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), 212 (Process Operations); 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
9-2934-00022/00049

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 (formerly 361 [Siting of Industrial Hazardous Waste Facilities]) by

CWM Chemical Services, LLC,
Applicant (RE: Residuals Management Unit - Two [RMU-2]).

February 14, 2019

Supplemental Rulings on Proposed Issues for Adjudication

Proceedings

On December 22, 2015, I issued a ruling on proposed issues for adjudication and petitions for full party status and amicus status concerning the captioned matters. The December 2015 ruling provided a description of CWM's Model City facility including the proposed RMU-2 landfill and associated features. In addition, the ruling identified the required permits and approvals that CWM must obtain from the Department to construct and operate the proposed RMU-2 landfill. (*See* December 2015 ruling at 4-6.) The December 22, 2015 ruling on

proposed issues for adjudication and petitions for full party status and amicus status is incorporated by reference into these supplemental rulings.

In addition, the December 2015 ruling identified the permit applications and supporting materials filed by CWM, and outlined the administrative review undertaken by Department staff. The December 2015 ruling also described the various notices published in the Department's *Environmental Notice Bulletin* (*ENB*) and the local newspapers. The notices provided for a written comment period and scheduled public comment hearing sessions on July 7, 2014. Additional notices set a schedule and provided instructions to file petitions for party status and amicus status. The March 11, 2015 notice of issues conference scheduled the issues conference for April 28, 2015 in the Fellowship Hall at the First Presbyterian Church in Youngstown, New York. The issues conference convened as scheduled on April 28, 2015, and concluded on April 30, 2015. (*See* December 2015 ruling at 6-16.)

The December 2015 ruling identified various issues for adjudication, and excluded other proposed issues. The December 2015 ruling granted full party status to: (1) the Residents for Responsible Government (RRG), who jointly filed a petition with the Lewiston-Porter Central School District, and the Niagara County Farm Bureau; (2) local municipalities consisting of Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (municipalities); and (3) Amy Witryol (*see* December 2015 ruling at 151-152).

The parties timely filed appeals and replies from the December 2015 ruling with the Siting Board and with the Commissioner.[1] After considering the parties' appeals and replies, the Siting Board issued an Interim Decision dated August 11, 2016. In the August 2016 Interim Decision, the Board granted the municipalities' appeal concerning the radiological contamination and project-specific soil excavation monitoring and management plan (SEMMP), and recommended that the Deputy Commissioner deny staff's appeal with respect to the geological and hydrogeological issues identified in the December 2015 ruling (at 99-100). In addition, the Siting Board affirmed all other rulings outlined in the December 2015 ruling. (*See* Interim Decision, dated August 11, 2016, at 17-19.)

The December 2015 issues ruling reserved on proposed issues related to potential impacts from waste water discharges and air emissions. At the time of the December 2015 issues ruling, Department staff was in the process of reviewing additional submissions from CWM and its consultants with respect to CWM's requests to modify the April 2015 State Pollutant Discharge Eliminations System (SPDES) permit and the October 2014 Air State Facility (ASF) permit. The December 2015 ruling advised the issues conference participants that they would have the opportunity either to revise or to supplement their respective petitions for party status after Department staff issued tentative determinations about these two permit applications consistent with the procedures outlined in 6 NYCRR part 621 (Uniform Procedures). (*See* December 2015 ruling at 141-142 and 150-151.)

[1] As of the date of these supplemental rulings, the parties' appeals and replies from the December 2015 ruling, filed with the Commissioner, are pending. By memorandum dated December 21, 2015, decision making authority in this matter was delegated to Assistant (now Deputy) Commissioner Louis A. Alexander.

With a cover letter dated December 23, 2016, Department staff issued a Notice of Complete Application (NOCA) with respect to CWM's application to modify the SPDES permit. A copy of the NOCA appeared in the Department's *ENB*, the *Buffalo News*, and the *Niagara Gazette* on December 28, 2016, as well as the *Lewiston-Porter Sentinel* on December 31, 2016. With a memorandum dated June 1, 2017, Department staff referred the draft SPDES permit and related documents, including public comments, to the Office of Hearings and Mediations Services (OHMS).

Department staff issued a NOCA with respect to CWM's application to modify the ASF permit with a cover letter dated August 18, 2017. A copy of the NOCA appeared in the Department's *ENB*, the *Buffalo News*, and the *Niagara Gazette* on August 23, 2017, as well as the *Lewiston-Porter Sentinel* on August 26, 2017. On December 8, 2017, OHMS received Department staff's hearing referral concerning the draft ASF permit, and related documents, including the public comments.

A Notice of Deadline for Petitions for Party Status and Issues Conference appeared in the Department's *ENB* on February 23, 2018 (February 2018 notice). A copy of the notice also appeared in the *Buffalo News* and the *Niagara Gazette* on February 28, 2018, and the *Lewiston-Porter Sentinel* on March 3, 2018. The notice outlined the following schedule. First, electronic copies of either new petitions for full party status and amicus status, or supplements to previously filed petitions were due by May 2, 2018, with hard copies postmarked by the same date. Second, electronic copies of responses from CWM and Department staff to any duly filed petitions or supplements were due by June 1, 2018, with hard copies postmarked by the same date. Finally, the notice scheduled the issues conference to reconvene on July 10, 2018 in Youngstown, New York, and to continue, as necessary, on the following day.

With a cover letter from R. Nils Olsen, Jr., Esq. (Fort Atkinson, Wisconsin) dated April 30, 2018, the Lewiston-Porter Central School District, Residents for Responsible Government, Inc. (RRG), and the Niagara County Farm Bureau jointly filed a supplemental petition. RRG's supplemental petition included Exhibit A, which is a copy of a revised study prepared by The Cost Benefit Group, LLC (Kenneth M. Acks) titled, *Analysis of Value Change arising from CWM Chemical Service, LLC (CWM) PCB/Chemical Landfill Proposal*. Exhibit B to RRG's supplemental petition is a copy of the Siting Board's decision dated December 10, 1993 concerning the RMU-1 landfill.

Amy Witryol filed a supplement and amendment to her petition dated May 2, 2018 with Addenda 1, 2, and 3, as well as Appendices A1 though Q3. Ms. Witryol's errata copy of the supplemental petition is dated May 4, 2018.

With a cover letter from Gary A. Abraham, Esq. (Great Valley, New York) dated May 4, 2018, Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (the municipalities) jointly filed a supplemental petition, which included expert reports prepared by Marvin Resnikoff, Ph.D., Anirban De, Ph.D., P.E., and Ranajit (Ron) Sahu, Ph.D., QEP, CEM. By letter from Mr. Abraham dated May 8, 2018, the municipalities filed an errata to the supplemental petition.

In addition to the supplemental petitions filed by the intervening parties, the Tuscarora Nation and the Buffalo-Niagara Waterkeeper filed petitions for amicus status. By its counsel, Jenna Macaulay, Esq. (Berkey Williams, LLP, Syracuse, New York), the Tuscarora Nation filed a petition for amicus status dated May 2, 2018. In addition, Chief Leo Henry 0appeared at the July 10, 2018 issues conference on behalf of the Tuscarora Nation.

