

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
 9-2934-00022/00233
 9-2934-00022/00232
 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]).

September 28, 2022

**Ruling on CWM's Motion to Strike the
Pre-filed Direct Testimony of Kenneth Acks**

With a cover letter from Mr. Kuhn dated May 6, 2022, CWM moves to strike the pre-filed direct testimony of Kenneth Acks, and related portions of Nicolas Rockler, as well as associated exhibits.¹ CWM's motion papers consist of a motion, an affirmation by Mr. Kuhn, dated May 6, 2022, with three exhibits, and an affidavit from Louis L. Wilde, Ph.D., sworn to on May 6, 2022, with five exhibits.

¹ Mr. Kuhn provided the parties and me with electronic copies of the documents via email dated May 6, 2022.

Attached to Mr. Kuhn's affirmation, as Exhibit A, is a copy of CWM's request for production of documents served upon RRG's counsel, dated June 8, 2021. Exhibit B is a copy of RRG's response to CWM's June 8, 2021, request for documents provided under cover of letter dated February 10, 2022. Exhibit C is a copy of RRG's amended response provided under cover of letter dated March 4, 2022.

Dr. Wilde attached five exhibits to his affidavit. As outlined in his curriculum vitae (Exhibit A), Dr. Wilde has a Doctor of Philosophy Degree in Economics from the University of Rochester. Exhibit B is a copy of a map of northwestern New York. Exhibit C is a copy of a map titled, *MIS-Located Data Points – Example Area*. Exhibit D is a copy of a map titled, *MIS-Located Data Points – In Canada*. Exhibit E is a three page table titled, *80 Records in 18 Groups with Identical Map Coordinates*.

The Eleventh Order regarding Supplemental Discovery, dated May 13, 2022 (at 5-6), set August 12, 2022, as the due date to respond to CWM's May 6, 2022 motion. With a cover letter dated August 12, 2022,² I received a timely response from Director Connolly, and Messrs. Teeter and Mitchell (Environmental Advocacy Clinic, University of Buffalo, School of Law), on behalf of Residents for Responsible Government, the Lewiston-Porter Central School District, and the Niagara County Farm Bureau (collectively RRG). With the August 12, 2022 cover letter, RRG's counsel provided a reply, of the same date, and an affidavit from Kenneth Acks, sworn to on August 12, 2022. RRG opposes CWM's motion.

In addition, Ms. Witryol filed a response, dated August 12, 2022, opposing CWM's motion to strike. Attached to Ms. Witryol's response is Exhibit 1, which addresses each statement in Dr. Wilde's affidavit. Mr. Abraham filed a response on behalf of the municipalities with a cover letter dated August 15, 2022. The municipalities oppose CWM's motion to strike. Department staff did not respond to CWM's motion to strike.

I. Potential Impacts to Property Values

In November 2014, RRG filed a petition for full party status, and participated in the April 2015 issues conference. RRG contended that CWM's proposal is not otherwise necessary or in the public interest, in part, because it would have a negative adverse impact on property values in the community, and upon the municipal and school property tax receipts. According to RRG, the distance from an active hazardous waste management facility is directly related to the reduction of property values. However, RRG asserted that the circumstances related to CWM's proposal are different because the designated transportation route requires trucks to pass by the Lewiston-Porter public school campus. As a result, RRG concluded that all property values in the school district would be adversely impacted, regardless of the distance from the site of the Model City facility. With its petition, RRG offered Kenneth M. Acks from the Cost-Benefit Group, LLC (Long Beach, New York), as an expert.

² The parties filed electronic copies of their respective responses via email of the same date.

As part of the offer of proof included with the petition for full party status, RRG explained that Mr. Acks's firm undertook a comprehensive investigation of the potential changes in property values associated with CWM's proposal. RRG explained further that Mr. Acks would testify that he used: (1) sales comparisons; (2) contingent valuation studies; and (3) hedonic regressions. According to Mr. Acks, the decrease in value would be greater for homes closer to the site. Prior to the November 2014 issues conference, RRG provided a copy of the Cost-Benefit Group's analysis, which was dated November 1, 2014. (*See* December 22, 2015 Issues Ruling at 82-83.)

