other issues that RRG had raised, RRG contends on its appeal that the proposed hazardous waste landfill presents an unacceptable risk to contiguous populations, referencing a health study undertaken of the municipal areas proximate to the Model City facility and transportation routes (see e.g. RRG Appeal 19-22). The ALJ however had ruled that the health study and the proffered testimony failed to raise an adjudicable issue (see Ruling at 37-38).

The RRG appeal argues an issue raised specifically by L-P CSD concerning the decrease in the number of students enrolled in the local school district, as well as the associated decrease in the number of teaching and non-academic employees, since operations began at the Model City facility. The ALJ rejected this issue (see Ruling at 88-89). On appeal, RRG notes that this issue was appropriate for consideration by the Facility Siting Board (see RRG Appeal at 34).

RRG in its petition contended that the history of facility operations and applicant's compliance history must be considered. It reiterates this and related arguments on appeal (see RRG Appeal at 34-35).

RRG also objects to the manner in which the Ruling addressed the issue whether the proposed RMU-2 landfill is inconsistent with New York State's preferred Statewide hazardous waste management practices hierarchy and appeals therefrom (see RRG Appeal at 35-38).

Finally, the appeal states that the Niagara County Farm Bureau had presented two issues for adjudication: the first related to the potential risk of chemical and metal contamination of the agricultural properties in the host communities of the Towns of Lewiston and Porter and the rural hamlet of Ransomville; and the second related to whether the proposed landfill would impact the marketability of agricultural products from farms located near the Model City facility. The ALJ identified impacts on the marketability of products as an issue but determined that the Farm Bureau failed to meet its burden of proof on the first issue. On appeal, RRG contests the ALJ's ruling on the first issue, as well as on the question whether a local farmer could present testimony regarding adverse impacts on his farm from flooding, and truck noise and particulate pollution generated by clay trucks required for landfill construction (RRG Appeal at 39-40).

Certain of the issues raised on RRG's appeal are discussed in the replies of other issues conference participants. Ms. Witryol, in her reply dated April 6, 2016 (Ms. Witryol Reply), provides comment and further explication on issues relating to the hazardous waste management preferred practices hierarchy and the siting plan as relating to the RRG appeal (see Witryol Reply at 7-11).

CWM, in its reply dated April 5, 2016 (CWM Reply), rejects all aspects of RRG's appeal. CWM contends that RRG's argument regarding the decline in school enrollment is not substantive, and rejects RRG's position that RRG should not have the burden of persuasion on this issue (see CWM Reply at 18). CWM further maintains that RRG's issue relating to the alleged potential contamination of agricultural lands was properly rejected by the ALJ and any issue relating to impacts on a local farmer due to floods and truck traffic was not properly raised (see id. at 19).

I note that RRG and Ms. Witryol raise a number of similar issues on their appeals. With respect to these mutually raised issues, CWM argues that RRG and Ms. Witryol failed to raise adjudicable issues with respect to:

--the proposed landfill's consistency with the State's hazardous waste management hierarchy (see CWM Reply at 8-10 [noting in part that the hierarchy contemplates the continued land disposal of treated residuals and other wastes "that cannot be otherwise managed" (see id. at 8)]);

--the alleged danger of the project to the local populations (see id. at 10-12 [noting in part that a New York State Department of Health report failed to show a causal link between the Model City facility and incidents of cancer]); and

--broadening the scope of the review of CWM's compliance history beyond that provided for in the Ruling (see id. at 4-8).

I have considered the appeal of the Residents for Responsible Government, Inc., the Lewiston-Porter Central School District, and the Niagara County Farm Bureau from the Ruling as it relates to issues within the Department's jurisdiction. In that regard, I have evaluated the RRG arguments on appeal, the replies to the RRG appeal by other parties, the Ruling, the issues conference transcript, and other submissions. Based on my review of the record, the issues that RRG raises are not substantive and significant and the Ruling is affirmed. I further note that with respect to matters relating to compliance, the ALJ has set forth an appropriate process to evaluate the record of compliance information that CWM will be providing (see Ruling at 73-76).

**--MS. WITRYOL**

Ms. Witryol filed an appeal dated March 9, 2016 (Witryol Appeal)[7] that sets forth eight appeal topics:

--Traffic/Clay/Sources of Waste/Noise;

--Revenue/Expense Tradeoff (including SEQR);

--Compliance;

--Public Participation;

--Contiguous Populations (including SEQR);

-- Niagara Falls Storage Site (NFSS)/Plutonium/Excavation;

--Surface/Stormwater/Air/Endangered Species; and

--Consistency with Siting Plan.