With a cover letter dated May 2, 2018 from Margaux J. Valenti, Esq., Buffalo-Niagara Waterkeeper (Waterkeeper) filed a petition for amicus status. With its May 2, 2018 petition for amicus status, Waterkeeper attached a copy of its comment letter dated November 18, 2014 concerning the proposed RMU-2 landfill.

The February 2018 notice provided CWM and Department staff with the opportunity to file written responses to any supplemental petitions, as well as to any new petitions for full party status and amicus status. In a reply dated June 5, 2018, prepared by Teresa J. Mucha, Esq., Associate Attorney, and David F. Stever, Esq., Assistant Regional Attorney, Department staff responded to the supplemental petitions filed by RRG, the municipalities, and Ms. Witryol, as well as to the petitions for amicus status filed by the Tuscarora Nation and Waterkeeper. Staff's response included three attachments. CWM's counsel (Daniel M. Darragh, Esq. [Cohen & Grigsby, PC, Pittsburgh, Pennsylvania], and Robert J. Alessi, Esq., and Jeffrey D. Kuhn, Esq. [DLA Piper, LLP (US), Albany, New York]) filed a response dated June 5, 2018. CWM's response included Exhibits A through H. With an email dated June 21, 2018, CWM provided a correction to Exhibit C.

As scheduled, the issues conference concerning the captioned matters reconvened at 10:00 a.m. on July 10, 2018 at the Board Room of the Community Resource Center[2] located at 4011 Creek Road, Youngstown, New York 14174. The reconvened issues conference concluded on July 10, 2018. The appearances for the issues conference participants are noted in the transcript (Tr. at 2-4, 9-10). In addition, all members of the Siting Board presided at the July 10, 2018 issues conference (Tr. at 6-7). Members of the public attended the issues conference.

OHMS received the transcript of the July 10, 2018 issues conference on July 18, 2018. Whereupon the record of the reconvened portion of the issues conference closed.

Rulings

I. The draft SPDES Permit

With respect to the draft State Pollutant Discharge Elimination System (SPDES) permit, RRG did not propose any factual issues for adjudication in its supplemental petition (Tr. at 16). In addition, no dispute exists between Department staff and applicant over any substantial term or condition of the draft SPDES permit (*see* 6 NYCRR 624.4[c][1][i]). (Tr. at 180-182.)

[2] The Community Resource Center is located on the campus of the Lewiston-Porter Central School District.

A. SPDES Review

In their respective petitions, Waterkeeper (amicus petition at 2-6) and Ms. Witryol (supplemental petition at 41) asserted a procedural defect related to how Department staff processed CWM's application to modify the April 2015 SPDES permit. They argued that staff processed the proposed modification as a "minor" rather than a "major" modification. However, based on Department staff's response (at 6-7), Waterkeeper withdrew its procedural objection (Tr. at 11-12). Ms. Witryol acknowledged that the question has been settled (Tr. at 26), but maintained that additional opportunities for public participation should have been provided, such as a legislative hearing (Tr. at 27).

Discussion and Ruling: When reviewing applications for SPDES permits, Department staff follows the procedures outlined in Environmental Conservation Law (ECL) article 70 (Uniform Procedures Act [UPA]) and implementing regulations at 6 NYCRR part 621 (Uniform Procedures). The regulations provide definitions of the terms *major* and *minor* (*see* 6 NYCRR 621.2[r] and [s]), and specify the requirements on a programmatic basis for permit applications (*see* 6 NYCRR 621.4). The requirements for SPDES permit applications are specified at 6 NYCRR 621.4(f), and identify two minor SPDES projects (*see* 6 NYCRR 621.4[f][2][i] and [ii]), which do not apply here. Consequently, all other SPDES permit applications are considered UPA major projects.

The procedures related to public notice and comment are outlined at 6 NYCRR 621.7. For UPA major projects, a notice of complete application (NOCA) must be published in the Department's *ENB* as well as in the local newspaper, and provide for a public comment period. For federally delegated permits, such as SPDES, the minimum public comment period is 30 days (*see* 6 NYCRR 621.7[b][6][iv]). In addition, Department staff must also provide a tentative determination, in the form of a draft permit (*see* 6 NYCRR 621.7[b][7][i][a]) and fact sheet (*see* 6 NYCRR 621.7[b][8]). As noted above, Department staff issued a NOCA with respect to CWM's application to modify the SPDES permit dated December 23, 2016, which was published in the *ENB*, the *Buffalo News*, and the *Niagara Gazette* on December 28, 2016, and the *Lewiston-Porter Sentinel* on December 31, 2016. Subsequently, Department staff extended the public comment period from January 30, 2017 to March 31, 2017, and duly published a notice in the *ENB* on February 1, 2017. With a memorandum dated June 1, 2017, Department staff referred the draft SPDES permit, and related documents, including public comments, to OHMS for an issues conference.

Based on the foregoing, members of the public were provided with the opportunity to file written public comments about the draft SPDES permit before staff referred the draft permit and related documents to OHMS for an administrative hearing. With the hearing referral, the intervening parties supplemented their previously filed petitions for party status, and the Tuscarora Nation and Waterkeeper took advantage of the opportunity to file petitions for amicus status. Therefore, Department staff processed CWM's application to modify the April 2015 SPDES permit in a manner consist with requirements outlined in 6 NYCRR part 621.

B. Great Lakes Water Quality Initiative[3]

Pursuant to the terms and conditions of the April 2015 SPDES permit, CWM operates an aqueous water treatment system (AWTS) at the Model City facility to treat on-site landfill leachate from RMU-1, site-generated wastewater, and other liquid wastes transported to the facility. The AWTS discharges through Outfall 01A to Facultative (Fac) Ponds 1, 2, and 3, where the treated effluent accumulates. Other than to reduce biochemical oxygen demand, the fac ponds are not intended to provide any additional treatment. The treated wastewater in Fac Pond 3 is batch discharged through Outfall 001, over the course of several days, to the Niagara River. Prior to the discharge from Fac Pond 3, the permit conditions presently in effect require prequalification sampling and analysis to ensure compliance with all discharge limits.[4] Treated stormwater runoff is discharged via Outfalls 002, 003 and 004. Outfall 002 discharges to an unnamed tributary of Four Mile Creek, and Outfall 003 discharges to an unnamed subtributary of Four Mile Creek, which are both class C waterbodies. Outfall 004 discharges to Twelve Mile Creek. (*See* NOCA, dated December 23, 2016, and Industrial SPDES Permit Fact Sheet Addendum, dated December 23, 2016.)

With its request to modify the April 2015 SPDES permit, CWM seeks to treat leachate from the proposed RMU-2 landfill by directing it to the AWTS. Because Fac Pond 3 would be in the footprint of the proposed landfill, CWM plans to construct a new Fac Pond 5 to replace Fac Pond 3. (*See* Engineering Report, revised November 2013, § 1.2 at 1-2 and § 4.2 at 36-38; Industrial SPDES Permit Fact Sheet, dated February 21, 2016; and Industrial SPDES Permit Fact Sheet Addendum, dated December 23, 2016.)

According to the December 23, 2016 NOCA (at 3 of 3), Department staff tentatively determined that the operation of the proposed RMU-2 landfill would have the potential to result in either a new or increased discharge of bioaccumulative chemicals of concern (BCCs) from the Model City facility to the Niagara River. The Niagara River, which is part of the Great Lakes basin, is a class A-Special water body (*see* 6 NYCRR 701.4 and 6 NYCRR 837.4, Table 1, Item No. 1 [Water Index No. O(ntario)-158]).