Based on this offer of proof, I determined that RRG had raised a substantive and significant issue for adjudication (*see* December 22, 2015, Issues Ruling at 83-84). After duly considering appeals, the Facility Siting Board affirmed the ruling (*see* Interim Decision of the Facility Siting Board, dated August 11, 2016, at 3-5, 18-19).

With a cover letter dated February 27, 2020, from Mr. Olsen, RRG submitted the pre-filed testimony of Kenneth Acks, Kent D. Messer, Ph.D., and James Bittner.³ With his pre-filed direct testimony, dated February 24, 2020, Mr. Acks included the following exhibits. Exhibit 1 is a copy of Mr. Acks's résumé. Exhibit 2 is a copy of a document titled, *Valuation Conclusion Update*. Exhibit 3 is a copy of a document titled, *Regression Analyses of Changes in Property Values near CWM*. Exhibit 4 is a copy of a document titled, *Analysis of Value Changes Arising from CWM Chemical Services, LLC (CWM), PCS/Chemical Landfill Proposal*, dated September 1, 2017, from the Cost-Benefit Group (CBG Report). Exhibit 4 is an updated version of the CBG Report initially appended to RRG's November 2014 petition for full party status.

With a scheduling order dated May 25, 2021, I authorized the parties to serve document demands, as part of supplemental discovery, and to do so by June 8, 2021. Counsel for CWM timely served document demands upon counsel for RRG with respect to Mr. Acks's pre-filed direct testimony and associated exhibits.⁴ The parties reported regularly about the status of responses.⁵ RRG's counsel responded initially on February 10, 2022, and provided an amended response under cover of letter dated, March 4, 2022.⁶

³ By motion dated May 29, 2020, CWM moved to strike the prefiled direct testimony of Dr. Messer and Mr. Bittner, but did not include any objections to the pre-filed direct testimony of Mr. Acks. Rulings on the CWM's May 29, 2020 motion to strike were issued on February 3, 2021. The Facility Siting Board issued the Fourth Interim Decision, dated April 27, 2021, which affirmed the ALJ's February 3, 2021, ruling, in part, and modified, in part.

⁴ *See* Kuhn Affirmation, Exhibit A.

⁵ *See* Second Order regarding Supplemental Discovery, dated July 22, 2021, at 2-3; Third Order, dated August 5, 2021, at 1; Fourth Order, dated September 15, 2021, at 2; Fifth Order, dated October 2021, at 2; Sixth Order, dated November 23, 2021, at 3; Seventh Order, dated December 10, 2021, at 2; Eighth Order, dated January 26, 2022, at 2; and Ninth Order, dated March 1, 2022, at 1.

⁶ *See* Kuhn Affirmation, Exhibits B and C.

II. CWM's Motion

CWM moves to strike the pre-filed direct testimony of Mr. Acks, dated February 24, 2020, and those portions of the pre-filed direct testimony of Nicolas Rockler, dated February 27, 2020, that rely upon the opinions outlined in Mr. Acks's pre-filed direct testimony.

The purpose of Mr. Acks's testimony (at 4:77-80) is to estimate the potential reduction of property values in the Towns of Lewiston and Porter that would result from the construction and operation of the proposed RMU-2 landfill and related facilities. In the pre-filed direct testimony (at 4:103-107), Mr. Acks explains that his conclusions are based on calculations outlined in the CBG Report. According to CWM, however, the CBG Report does not include any calculations related to real property in the Towns of Lewiston and Porter. (*See* CWM Motion at 6.)

With reference to Mr. Acks's pre-filed direct testimony (at 6:157-161), CWM observes that the witness does not explain how he considered several methods and data from Niagara County. Moreover, Mr. Acks does not explain in either his pre-filed direct testimony (at 6:162-164, 177-173), or the associated exhibits, such as the CBG Report, how he concluded that the construction and operation of the proposed RMU-2 landfill would reduce local property values. Absent a detailed explanation, CWM contends that it is impossible to reproduce or verify the results presented in the CBG Report. (*See* CWM Motion at 7.)

Pursuant to a revised scheduling order,⁷ which referenced 6 NYCRR 624.7(e), CWM states that RRG was required by March 16, 2020, to produce the supporting data and documents for Mr. Acks's pre-filed direct testimony. CWM contends, however, that the documents initially produced did not meet the regulatory requirements. (*See* CWM Motion at 11-12.) Then, after a conference call on May 21, 2021, I authorized the parties to serve discovery demands by June 8, 2021.⁸ At which time, CWM served discovery demands upon RRG's counsel seeking detailed information from Mr. Acks to support the conclusions outlined in his pre-filed direct testimony, and the associated exhibits.⁹ RRG's responses dated February 10, 2022,¹⁰ and March 4, 2022,¹¹ were deficient, according to CWM. (*See* CWM Motion at 11-17.)