Ms. Witryol indicates that each of the above-listed topics falls within the scope of the Facility Siting Board and the DEC Commissioner's jurisdiction, with the exception of Consistency with Siting Plan which she references as a Siting Board issue only (see Cover Letter to Witryol Appeal).

Ms. Witryol's appeal provides subheadings under each of the above-referenced topics that cover a range of issues.[8] For example, under "Traffic/Clay/Sources of Waste/Noise," she cites, among other things, SEQR, regulatory standards, data gaps, traffic volume changes, rail related issues, dust and leaking trucks, wrong designated truck route studied, omission of an alternate truck route, obsolete traffic study and lack of a cumulative impacts evaluation. Under "(Public) Revenue/Expense Tradeoffs", her appeal seeks, among other things, to dispute CWM-proffered economic impacts and to address tourism issues in the Towns of Lewiston and Porter.

[7] Ms. Witryol provided appeal errata sheets on April 3 and April 6, 2016.

[8] Each topic section in Ms. Witryol's appeal is individually and separately paginated.

Other items that Ms. Witryol contests include public revenue figures, public expense estimates, and the reliability of financial information that CWM offered.

In addition, Ms. Witryol's appeal focuses on a number of compliance-related issues including, but not limited to, issues relating to onsite monitors, the manner by which compliance matters are to be adjudicated, risk of fires, climate change, New York Power Authority subsidy programs, violations of the Occupational Safety and Health Act, and deed restrictions. She reiterates concerns from her petition for party status about impediments to public participation in this proceeding. On her appeal, Ms. Witryol seeks to expand adjudication of public health risks and she objects to the exclusion of three RRG witnesses who had reviewed a New York State Department of Health cancer study.

Ms. Witryol also contends that the risks associated with the Niagara Falls Storage Site (NFSS) that she had raised were substantive and significant both as to SEQR and the Siting Criteria, and she further notes risks with respect to plutonium and excavation on the CWM property. Her appeal addresses or references other matters that she argues are substantive and significant and, accordingly, adjudicable.

RRG, in its undated reply received on April 13, 2016 (RRG Reply), expresses its "substantial agreement" with Ms. Witryol's appeal, but by its reply seeks "to clarify the submissions and to identify areas of agreement and to state . . . their interpretation of the Appeal" (RRG Reply at 2). For example, RRG provides support for, and further explication, of Ms. Witryol's appeals with respect to: CWM compliance issues; DEC monthly reports and violations; traffic, truck volumes, clay transport and noise impacts; expanding the scope of adjudication of tourism issues, and witness testimony on health issues (id. at 3-6).

CWM, in its reply, addresses several of the issues that Ms. Witryol raises on her appeal including traffic studies and related noise issues, the public revenue/public expense issue, public participation, NFSS, and endangered species (see CWM Reply at 19-26). CWM argues that Ms. Witryol failed to demonstrate that any of these issues are substantive and significant, her request for revised noise studies should be rejected, and her arguments regarding NFSS are untimely (see id.). CWM contends that, in addition, several of the arguments and issues that Ms. Witryol raises are procedurally deficient because she failed to raise them in her petition. As noted, Ms. Witryol raises certain issues on her appeal that were also raised by RRG, and these are referenced earlier in this decision together with CWM's responses (see pages 11-12, supra).

Department staff, in its reply, contends that the ALJ correctly excluded Ms. Witryol's comments regarding the proximity of NFSS to the Model City facility, in general, and to the location of the proposed landfill, in particular (see Department Staff Reply at 6). Department staff supported the ALJ's analysis by which he concluded that no adjudicable issue had been raised (see id. at 7; see also Ruling at 133).

I have considered Ms. Witryol's appeal as it relates to issues within the Department's jurisdiction. In that regard, I have evaluated Ms. Witryol's appeal, the replies to the appeal by other parties, the Ruling, and the record in this proceeding. Based on the record before me, the

issues that Ms. Witryol seeks to raise on appeal are not substantive and significant and the Ruling is affirmed.