With respect to the potential discharge of BCCs to the Great Lakes basin, staff from the Department's Division of Water developed two policies. They are identified as Organization and Delegation (O&D) Memorandum 85-40, which is titled, *Water Quality Antidegradation Policy*, dated September 9, 1985, and Technical and Operational Guidance Series (TOGS) 1.3.9, which is titled, *Implementation of the NYSDEC Antidegradation Policy – Great Lakes Basin (Supplement to Antidegradation Policy dated September 9, 1985)*. The former is incorporated by reference into the latter as Attachment A (*see* TOGS 1.3.9 at 2).

Division of Water staff developed TOGS 1.3.9 to comply with the federal requirement outlined in 40 CFR 132.4(a)(6), which required Great Lake States, such as New York State, to develop an antidegradation policy consistent with the standards outlined in Appendix E to 40

[3] *See* title 40 of the Code of Federal Regulations (40 CFR) part 132 (Water Quality Guidance for the Great Lakes System).

[4] Prequalification sampling and analysis would also be required by the draft SPDES permit (at 15 of 35, Footnote 1).

CFR 132 (Great Lakes Water Quality Initiative Antidegradation Policy). The purpose of TOGS 1.3.9 (at 2) is to assure a thorough evaluation of alternatives that would reduce or avoid the potential discharge of BCCs to the waters of the Great Lakes basin. As part of the permit review process, the applicant, or permittee seeking a modification of an existing permit, as is the case here, must demonstrate that the potential new or increased discharge would be associated with important social or economic development that would benefit the local area. (*See also* 40 CFR 132, Appendix E § I.B.)

According to TOGS 1.3.9 (*see* § 1.d at 5), no additional loading of BCCs is authorized when the water quality necessary to maintain the current use is not being attained (*see also* 40 CFR 132, Appendix E § II.B). In addition, the Department's guidance states further that new discharges may be prohibited pursuant to 6 NYCRR 701.24 (*see* TOGS 1.3.9 § 1.d at 5).

In comments dated March 21, 2016 concerning a draft SPDES permit developed in February 2016 by Department staff, the US Environmental Protection Agency (EPA) observed, among other things, that in 2002 the Niagara River and Lake Ontario were listed as "impaired" due to concentrations of dioxin, mirex, and PCBs. Given this impairment, EPA concluded that the Niagara River is not achieving its best use. Citing Appendix E § II.B to 40 CFR 132, EPA stated that no lowering of water quality could be allowed, under any circumstance, even if CWM had demonstrated an economic need for the SPDES permit modification. (*See* Staff's reply, Attachment 1 [EPA's March 21, 2016 comment letter at 2-4].)

After reviewing EPA's March 21, 2016 comments and other public comments, Department staff withdrew the February 2016 draft SPDES permit to revise it. As noted above, Department staff issued a NOCA dated December 23, 2016, a revised draft SPDES permit, and related documents, for public review and comment. The December 23, 2016 NOCA (at 2) summarizes the revisions. According to the Industrial SPDES Permit Fact Sheet Addendum issued with the December 23, 2016 NOCA, the draft SPDES permit would not allow a net increase in BCC loading and other pollutants to the Niagara River. Based on these revisions, Department staff concluded that the antidegradation requirements would be satisfied for BCCs and other pollutants. One of the special conditions that staff added to the revised draft SPDES permit would prohibit an increase in loading of BCCs to the Great Lakes basin due to RMU-2 operations. (*See* Industrial SPDES Permit Fact Sheet Addendum, dated December 23, 2016, at 3.)

Discussion and Rulings: In its amicus petition, Waterkeeper argued that the discharges associated with the proposed RMU-2 landfill and related modifications to the Model City facility would result in new discharges to the Niagara River. According to Waterkeeper, the purpose of the binational Great Lakes Water Quality Agreement is to eliminate the discharge of toxic substances. With reference to EPA's March 21, 2016 comments, Waterkeeper contended that the revised draft SPDES permit would result in additional loading of BCCs to the Niagara River. (*See* Waterkeeper's amicus petition at 6-8; Tr. at 11-15.)

Like Waterkeeper, the municipalities contended that the discharge associated with CWM's proposal should be considered a new discharge to the Niagara River. The municipalities further contended that CWM cannot demonstrate that its proposal would be associated with an

important local social or economic development. The municipalities noted that both EPA and Department staff have not identified any economic need for additional hazardous waste land disposal capacity for at least a generation. According to the municipalities,[5] the operations associated with the proposed RMU-2 landfill and related modifications would continue to discharge polychlorinated biphenols (PCBs) and other BCCs to the Great Lakes basin. The municipalities also contended that additional PCB loading would occur from stormwater discharges. (*See* Municipalities' supplemental petition at 2, 5-6; Tr. at 23.)

During the issues conference, the municipalities argued that the Model City facility should be considered a new discharger to the Great Lakes. The municipalities argued further that the Great Lakes initiative does not allow a net reduction in loading compared to an existing facility. The municipalities concluded that no additional loading of BCCs from a new or recommencing discharge to the Great Lakes basin could be authorized. To support its position, the municipalities referred to EPA's March 21, 2016 comment letter. (*See* Municipalities' supplemental petition at 3-5; Tr. at 21-23, 33-34.)

CWM disputed the municipalities' premise, however. According to CWM, it would not be a new discharger because the Model City facility is an existing source (*see* CWM's Response at 29). Department staff presumed the same and revised the terms and conditions of the draft SPDES permit accordingly. As support, staff referenced EPA's March 21, 2016 comment letter (*see* Staff's reply at 8-9, and Attachment 1). Citing to the definition of the term, *new Great Lakes discharger*, at 40 CFR 132.2, the municipalities argued, however, that EPA's March 21, 2016 comment letter supports their position (Tr. at 34, 36-37).

1. Pollutant Source

The threshold legal question identified at the July 10, 2018 issues conference (Tr. at 34) was whether the proposed RMU-2 landfill and related modifications to the Model City facility should be considered a new source. Definitions for the terms, *new discharger* and *new source*, among others, are provided in 40 CFR 122.2.

A *new discharger* is any building, structure, facility, or installation: (a) from which there is or may be a discharge of pollutants; (b) that did not commence the discharge of pollutants at a particular site prior to August 13, 1979; (c) which is not a new source; and (d) which has never received a finally effective NDPES permit for discharges at that site. The term, *site*, is also defined as the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity. (*See* 40 CFR 122.2.)

Pursuant to the definitions provided at 40 CFR 122.2, a *new source* is any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced: (a) after either the promulgation of standards of performance under section 306 of the federal Clean Water Act (CWA), which are applicable to such a source, or (b) the proposal of standards of performance in accordance with CWA § 306, which are applicable to such source, but only if the standards are promulgated in accordance with section

[5] *See also* Ms. Witryol's supplemental petition at 48.

306 within 120 days of their proposal (*see also* 33 USC § 1316[a][2]). With respect to the applicable State regulations (*see* 6 NYCRR 750-1.2[a][57]), the wording of the definition of the term, *new source*, is identical to the federal definition.