CWM contends that Mr. Acks's pre-filed direct testimony provides no foundation, and must be struck because he does not explain how he used any underlying data to determine that the construction and operation of the proposed RMU-2 landfill and associated features would diminish local real property values. CWM contends further that RRG must establish its

⁷ The initial Scheduling Order was dated October 10, 2019. By email dated January 27, 2020, I extended the filing date to distribute the supporting data and documents from February 17, 2020 to March 16, 2020.

⁸ *See* Scheduling Order, dated May 25, 2021, at 2-3.

⁹ *See* Kuhn Affirmation, Exhibit A.

¹⁰ *See* Kuhn Affirmation, Exhibit B.

¹¹ *See* Kuhn Affirmation, Exhibit C.

admissibility as the proponent of the pre-filed testimony.¹² CWM asserts that expert testimony is inadmissible when it lacks a proper foundation of reliability.¹³ CWM concludes that the absence of foundation goes, not merely to the weight, but to the admissibility of the expert testimony.¹⁴ CWM asserts further that in the absence of any explanation or demonstration about how Mr. Acks reached his conclusions, his pre-filed testimony has no foundation, and concludes that it should be struck and, therefore, excluded from the evidentiary record. (See CWM Motion at 17-19.)

As a second basis to strike the pre-filed direct testimony of Mr. Acks, CWM contends that the information RRG produced on discovery shows that Mr. Acks's pre-filed direct testimony is based on erroneous, incomplete, and unreliable data. To support this contention, CWM references Dr. Wilde's affidavit. For example, Exhibit 3 to Mr. Acks's pre-filed direct testimony states that he based the hedonic regressions on 22,746 real estate sales in Niagara County between January 1999 and June 2019. However, the dataset identified on Sheet 5 of the "Niagara Dist Sort.xlsx" spreadsheet includes only 17,196 sales. Dr. Wilde observes that 24.4% of the data purportedly relied upon is missing from the "Niagara Dist Sort.xlsx" spreadsheet. (See ¶ 12 Wilde Affidavit at 5.)

In addition, Dr. Wilde notes that the GIS coordinates provided for 19 sales that Mr. Acks relied upon for his analysis are located in Canada. Also, 80 of the 1,787 datapoints used in the five-mile radius hedonic regression models are duplicates. Dr. Wilde notes further that 37 of these datapoints have the exact same GIS coordinates (*i.e.*, 43.1986162-79.04276), but different street addresses. (See ¶¶ 16 and 17 Wilde Affidavit at 7.) CWM concludes that in order to be admissible, the proposed expert testimony must be based on reliable facts or data.¹⁵ Based on Dr. Wilde's review of the CBG Report, CWM contends that none of the expert opinions presented in Mr. Acks's pre-filed direct testimony are based on reliable facts or data and, therefore, should be stricken. (See CWM Motion at 24-25.)

Finally, CWM moves to strike those portions of Dr. Rockler's pre-filed direct testimony that relate to, or are based upon, the opinions outlined in Mr. Acks's pre-filed direct testimony. For example, CWM notes that Question 13 (at 8:14-15) asks:

¹² See *Nonnon v NYC*, 32 AD3d 91, 111 [1st Dept. 2006]).

¹³ See *Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 (2006); see also *People v Wesley*, 83 NY2d 417, 422 (1994) (noting "foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted").

¹⁴ See *e.g. Drago v Tishman Constr. Corp.*, 4 Misc. 3d 354, 361 (Sup. Ct. New York County, 2004) see also *Velez v Svehla*, 229 AD2d 528, 529 (2d Dept. 1996) ([i]f the basis of an expert's "statistical testimony" is "not revealed" or explained, it is impossible to determine if the expert's opinion is "reliable" or "mere speculation," and such testimony is "inadmissible" for lack of "adequate foundation").

¹⁵ See *Matter of US Energy Development Corp.*, Rulings of the Chief ALJ on Pre-Hearing Motions, dated February 23, 2016, at 5-7; *Andaloro v Town of Ramapo*, 242 AD2d 354, 355 (2d Dept. 1997) (holding trial court should have excluded expert testimony based on unreliable "statistical material").