### --HYDROGEOLOGICAL AND GEOLOGICAL CONSIDERATIONS AND DEPARTMENT STAFF'S APPEAL

Considerations relating to hydrogeology and geology are important to the evaluation of the proposed modification of the 2013 site-wide 6 NYCRR part 373 permit to incorporate the RMU-2 landfill and related modifications to the Model City facility. The ALJ, upon a thorough examination of the arguments presented, identified various issues and factual disputes to be addressed during the adjudicatory hearing phase of this proceeding relating to hydrogeological and geological considerations (see Ruling at 99-100). As part of the Ruling, the ALJ referenced information from various sources including an April 2003 engineering report (revised as of November 2013) that documents numerous geologic investigations at the site, the draft environmental impact statement for the project, the Municipalities' petition for party status (which, in part, focused on hydrogeological and geological issues), CWM's and Department staff responses to the petitions for party status both dated February 27, 2015, as well as the issues conference transcript (see Ruling at 93-100).

Department staff, in its appeal dated March 4, 2016 (Department Staff Appeal), contends that the Municipalities failed to proffer sufficient evidence that the geology and hydrogeology issues are substantive and significant. Department staff specifically disputes the argument of the Municipalities that the presence of an alleged "underground alluvial valley within the unconsolidated deposits underneath the Model City facility" adversely impacts the ability to monitor the existing groundwater contamination at the site "and causes the groundwater at the facility to flow in a different direction, and at a different rate" than what has been demonstrated by past investigation (Department Staff Appeal at 5). Department staff references: the investigations and analysis that have been conducted of the site over several decades; the extensive documentation associated with corrective action programs, remedial efforts and site monitoring; and the experience of Department staff (see Department Staff Appeal at 7, 9-10, 12-13). Department staff's appeal further calls into question the "underground alluvial valley," noting that the data from site investigations "do not support the Municipalities' contention that the alleged underground valley exists, let alone that it acts as a pathway for contaminant migration" (id. at 11).

Department staff further contends that the data obtained regarding the groundwater flow and rate show a consistent flow direction to the north/northwest in the proposed RMU-2 footprint and that a hearing on the issue of groundwater flow and rate is not necessary (see id. at 12-13). Department staff also argues that the nature and extent of groundwater contamination has been fully investigated and the corrective and remedial actions that CWM has undertaken "adequately address the contamination at the Model City facility" (id. at 13). Staff also notes that the comprehensive groundwater monitoring network "also ensures that any possible releases from the proposed RMU-2 landfill, should they occur, will be quickly detected" (id. at 14).

CWM, in its reply dated April 5, 2016 (CWM Reply), states that it had elected not to appeal from the Ruling in order to expedite the proceeding. CWM does express its support of Department staff's appeal, however, noting its agreement with Department staff that the proffer of the Municipalities "was not sufficient to raise a significant and substantive issue with regard to the regulatory requirements related to the geology, hydrogeology, and groundwater flow at the Site" (CWM Reply at 26).

Ms. Witryol, in her reply, opposes Department staff appeal on several points, including but not limited to matters relating to legacy contamination, a perceived lack of adequate and independent monitoring and reporting, and the failure of the Department to provide specific documents (see Witryol Reply at 3-5).

The Municipalities, in their reply dated April 6, 2016 (Municipalities Reply), oppose Department staff's appeal. The Municipalities acknowledge that a large number of borings and monitoring wells have been installed at the site. However, the Municipalities argue that the majority of these borings and wells were completed in the upper till unit, well coverage in the glaciolacustrine silt/sand unit was not uniform, and "the well coverage west of Facultative Pond 8 is very sparse" (Municipalities Reply at 6). Accordingly, due to the depths of the wells and borings and their locations, the Municipalities dispute staff's reliance on this data in resolving groundwater protection, monitorability, and siting issues (id. at 5), and call into question staff's hydrogeologic evaluations (see e.g., id. at 10-12, 14).

In addition, the Municipalities note that "new localized data was obtained after the deadline for petitions in this matter" (id. at 2). Specifically, the Municipalities reference a new groundwater study that applicant initiated after petitions for party status were filed, as well as the initiation of a second post-petition groundwater study (see id. at 2-3).[9] The Municipalities state that both studies "involve drilling new groundwater monitoring wells in the western and eastern portion of CWM's property to address the Municipalities' concerns with the extent and permeability of deep sand and gravel deposits in that area" (id. at 3). The Municipalities contend that this new data should be considered in this proceeding and that these studies indicated the substantive and significant nature of this question (see id. at 3, 15-16).

Finally, the Municipalities argue that the corrective actions that CWM has undertaken at the site have failed to adequately address groundwater contamination, and contend that Department staff has not indicated how "new releases would be distinguished from prior contamination in the already impacted areas" (id. at 17).