Additional regulatory criteria related to the terms, *new source* and *new discharger*, are outlined at 40 CFR 122.29 (New Sources and New Dischargers). Section 122.29(b)(1) of 40 CFR states in full that:

> Except as otherwise provided in an applicable new source performance standard, a source is a new source if it meets the definition of new source in § 122.2, and
>
> i. It is constructed at a site at which no other source is located; or
>
> ii. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> iii. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

Therefore, to be considered a *new source*, the source must meet both the definition outlined at 40 CFR 122.2, and one of the criteria outlined at 40 CFR 122.29(b)(1). The proposed RMU-2 landfill and related modifications to the Model City facility, however, do not meet any of the criteria outlined at 40 CFR 122.29(b)(1). Therefore, based on the following, I conclude, as a matter of law, that the proposed RMU-2 landfill and related modifications would not be a *new source* pursuant to 40 CFR 122.

With respect to the criterion at 40 CFR 122.29(b)(1)(i), the proposed RMU-2 landfill would be constructed at a site where an existing source is already located. The Model City facility consists of several closed secure landburial facilities (SLFs), the RMU-1 landfill, a leachate collection and management system, the AWTS, and fac ponds. According to the DEIS § 1.5.3.2, discharges from the site have been regulated pursuant to a SPDES permit since 1974.

The construction of the proposed RMU-2 landfill and related modifications would result in a partial reconfiguration of the leachate collection system to the AWTS rather than a total replacement of the wastewater management system currently in place at the Model City facility. In addition to treating the on-site generated leachate from RMU-1 and SLF-12, the AWTS would continue to treat other site-generated wastewater, as well as off-site generated aqueous wastes. As is currently the case, the AWTS would continue to discharge treated effluent to the fac ponds. Therefore, the proposed RMU-2 landfill and related modifications would not "totally replace[] the process or production equipment that causes the discharge of pollutants at an existing source" (40 CFR 122.29[b][1][ii]).

Finally, with respect to the criterion at 40 CFR 122.29(b)(1)(iii), the wastewater management processes associated with the operation of the proposed RMU-2 landfill would not be "substantially independent" from the rest of the wastewater management processes currently in place at the Model City facility. The leachate collection system for the proposed RMU-2 landfill would be integrated into the existing wastewater collection and treatment infrastructure. Leachate collected from the proposed RMU-2 landfill would be mixed with that collected from RMU-1 and SLF-12 before being transferred to the AWTS for treatment and discharged to the fac ponds. In addition, the non-contact stormwater runoff associated with the proposed RMU-2 landfill would be collected in the same drainage channels receiving runoff from other sections of the Model City facility for treatment prior to being discharged through existing Outfalls 002, 003, and 004.

Based on the foregoing, the proposed RMU-2 landfill and related modifications to the Model City facility would not be a *new source*. I conclude further that CWM's proposal is not a *new discharger*. In full, 40 CFR 122.29(b)(3) states that:

> [c]onstruction on a site at which an existing source is located results in a modification subject to § 122.62 rather than a new source (or a new discharger) if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment.

Because the proposed RMU-2 landfill and related modifications do not meet the criteria set forth in 40 CFR 122.29(b)(1)(ii) or (iii), CWM's proposal at the Model City facility would be a *modification* of the existing source, as described above, rather than a *new source* or a *new discharger*.[6]

2. Great Lakes Discharger

If CWM obtains all the necessary approvals for the proposed RMU-2 landfill, the municipalities also asserted that the Model City facility would be a *new Great Lakes discharger*. Section 132.2 of 40 CFR provides definitions of the terms, *existing Great Lakes discharger*, and *new Great Lakes discharger*. The municipalities contended that the distinction between existing and new dischargers is significant because when a water quality-based effluent limitation (WQBEL) is included in a permit for a new discharger, the permittee must comply with the limitation when the discharge begins (*see* Municipalities' supplemental petition at 2, *citing* 40 CFR part 132, Appendix F, Procedure 9: *Compliance Schedules* § A).

Pursuant to 40 CFR 132.2, an *existing Great Lakes discharger* is any building, structure, facility, or installation from which there is or may be a discharge of pollutants (as defined in 40 CFR 122.2) to the Great Lakes system, that is not a new Great Lakes discharger. A *new Great Lakes discharger* is any building, structure, facility, or installation, constructed after March 23, 1997, from which there is or may be a discharge of pollutants (as defined in 40 CFR 122.2) to the Great Lakes system.

[6] *See* CWM's response at 29 *citing National Wildlife Federation v EPA*, 286 F3d 554, 568 (DC Cir 2002).

Appendix F to 40 CFR 132 outlines the procedures for implementing the Great Lakes water quality initiative. In Appendix F, nine procedures are prescribed. Distinctions between existing and new dischargers, as defined at 40 CFR 132.2, are made in Procedures 2, 3, and 9. Procedure 2 is titled, *Variances from Water Quality Standards for Point Sources*. According to Procedure 2, new Great Lake dischargers or recommencing dischargers may not obtain variances from water quality standards (*see* 4 CFR 132, Appendix F, Procedure 2 § A[1]). With respect to Procedure 2, whether CWM would be an existing or new discharger is immaterial because CWM did not request any variance from any water quality standard. Moreover, Department staff said that the terms and conditions of the draft SPDES permit should not be construed as such (*see* Staff's reply at 11).

Procedure 3 is titled, *Total Maximum Daily Loads, Wasteload Allocations for Point Sources, Load Allocations for Nonpoint Sources, Wasteload Allocations in the Absence of a TMDL, and Preliminary Wasteload Allocations for Purposes of Determining the Need for Water Quality Based Effluent Limits*. Pursuant to § C.1 of Procedure 3, mixing zones for new discharges of BCCs are prohibited. With respect to existing discharges of BCCs, mixing zones were authorized until November 15, 2010, although an extension past November 2010 is authorized by Procedure 3 consistent with the requirements outlined in Sections D and E (*see* 40 CFR 132, Appendix F, Procedure 3 § C.3). Nevertheless, the terms and conditions of the draft SPDES permit do not authorize any mixing zone. (*See also* EPA's March 21, 2016 comment letter at 3.) Rather, the identification of Internal Outfall 01A, the fac ponds, and the prequalification requirements (*see* Draft SPDES permit at 15 of 35, Footnote 1) avoid any need for a mixing zone for the discharges from the Model City facility (*see* TOGS 1.2.1 § I.B.7).

Procedure 9 in Appendix F of 40 CFR part 132 is titled, *Compliance Schedules*. The municipalities correctly noted in their supplemental petition (at 2) that when permitted, a new Great Lakes discharger must comply with all WQBELs upon the commencement of the discharge (*see* 40 CFR part 132, Appendix F, Procedure 9 § A). In Procedure 9, limitations for existing Great lakes dischargers are outlined in § B. Permittees are provided a reasonable period, up to five years, to comply with new or more restrictive WQBELs for existing permits that are reissued or modified after March 23, 1997 (*see* 40 CFR part 132, Appendix F, Procedure 9 § B.1). The municipalities have expressed concern that CWM would not be required to comply with the WQBELs for BCCs immediately upon issuance of any SPDES permit related to the proposed RMU-2 landfill (*see* Municipalities' supplemental petition at 3-4, 7-8.) Because additional BCC loading is prohibited by the Great Lakes initiative, the intervening parties recommended that the Department staff require CWM to dispose of all managed wastewater and stormwater off site, out of the Great Lakes basin (*see* Municipalities' supplemental petition at 8; Ms. Witryol's supplemental petition at 40-41; Waterkeeper's petition for amicus status at 9; Tr. at 14, 18, 31-32, 35-56).