What would be the municipal revenue loss (or expense) from the CBG 2020 estimate of diminution?

CWM notes that the initial portion of Dr. Rockler's response (at 8:16-19) is:

Based on the updated property value estimates in the Cost-Benefit Group prefiled testimony of February 2020, which shows reductions ranging from 5% percent [sic] to 7.5 percent, I have applied these 'loss' rates to the 2019 amounts levied by the school district, town and village jurisdictions, shown in Exhibits 3 and 4.

According to CWM, the remainder of Dr. Rockler's response to Question 13 (at 8:19-10:14) relies on Mr. Acks's unreliable conclusions to arithmetically extrapolate corresponding municipal revenue and tax losses. Consequently, CWM seeks to strike the following portions of Dr. Rockler's pre-filed direct testimony: (1) page 3, lines 7-9 and 27-36; (2) page 4, lines 1-11; (3) page 8, line 10 through page 10, line 14; as well as (4) Exhibit 3; Exhibit 4A; and Exhibit 4B.¹⁶ (See CWM Motion at 26.)

III. RRG's Response

RRG opposes CWM's motion to strike Mr. Acks's pre-filed direct testimony and portions of Dr. Rockler's pre-filed direct testimony, as well as associated exhibits. According to RRG, CWM's motion misrepresents the standards for admission of expert testimony, and misapplies the case law referenced in CWM's motion. RRG argues that the motion gives the false impression that an overwhelming body of case law supports CWM's assertions. RRG argues further that expert testimony needs to be based upon methods and principles that "have gained general acceptance in the particular field,"¹⁷ and that this standard applies to methods, rather than to specific conclusions.¹⁸ (See RRG Response at 3, 5.)

According to RRG, a complete review of Mr. Acks's pre-filed direct testimony and associated exhibits shows that his testimony deserves full consideration. RRG asserts that the CBG Report details the reasoning relied upon by Mr. Acks to determine the reduction in property values discussed in his testimony. To support this assertion, RRG references pages 42-81 and 84-125 from the CBG Report. RRG argues that the methodologies outlined in the CBG Report describe the background materials, and the studies from published experts within the field, as well as the applicability of this information to the CBG Report. (See RRG Response at 3, 7.)

RRG notes that Mr. Acks's pre-filed direct testimony references over 200 sources relied upon to develop his diminution value. Accordingly, RRG contends that the CBG Report

¹⁶ See *Hamsch v NYC Transit Auth.*, 63 NY2d 723, 725-726 (1984) (to be admissible, expert "opinion evidence must be based on facts in the record or personally known to the witness").

¹⁷ *Frye v United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

¹⁸ See *Parker v Mobil Oil Corp.*, 7 NY3d 434, 446-447 (2006).

provides a substantial foundation to support Mr. Acks's conclusions. RRG concludes that CWM's claim of unreliability is baseless. Rather, RRG argues that it has disclosed the data sets, spreadsheets for final regressions, and background materials for calculations. (*See* RRG Response at 8-9.)

IV. Ms. Wityrol's Response

Ms. Wityrol opposes CWM's motion to strike the pre-filed direct testimony of Mr. Acks, and the related pre-filed direct testimony of Dr. Rockler, as well as the associated exhibits. According to Ms. Wityrol, CWM's motion misrepresents Mr. Acks's pre-filed direct testimony. Ms. Wityrol contends that the conclusions presented in Mr. Acks's pre-filed direct testimony are based on several methods of determining property value impacts that would result from the construction and operation of the proposed RMU-2 landfill and related facilities. Ms. Wityrol notes that an hedonic regression is only one such method. Ms. Wityrol notes further that the hedonic regression presented in the CBG Report considers additional factors related to the environment, the location of the proposed RMU-2 landfill in relationship to the school, as well as the truck route from the highway to the Model City facility. (*See* Wityrol Response at 2.)

With respect to Dr. Wilde's affidavit, Ms. Wityrol asserts that his limited work experiences, compared to those of Mr. Acks, invalidates Dr. Wilde's evaluation of Mr Acks's pre-filed direct testimony. Attached to Ms. Wityrol's response is Exhibit 1, which addresses each statement in Dr. Wilde's affidavit. (*See* Wityrol Response at 3, Exhibit 1.) Ms. Wityrol argues that those portions of Dr. Rockler's pre-filed direct testimony identified in CWM's motion should not be stricken based on his experiences and qualifications (*see* Wityrol Response at 3-4).