The assessment of the Municipalities' expert on the geology and hydrogeology of the site, including but not limited to the direction of ground water flow, hydraulic conductivity at the site, and the detection monitoring program and the nature and extent of groundwater contamination is in stark contrast with the positions of CWM and Department staff. I recognize

[9] See also e-mail dated March 24, 2016 from Daniel M. Darragh, Esq. to Department staff, RRG, the Municipalities, Ms. Witryol, and ALJ O'Connell advising that CWM "has undertaken to install 6 new borings in the footprint of RMU-2, as well as 5 new groundwater monitoring wells."

that Department staff has made an important point regarding the numerous investigations at the site and the amount of data that has been collected. I recognize also that the record on the hydrogeologic and geologic issues is extensive and addresses certain questions. However, based on my review, the record of the proceeding at this stage is not sufficient to resolve the substantive and significant matters that the Municipalities have raised.

The ALJ, in the Ruling, has presented a well-structured analysis and reasoned basis for his determination of the hydrogeologic and geologic issues to be adjudicated. Based on my review of the record, I see no reason to disturb the ALJ's determinations on the issues to be adjudicated with respect to hydrogeology and geology as set forth in the Ruling.[10] The application and related materials on the geology and hydrogeology of the site do not fully rebut the Municipalities' offer of proof and the basis exists to inquire further. Accordingly, the Ruling is affirmed.[11]

I note however that, in any adjudication, Department staff's evaluation will be an important consideration (see e.g. Matter of Saratoga County Landfill, September 3, 1996, Hearing Report at 89-90 [role of Department staff hydrogeologist where applicant's and project opponent's experts disagree]). I also note that applicant has undertaken additional investigation of the site and that this information may well be significant in the evaluation of these issues by all parties,[12] including the three factual disputes that the ALJ has determined must be resolved to determine compliance with specific part 373 regulatory requirements.[13]

**--RADIOLOGICAL CONTAMINATION/THE PROJECT-SPECIFIC SEMMP AND THE MUNICIPALITIES' APPEAL**

The site of the Model City facility, as the ALJ noted, has been the subject of many investigative surveys (see Ruling at 133). The Municipalities argued that legacy surface and subsurface radiological contamination in the areas to be excavated for the project have not been adequately characterized (see Municipalities Petition at 42). According to the Municipalities "major excavation threatens to disperse these contaminants into the air, posing an unacceptable health risk to workers and nearby sensitive receptors," as well as possibly releasing radiological contaminants to surface and groundwater (see Municipalities Petition at 42-43). The

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[10] See Ruling at 99-100.

[11] I also take into consideration the Facility Siting Board's recommendation that Department staff's appeal be rejected (see SB Interim Decision at 11).

[12] The ALJ noted that the Facility Siting Board may be able to rely on the factual record that will be developed in determining whether CWM's proposal would conform to the siting criterion concerning ground water considerations (see Ruling at 100).

[13] See id. (whether application includes adequate information to protect groundwater [see 6 NYCRR 373-1.5(a)(3)]; adequacy of ground water monitoring and response program to respond to any release of hazardous constituents from the proposed landfill given the ongoing implementation of the corrective action program associated with legacy contamination [see 6 NYCRR 373-2.6]; and whether the soil underlying the footprint of the proposed landfill has a hydraulic conductivity of $1x10^{-5}$ cm/s or less [see 6 NYCRR 373-2.14(b)(1)]).

Municipalities indicated that further radiological investigative surveys should be conducted at the site in order to characterize and remediate "areas known or suspected to be radiologically contaminated" (Municipalities Petition at 73-74). In addition, the Municipalities set forth their objections to the project-specific soil excavation monitoring and management plan (SEMMP) for the facility.

The ALJ however determined that CWM should not be required "to undertake an investigative survey in the manner outlined in the municipalities' petitions and in [its expert's] reports" (Ruling at 135). The ALJ also concluded that the assertion of the Municipalities that the revised 2015 project-specific SEMMP would not protect public health and the environment "is without merit" (id.).