During the July 10, 2018 issues conference, the parties' representatives discussed whether the Model City facility should be considered a *new Great Lakes discharger* based on EPA's March 21, 2016 comments (Tr. at 37-43). The discussion focused on the following paragraph on page 3 from EPA's March 21, 2016 letter, which states in full, with the original emphasis, that:

> NYSDEC is obliged as the SPDES permitting authority to ensure, through permit effluent limitations and requirements that there is **no additional loading of BCCs** from this Great Lakes discharger to a 303(d) listed water body, regardless of the completeness of the antidegradation demonstration, demonstration of economic need, availability of variances or detection limits above water quality standards. NYSDEC should be requiring the offsite treatment of leachate, or an alternative solution that decreases the discharge of BCCs. NYSDEC cannot allow additional loading of BCCs to the Great Lakes System.

Department staff acknowledged that, in the March 21, 2016 comment letter, EPA considers CWM's Model City facility to be a Great Lakes discharger. Referring to the above quoted paragraph, staff noted, however, that EPA does not expressly use the term, *new Great Lakes discharger*, in its comments. During the discussion at the issues conference, staff also referred to EPA's comment letter dated January 17, 2017, concerning the revised draft SPDES permit. (Tr. at 37-38.) In the January 17, 2017 letter (at 1), EPA states, in part, that after reviewing the revised draft SPDES permit and associated fact sheet addendum, EPA determined that Department staff appropriately revised the draft SPDES permit in response to the March 21, 2016 comments.

Nonetheless, the municipalities maintained that, if CWM's proposal obtains all necessary approvals, EPA would consider the proposed RMU-2 and related modifications to the Model City facility to be a *new Great Lakes discharger*. With reference to the above quoted paragraph from EPA's March 21, 2016 letter, the municipalities pointed to the statement expressly prohibiting any additional loading of BCCs. The municipalities argued that this prohibition applies only to new Great Lakes dischargers. Existing dischargers, according to the municipalities, are given additional time to reduce and minimize their loading in pursuit of the discharge limit. (Tr. at 38-39.)

CWM agreed with Department staff. CWM noted that EPA's March 21, 2016 comments identified regulatory options available to Department staff. For example, staff may require either off-site treatment of leachate, or an alternative solution with the goal of decreasing the discharge of BCCs. CWM pointed out that staff has proposed an alternative solution in the revised draft SPDES permit. The alternative would be to require CWM to dispose of all leachate from SLF 1-7 off site, while allowing the leachate collected from other on-site sources to be directed to the AWTS for treatment before discharge. CWM maintained that the result would be a net decrease in the discharge of BCCs from current levels. Referring to EPA's January 17, 2017 comments, CWM argued that EPA accepted Department staff's alternative solution. (Tr. at 19-21, 40-43.)

In its comments, Waterkeeper emphasized the distinction between the terms *new source* from 40 CFR 122.2 and *new Great Lakes discharger* from 40 CFR 132.2. According to Waterkeeper, the controlling regulation is 40 CFR part 132 because the Niagara River, as the receiving water, is part of the Great Lakes basin. (Tr. at 43.)

If CWM obtains all the necessary approvals to construct and operate the proposed RMU-2 landfill and related modification to the Model City facility, I conclude that the Model City

facility would not be a *new Great Lakes discharger* as that term is defined at 40 CFR 132.2. Since the closure of the RMU-1 landfill, the leachate collection system at the Model City facility has, nevertheless, continued to collect leachate from RMU-1 and some of the SLFs on the site, and directed the leachate to the AWTS for treatment before discharge to the fac ponds. The terms and conditions of the April 2015 SPDES renewal permit remain in place and apply to current operations. Contrary to the municipalities' characterization (*see* Municipalities' supplemental petition at 8; Tr. at 22), the Model City facility would not resume operations that would require a SPDES permit if the proposed RMU-2 landfill is constructed and becomes operational. Rather, the construction and operation of the proposed RMU-2 landfill at the Model City facility would be a *modification* as that term is defined at 20 CFR 122.29(b)(3).

Moreover, I am not persuaded by Waterkeeper's arguments, which distinguish the applicability of the various federal regulations. The Department's federally approved SPDES delegation incorporates by reference both 40 CFR part 122 and part 132 (*see* 6 NYCRR 750-1.25[c]). In addition, EPA references the regulations at 40 CFR parts 122 and 123 (State Program Requirements) in its public comments (*see e.g.*, EPA's March 21, 2016 comment letter at 1, 4, 5, and EPA's January 17, 2017 comment letter at 1), as well as the federal regulations associated with the Great Lakes Initiative at 40 CFR 132.

3. Technical and Operational Guidance Series 1.2.1

For the reasons discussed in detail above, the Model City facility would not become a *new source*, a *new discharger*, or a *new Great Lakes discharger*, as those terms are defined in the federal regulations, if CWM receives all required approvals for the construction and operation of the proposed RMU-2 landfill. However, the municipalities contended that the terms and conditions of the draft SPDES permit must be consistent with the federally approved water quality standards. To support this contention, the municipalities cited the following authorities: 33 USC § 1311(b)(1)(C) [CWA § 301(b)(1)(C)], and 40 CFR parts 122 and 123, specifically 40 CFR 122.4, 122.44(d)(1), and 123.25 (a)(1). With respect to discharges to the Great Lakes basin, the municipalities noted that some WBQELs, such as those set for PCBs and Mercury, have been set below approved analytical detection levels. Because CWM cannot demonstrate that it could comply with the WBQELs due to the limitations of the analytical procedures, the municipalities asserted that any new or increased loading of any BCC from discharges would result in the significant deterioration of water quality in contravention of the Great Lakes antidegradation policy (*i.e.*, 40 CFR 132, Appendix E). (*See* Municipalities' supplemental petition at 4-5; *see also* Waterkeeper's petition for amicus status at 2-3.)

To draft the SPDES permit under consideration here, Department staff relied on the guidance provided in TOGS 1.2.1, dated February 26, 1998, titled, *Industrial Permit Writing*. The guidance acknowledges the federal Great Lakes antidegradation policy (*i.e.*, 40 CFR part 132, Appendix E), and related State guidance (*see* TOGS 1.2.1 at § I.B.5). The guidance also acknowledges the limitations that may be associated with analytical technologies. TOGS 1.2.1 references an additional guidance document titled, *Analytical Detectability and Quantitation Guidelines for Selected Environmental Parameters (DEC Detectability Manual)*. (*See* TOGS 1.2.1 § I.B.6.)

TOGS 1.2.1 explains that the *DEC Detectability Manual* identifies method detection limits (MDLs) and practical quantitation limits (PQLs) for about 400 substances or groups of compounds using analytical methods published by EPA. With respect to the Great Lakes Initiative, the guidance states that EPA has included requirements for using EPA minimum levels (MLs) as the lowest reasonable levels for effluent limitations in permits. According to TOGS 1.2.1, EPA's MLs are approximately equivalent to the Department's PQLs. TOGS 1.2.1 recommends that concentrations of compliance levels should be set no lower than what can be measured at the PQL, as identified in the *DEC Detectability Manual*. (*See* TOGS 1.2.1 § I.B.6; *see also* 40 CFR 132, Appendix F, Procedure 8 § B.)