V. Municipalities' Response

The municipalities oppose CWM's motion. Contrary to CWM's arguments, the municipalities assert that the bases for Mr. Acks's opinions are outlined in the CBG Report, which references studies concerning the effect of Superfund sites in proximity to residential real estate, among other things. The municipalities argue that Mr. Acks fully addresses the referenced studies in the CBG Report. (*See* Municipalities Response at 1.)

According to the municipalities, CWM's motion does not show how, or why, the purported data flaws, or the lack of calculations, in Mr. Acks's pre-filed direct testimony would materially alter his conclusions. The municipalities argue further that CWM did not identify any obstacle to cross-examining Mr. Acks to probe his methods and conclusions. (*See* Municipalities Response at 2-3.)

The municipalities argue that CWM's reliance on 22 NYCRR 202.59(g)(2) is misplaced. According to the municipalities, CWM contends that Mr. Acks should have applied property appraisal methods consistent with 22 NYCRR 202.59(g)(2). The municipalities argue, however,

that CWM must demonstrate the need to comply with these requirements before determining whether Mr. Acks's pre-filed direct testimony lacks foundation or is unreliable. The municipalities argue further that Dr. Wilde does not show how the conventions governing a professional appraisal of real property, as outlined in 22 NYCRR 202.59(g)(2), would be the same methods used to determine the potential property values of contaminated sites. Because a property diminution analysis may not be as conventional as a property appraisal, the municipalities conclude that it is not clear what is needed to verify Mr. Acks's conclusions. (*See* Municipalities Response at 3-4.)

VI. Discussion and Ruling

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.¹⁹ To be considered relevant, the evidence must relate to the issues identified for adjudication (*see* 6 NYCRR 624.8[a][4]).

The sworn testimony of a witness is a form of evidence (*see* 6 NYCRR 624.2[p]). 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 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, 308 [1983]).²⁰

I deny CWM's May 6, 2022, motion to strike the pre-filed direct testimony of Kenneth Acks, and related portions of Nicolas Rockler's pre-filed direct testimony, as well as associated exhibits. The Facility Siting Board identified property values and tax receipts, among others, as issues for adjudication related to the pending siting certificate, and directed the adjudication to proceed without delay (*see* Third Interim Decision, dated September 10, 2019, at 16). The pre-filed direct testimony of Mr. Acks, the related pre-filed direct testimony of Dr. Rockler, as well as the associated exhibits address the issue certified for adjudication and are, therefore, relevant. Whether the proffered testimony and exhibits are based upon reliable facts or data can be tested during cross-examination.

VII. Further Proceedings

A hearing session shall be scheduled using the Webex videoconferencing platform to introduce the pre-filed direct testimony of Mr. Acks, the related portions of Dr. Rockler's pre-

¹⁹ For regulatory definitions of the terms, *evidence*, *hearsay*, and *relevant*, see 6 NYCRR 624.2(p), (r), and (cc), respectively.

²⁰ *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.

filed direct testimony, and the associated exhibits. In addition, this session shall provide the opportunity to introduce the pre-filed direct testimony of Mr. Bittner, and his related exhibits. During the hearing session, the other parties will have the opportunity to cross-examine these three witnesses. Accordingly, counsel for RRG and Ms. Witryol shall confer with their respective witness or witnesses to determine their availability, and advise the parties and me about their availability for the hearing session by October 17, 2022.

I recommend reserving at least three or four days for this hearing session. I am available during the week of October 31; the week of November 7 (Friday, November 11, 2022 is a State holiday); and the weeks of December 5, 12, and 19, 2022. If the parties need dates in January 2023, please advise.

VIII. Schedule for Filing Appeals

I understand that the Jewish holiday season that includes Rosh Hashanah and Yom Kippur extends from sundown on Saturday, September 25, 2022 through Wednesday, October 5, 2022. Therefore, the regulatory time frames for filing requests for leave to appeal from this ruling are suspended during the pendency of this period, and will begin to toll from Friday, October 7, 2022.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
September 28, 2022

To: Service List revised May 27, 2022