On appeal, the Municipalities challenge the ALJ's rejection of additional radiological investigative surveys and the ALJ's conclusion regarding the sufficiency of the SEMMP (see Municipalities Replacement Appeal dated March 9, 2016). The Municipalities contend that: the history of site operations and radiological investigations demonstrates a potential for widespread contamination (see id. at 13-19); the Ruling overlooks the "deficient methods and limited scope" in applicant's radiological investigations (see id. at 19-26); the proposed SEMMP is unsafe under the circumstances (see id. at 26-29); and, under the proposed SEMMP, applicant would illegally stockpile contaminated soils on the site (see id. at.29-30). The Municipalities indicate that a "hard look" must be taken to determine whether the SEMMP "adequately [addresses] health and safety concerns arising from the necessity to handle potentially radiologically contaminated materials" and that excavation and movement of soils should not occur "without conditioning such excavations on a prior defensible investigation determining in advance where buried radioactive constituents are located" (id. at 32). Ms. Witryol, in her reply, concurs with the Municipalities on the radiological investigation and excavation issues (see Witryol Reply at 6).

Department staff contends that the proposed issues regarding radiological investigative surveys and the project-specific SEMMP are not adjudicable and supports the Ruling in that regard (see Department Staff Reply at 7-10). Similarly, CWM supports the ALJ Ruling on those two issues (see CWM Reply at 12-18).

The issues posed by this appeal are overlapping between the jurisdiction of the Department and that of the Facility Siting Board relative to its evaluation of the Part 377 siting criteria. The SB Interim Decision provides a detailed review of the issues in question (see SB Interim Decision at 11-18) and I see no need to duplicate that here. Based on its review, the Facility Siting Board expressed concern with the manner by which soil at the site was proposed to be excavated and evaluated (see id. at 16-18). Furthermore, the Facility Siting Board stated that applicant had not demonstrated to the Siting Board's satisfaction "why radiological scanning in six-inch lifts is physically or economically impracticable" (id. at 18). The Facility Siting Board concluded that, on the present record, "the Municipalities have raised a substantive and significant issue regarding the mass excavation and movement of soils at this site without first conducting the appropriate radiological and chemical surveys" (id. at 17). Accordingly, it held

that "the sufficiency of the radiological surveys and the adequacy of the SEMMP . . . are appropriate for adjudication" (id. at 18).[14]

Based on my review of the record, and the Facility Siting Board's analysis, I see no reason to disturb or otherwise modify the conclusion of the Facility Siting Board that the sufficiency of radiological surveys and the adequacy of the SEMMP constitute adjudicable issues. Accordingly, I concur with the modification of the ALJ's Ruling as set forth in the Facility Siting Board's (First) Interim Decision.

I note that, by letter dated November 18, 2016 to ALJ O'Connell and the service list to this proceeding (November 18, 2016 Letter), CWM submitted a revised project-specific SEMMP for consideration. According to the November 2016 letter, "CWM has revised the proposed project-specific SEMMP to use the same approach contained in the Generic Small Project Plan which the Facility Siting Board concluded would constitute monitoring during excavation" (November 18, 2016 Letter at 2). Although the revised project-specific SEMMP cannot be considered in the context of this appeal, it would be appropriate for consideration during the adjudication of the SEMMP issue (see Matter of Southern Dutchess Sand & Gravel, Inc., Interim Decision of the Deputy Commissioner, March 9, 2006, at 29-30).

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To the extent that any other issues have been raised on the appeals which are subject to the Department's jurisdiction, these have been considered and are found lacking in merit or otherwise moot. The Ruling is affirmed as modified by the (First) Interim Decision of the Facility Siting Board dated August 11, 2016. I hereby remand this matter to the ALJ for further proceedings consistent with this First Interim Decision and the (First) Interim Decision of the Facility Siting Board.[15]

For the New York State Department of
Environmental Conservation

By: /s/
Louis A. Alexander
Deputy Commissioner

Dated: June 23, 2021
Albany, New York 12203

[14] The Facility Siting Board agreed with the Ruling that, with respect to any radiological contamination and remediation of Fac Pond 8, the issue is beyond the scope of this proceeding (see Ruling at 137). I concur.

[15] Subsequent to the issuance of the Interim Decision of the Facility Siting Board, CWM moved for leave to serve discovery demands on parties relating to designated Siting Board issues. By ruling dated April 7, 2017, ALJ O'Connell granted CWM's motion and issued a scheduling order for discovery and pre-filed testimony as well as providing dates for the adjudicatory hearing with respect to three economic impact issues and a transportation noise analysis. Ms. Witryol sought to appeal from the April 7, 2017 ruling; her appeal was treated as a motion for leave to appeal from the ALJ's ruling. The Facility Siting Board, in a Ruling and Second Interim Decision effective May 24, 2017, granted Ms. Witryol's motion and vacated the ALJ's ruling. Based on the then relevant circumstances, I concur with the Facility Siting Board's Ruling and Second Interim Decision.