According to TOGS 1.2.1, the Great Lakes implementation procedures provide for pollution minimization programs (PMPs) (*see* 40 CFR 132, Appendix F, Procedure 8 § D) when limits are based on analytical procedures approved by EPA. PMPs are conditions that require the permittee to undertake wastewater collection system monitoring, reductions, and reporting. The guidance in TOGS 1.2.1 states that PMPs should be included in the permit for pollutants limited by the PQL in lieu of the more stringent calculated WQBEL. This guidance expressly applies to discharges to the Great Lakes basin. (*See* TOGS 1.2.1 § I.E.4.)

For PCBs, the WBQEL is 0.001 nanograms per liter (ng/L). However, 0.001 ng/L is below both the 200 ng/L PQL for PCBs and the 65 ng/L MDL for PCBs using EPA Method 608 (*see* TOGS 1.2.1, Attachment C). Consequently, the terms and conditions of the draft SPDES permit set a discharge limit of 65 ng/L at Outfall 001, where unique sample collection procedures are in place, and 200 mg/L for the remaining outfalls (*see* Draft SPDES permit at 17 of 35, Footnote 10). Consistent with the guidance outlined in TOGS 1.2.1 § I.E.4 as well as in 40 CFR 132, Appendix F, Procedure 8 § D, the draft permit also includes conditions requiring pollution minimization programs for Mercury (at 23 of 35), PCBs (at 24-25 of 35), and Dioxins and Furans (at 26 of 35).

The discharge limits for PCBs and other pollutants in the draft permit are based on EPA approved analytical procedures. Accordingly, I conclude that Department staff developed the terms and conditions of the draft SPDES permit consistent with applicable federal and State requirements. This conclusion is further supported by the comments outlined in EPA's January 17, 2017 letter (at 1).

Because the Model City facility is an *existing Great Lakes discharger*, as a matter of law, the municipalities and Ms. Witryol alleged an issue of fact about CWM's ability to comply with the effluent limitations, as set forth in the draft SPDES permit for BCCs, if CWM obtains all necessary approvals (Tr. at 24-25, 31-32). The municipalities would demonstrate their allegation based on CWM's reporting documents (Tr. at 25). Ms. Witryol offered the expert testimony of Alan Rabideau, Ph.D., P.E., from the Department of Civil, Structural, and Environmental Engineering at the University of Buffalo (Tr. at 32, 151). By adjudicating this issue, the municipalities and Ms. Witryol would demonstrate the need to amend the draft SPDES permit to require CWM to transport all leachate collected at the Model City facility to a disposal site located outside the Great Lakes basin (Tr. at 31-32, 35-36).

Absent any disputes between applicant and Department staff, an issue will be adjudicated if it is proposed by a potential party and is both substantive and significant (*see* 6 NYCRR 624.4[c][1][iii]). When, as here, Department staff has reviewed an application and determined that applicant's project would comply with all applicable statutory and regulatory requirements, as conditioned by the draft permit, the burden of persuasion is on the potential party to demonstrate that any proposed issue is both substantive and significant (*see* 6 NYCRR 624.4[c][4]).

An issue is substantive if there is sufficient doubt about an applicant's ability to meet the statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry (*see* 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 (*see* 6 NYCRR 624.4[c][3]). The Commissioner has previously determined that in areas of Department staff's expertise, staff's evaluation of the application and supporting documentation is an important consideration to determining whether a proposed issue is adjudicable (*see Matter of Bonded Concrete, Inc.*, Interim Decision of the Commissioner, June 4, 1990, at 2).

For the following reasons, the municipalities and Ms. Witryol have not identified a substantive and significant issue for adjudication about CWM's ability to comply with the effluent limitations outlined in the proposed draft SPDES permit. First, the municipalities offered nothing to raise issues about the Department's analysis and determination, or to support their claim that CWM would not comply with the revised draft permit conditions. Second, Ms. Witryol's proffer of a potential expert at the issues conference is untimely. Finally, EPA determined in its January 17, 2017 comment letter[7] (at 1) that Department staff "made appropriate revisions" to the February 2016 draft SPDES permit in response to the March 21, 2016 comments. Neither intervening party offered anything to refute EPA's determination in the January 17, 2017 comment letter.

4. Antidegradation Demonstration

As part of its application to modify the April 2015 SPDES permit, CWM filed Antidegradation Demonstrations (ADDs) dated August 2015 and November 2015. Department staff required the ADDs pursuant to the federal and State antidegradation policies (*see* 40 CFR 132, Appendix E, and TOGS 1.3.9). In their respective supplemental petitions, the intervening parties responded to some of the topics presented in the ADDs (*see e.g.* RRG's supplemental petition at 10-14, and Exhibit A [*Analysis of Value Changes Arising from CWM Chemical Service, LLC (CWM) PCB/Chemical Landfill Proposal, March 23, 2018*]; Ms. Witryol's supplemental petition at 41-48, 53-58).

Despite the federal requirement to provide an antidegradation demonstration (*see* 40 CFR 132, Appendix E, § III Antidegradation Demonstration), EPA stated, in full, that:

[7] *See* Staff's reply, Attachment 2.

> [e]ven if CWM provides a demonstration of economic need for this expansion, the requirements of 132 Appendix E Paragraph B mandate that no lowering of water quality shall be allowed, under any circumstance (EPA's March 21, 2016 comment letter at 2).

As previously noted, EPA stated further that the Department must ensure through SPDES permit conditions that no additional loading of BBCs would occur "regardless of the completeness of the antidegradation demonstration, demonstration of economic need, availability of variances or detection limits above water quality standards" (EPA's March 21, 2016 comment letter at 3).

Given EPA's March 21, 2016 comments, Department staff said that it did not rely upon CWM's ADDs when drafting the SPDES permit conditions concerning discharges related to BCCs. In response to EPA's comments, Department staff added a draft condition that would prohibit the discharge loading of BCCs resulting from operations of the proposed RMU-2 landfill. (*See* Staff's reply at 8; *see also* Draft SPDES permit, Special Condition No. 4, at 19 of 35.)

Because staff did not rely on CWM's ADDs, I determined at the issues conference that any proposed disputes related to the ADDs are not relevant to the Deputy Commissioner's final determination about the SPDES permit application (Tr at 138). However, some of the topics addressed in the ADDs relate to topics concerning whether CWM's proposal would be otherwise necessary or in the public interest (*see* ECL 27-1105[3][f]). I addressed the proposed issues related to the otherwise necessary or in the public interest determination in the December 2015 ruling (at 81-92). The Siting Board reviewed appeals from these rulings and affirmed the rulings (*see* Interim Decision, dated August 11, 2016, at 4 and 18). Consistent with the Board's August 11, 2016 Interim Decision, the topics presented in the supplemental petitions that relate to the socioeconomic issues already identified for adjudication will be addressed at the hearing as part of the siting process (Tr. at 150).

II. The draft ASF Permit

On August 18, 2017, Department staff issued a NOCA with respect to CWM's application to modify the Air State Facility (ASF) permit for the Model City facility. With the NOCA, Department staff issued a revised draft ASF permit for public review and comment. According to the NOCA, Department staff determined that the Model City facility would not be a major source of criteria or hazardous air pollutants because CWM elected to accept federally enforceable permit conditions that restrict, or cap, emissions below threshold requirements (*see* 6 NYCRR 201-7.1[a]). In the draft ASF permit (at 7-18), the applicable conditions are identified as Conditions 1-3 through 1-7, inclusive.

The August 18, 2017 NOCA noted further that the Model City facility would be subject to certain air emission standards that are part of the draft site-wide Part 373 renewal permit. The draft ASF permit does not reiterate those air emission control requirements regulated pursuant to 6 NYCRR part 373. However, the draft ASF permit references the *Fugitive Dust Control Plan* (*see* Attachment L, draft site-wide Part 373 renewal permit) and the *Air & Meteorological*

Monitoring Plan (*see* Attachment N, draft site-wide Part 373 renewal permit). As part of the review of the ASF permit application, CWM revised Attachments L and N to include the following: (1) perimeter monitoring for particulate matter 10 microns in diameter (PM-10 [treated as particulate matter 2.5 microns in diameter (PM-2.5)]), (2) use of the air monitoring network to determine compliance with the national ambient air quality standards (NAAQS), and (3) requirements outlined in the *Technical Guidance for Site Investigation and Remediation*, dated May 3, 2010 (Division of Environmental Remediation [DER]-10). (*See* draft ASF permit [6 NYCRR Part 373 References] at 3-4, and Condition 1-30 at 49; Tr. at 58, 102.)

1. Health Risk Assessment

Given the legacy contamination at the Model City facility, the intervening parties argued that the potential public health and environmental risks associated with the construction and operation of the proposed RMU-2 landfill should be evaluated with a health risk assessment. In their respective supplemental petitions, the parties referenced the health risk assessment undertaken at Waste Management's Kettleman Hills facility in California. (*See* RRG's supplemental petition at 14-15; Ms. Witryol's supplemental petition at 60-62; Municipalities' supplemental petition at 8-9; Tr. at 50-54). Dr. Sahu, who is a consulting expert for the municipalities, acknowledged that such assessments may focus on a specific medium, such as air resources. With respect to the proposed RMU-2 landfill, however, Dr. Sahu recommended that the assessment should include all potentially affected media such as soil, surface and groundwater, and air resources. (*See* Municipalities' supplemental petition, Dr. Sahu's comments at 1-2.)

CWM argued that the required assessment for an ASF permit is found in Division of Air Resources (DAR)-1 titled, *Guidelines for the Evaluation and Control of Ambient Air Contaminants under Part 212*, dated August 10, 2016. DAR-1 outlines the procedures for evaluating the potential emissions of criteria and non-criteria air contaminants from process operations (*see* DAR-1 at 1). According to CWM, the process operations at the Model City facility associated with the construction and operation of the proposed RMU-2 landfill would comply with the regulatory requirements at 6 NYCRR part 212 (Process Operations), as well as the guidance outlined in DAR-1. (*See* CWM's response at 16.)

CWM noted that the review of an ASF permit application does not require a multimedia, multi-pathway, health risk assessment as contended by the intervening parties. Rather, DAR-1 provides guidance to control the potential emissions of criteria and toxic air contaminants. Consistent with the guidance outlined in DAR-1, CWM said that its consultants undertook an air dispersion modeling analysis which demonstrates that concentrations of potential emissions of expected contaminants at the facility's fence line and beyond would not exceed the applicable annual and short-term guideline concentrations (AGCs and SGCs, respectively). According to CWM, the analysis demonstrated that no applicable AGCs and SGCs values would be exceeded. (*See* CWM's response, Exhibit G, Attachment 2 at 2-3, 18-19; Tr. at 106-107.)

According to Department staff, the regulatory requirements of the air toxics program are outlined in 6 NYCRR part 212. Contrary to the intervening parties' claim that a health risk

assessment was not performed, staff contended that the intent of these regulations is to protect the public health and the environment from the potential adverse effects associated with exposure to air contaminants. Staff explained that the draft ASF permit conditions would impose stringent emission and operational restrictions so that potential off-site emissions would not exceed the SGCs and the AGCs, as outlined in Appendix A of DAR-1. Staff explained further that the draft ASF permit relies on toxic best available control technology (T-BACT) to limit potential emissions of PCBs and polycyclic organic matter (*see* 6 NYCRR 212-1.5[d], and DAR-1 § F.1 at 16-22). (*See* Staff's reply at 9-10, 12.)

Discussion and Rulings: At the issues conference, the intervening parties reiterated their respective requests for a health risk assessment (Tr. at 51-54). CWM argued there is no legal basis to require a health risk assessment of the nature requested by the intervening parties (Tr. at 58-59). Department staff maintained, however, that such an assessment was not needed given the requirements outlined in 6 NYCRR part 212 (Tr. at 55). The municipalities, nevertheless, asserted that the applicable air regulations provide Department staff with the discretion to require CWM to undertake a health risk assessment (Tr. at 198).

Steven DeSantis is a member of Department staff from the Division of Air Resources, who holds the title of Research Scientist III (Tr. at 62-63). Mr. DeSantis explained that the values for the annual guideline concentrations and short-term guideline concentrations for various air contaminants, as outlined in Appendix A of DAR-1, are derived from data collected by EPA, the New York State Departments of Health and Environmental Conservation, and occasionally from similar agencies in California. For the past 35 years, EPA's standard practice has been to identify potential air contaminants, develop negligible risk values and, as appropriate, revise these values every three years. Mr. DeSantis said that the values for the annual guideline concentrations and short-term guideline concentrations are conservative, health-based standards. (Tr. at 70-71.)

Mr. DeSantis confirmed that Department staff reviewed the dispersion modeling analysis undertaken by CWM's consultant. The purpose of the modeling was to predict the concentrations of potential emissions from process operations at the fence line of the site and beyond in a grid-like manner. The annual guideline concentration and short-term guideline concentration values for the relevant contaminants are applied at the fence line. (Tr. at 69-70.) After reviewing the modeling analysis, Department staff developed the following draft ASF permit conditions to ensure that the applicable AGC and SGC values would be complied with: Conditions 1-9 through 1-13, 1-18, 1-23, and 1-24 (*see* draft ASF permit at 19-26, 29, 33-35). (*See also* Staff's reply at 12.)

During the July 10, 2018 issues conference, I determined that the multi-media health risk assessment requested by the intervening parties was not necessary given the analysis required by 6 NYCRR part 212 and Department staff's review of it. (Tr. at 104.) Based on the foregoing, I find that the proposed issue is neither substantive nor significant (*see* 6 NYCRR 624.4[c][2] and [3]). Therefore, the intervening parties did not meet their respective burden of persuasion (*see* 6 NYCRR 624.4[c][4]).

2. Dispersion Modeling (DAR-10)

The intervening parties argued that CWM did not follow the guidance outlined in DAR-10, dated May 9, 2006, titled, *NYSDEC Guidelines on Dispersion Modeling Procedures of Air Quality Impact Analysis*. DAR-10 outlines the procedures for conducting ambient impact analyses. The guidance mirrors EPA's approved methodologies. (*See* DAR-10 at 1.) Of particular concern to the intervening parties is the source of meteorological data used in the analysis outlined in DAR-10 for the proposed RMU-2 landfill. (*See* RRG's supplemental petition at 15; Ms. Witryol's supplemental petition at 1 and 61-62; Municipalities' supplemental petition, Dr. Sahu's comments at 7-8; Tr. at 60-62.)

According to DAR-10, on-site data is generally preferred over data collected by the National Weather Service (*see* DAR-10 § V[1][c] at 5-6). However, CWM's consultants used data collected by the National Weather Service at the Niagara Falls International Airport from 2012-2016 (*see* CWM's response, Exhibit G, Attachment 2 at 12-13; Tr. at 67-69).

With her supplemental petition, Ms. Witryol provided a copy of a report prepared by Argonne National Laboratory for the US Army Corps of Engineers (USACE), dated December 2011, titled, *Evaluation of Meteorological Data and Modeling Approaches to Assess the Dispersion of Airborne Releases from the Niagara Falls Storage Site* (*see* Ms. Witryol's supplemental petition at 1 and 63, and Appendix A2). Dr. Sahu also referred to this report in his comments. Dr. Sahu acknowledged that the report compared predictions between two different dispersion models (*i.e.*, AERMOD and CAP88-PC). He acknowledged further that the appropriate dispersion model to use here is AERMOD. Nevertheless, Dr. Sahu argued that CWM should have used local meteorological data because USACE concluded in the December 2011 report that local data is more representative than National Weather Service data from the Niagara Falls International Airport. Dr. Sahu concurs with that conclusion. (*See* Municipalities' supplemental petition, Dr. Sahu's comments at 7-8; *see also* RRG's supplemental petition at 15.)

According to CWM, its consultant submitted a proposed air quality modeling protocol to Department staff in February 2017 as part of the application for the ASF permit. CWM's consultant acknowledged that the Model City facility maintains a meteorology tower and collects data. By letter dated March 3, 2017, Department staff approved the proposed protocol. However, staff provided CWM's consultant with 2012-2016 surface and profile meteorological data from the Niagara Falls International Airport, and directed CWM to use the off-site data. (*See* CWM's response, Exhibit G, Attachment 2 at 12-13; Tr. at 67-68.)

In the reply, Department staff addressed Dr. Sahu's comments as they related to the December 2011 USACE report and the use of off-site meteorological data. Staff contended that the conclusions from the USACE report are no longer valid because EPA's AERMINUTE software now uses airport observations with 60 wind measurements per hour. (*See* Staff's reply at 13-14.)

During the issues conference, Mr. DeSantis offered additional information to explain why the conclusions from the USACE report are no longer valid. First, EPA changed the modeling protocol after December 2011. The purpose of the change was to better address how the

dispersion model considered calm weather. According to Mr. DeSantis, the current software uses average two-minute data, which provides a more accurate evaluation of calm conditions from previous versions of the modeling software.[8] Second, staff wants the analysis to be based on the most recent data. After staff approved the modeling protocol in March 2017, the most recent data set was from 2012-2016 compared to the 2005-2009 period considered in the USACE report. Finally, Mr. DeSantis explained that the meteorological data collected by the National Weather Service is in a format that is compatible with the current version of the modeling software. Aside from its dated nature, the on-site data was not formatted in a manner compatible with the current modeling software. Mr. DeSantis noted further that Department staff prefers to provide applicants with the meteorological data to ensure that the data are properly formatted and used consistently with the modeling software. (Tr. at 63-69.)

Discussion and Ruling: During the July 10, 2018 issues conference, I determined there were no factual issues related to the meteorological data. Based on Mr. DeSantis' explanation, I concluded that the approved modeling protocol, which relied on meteorological data collected by the National Weather Service at the Niagara Falls International Airport from 2012-2016, was consistent with the guidance outlined in DAR-10, given EPA's software revisions. (Tr. at 102-103.) Because EPA's revisions to the modeling software postdate the December 2011 USACE report, the intervening parties' reliance on it to demonstrate an inconsistency in how Department staff applied the guidance in DAR-10 here is misplaced. Consequently, the proposed issue is not substantive (*see* 6 NYCRR 624.4[c][2]).

3. Soil Excavation Monitoring and Management Plan

The municipalities object to the proposed project-specific soil excavation monitoring and management plan (SEMMP). The basis for their objection is that the prior subsurface radiological investigation and post-remedial final status survey are inadequate. (*See* Municipalities' supplemental petition at 8, and Dr. De's April 30, 2018 Memorandum and Dr. Resnikoff's April 2018 Critique; Tr. at 82-83.) In their supplemental petition, the municipalities discuss the revised May 28, 2015 SEMMP, which was considered in the December 2015 issues ruling (at 135-137). With reference to the August 11, 2016 Interim Decision (at 17), the municipalities noted that the Siting Board concluded that a substantive and significant issue had been raised with respect to the SEMMP, revised May 2015. The municipalities noted further that CWM further revised the May 2015 SEMMP in November 2016. (*See* Municipalities' supplemental petition at 10.) According to the municipalities, the November 2016 SEMMP does not provide sufficient details about the equipment to be used, how the equipment would be used to meet the objectives of the SEMMP, and what safety and control procedures would be put in place (*see* Municipalities' supplemental petition at 12).

The municipalities argued, at the issues conference, that the SEMMP should be considered part of the review of the application for the ASF permit. The intervening parties are concerned that potential dust emissions related to the construction and operation of the proposed RMU-2 landfill would be contaminated with radioactive and hazardous materials previously

[8] It is not known whether Dr. Sahu was aware of the software revisions, and the resulting effects when he prepared his comments (Tr. 66).

disposed on the site prior to CWM's ownership. Because the RMU-2 landfill would be constructed in phases, where after one cell is filled the next would be constructed, the intervening parties observed that the dispersion of potentially contaminated dust would be an ongoing concern. (Tr. at 51-54, 57.)

According to CWM, the arguments in the intervening parties' supplemental petitions concerning the SEMMP are beyond the scope of the issues conference. Referencing the February 23, 2018 notice concerning the July 10, 2018 issues conference, CWM noted that the purpose was to identify substantive and significant issues, if any, for adjudication with respect to the draft SPDES permit and the draft ASF permit. CWM contended that the SEMMP is a requirement of the 2013 site-wide Part 373 renewal permit, and not a requirement of the ASF permit. CWM contended further that the draft ASF permit does not reference or otherwise incorporate the terms and conditions of the SEMMP. In addition, CWM observed that Dr. De's April 20, 2018 memorandum, and Dr. Resnikoff's April 2018 critique, which were attached to the municipalities' supplemental petition, address the revised November 2016 SEMMP and are silent about the terms and conditions of the draft ASF permit. (*See* CWM's response at 51-52, 54-55, 56-58.)

Department staff's comments in the reply are generally the same as CWM's. In addition, Department staff noted that the intervening parties did not seek permission prior to filing their respective supplemental petitions to reargue issues related to the SEMMP at the July 10, 2018 issues conference. Staff acknowledged that the Siting Board addressed this topic in the August 11, 2016 Interim Decision. Finally, Department staff explained that radionuclides may be identified as hazardous air pollutants for air permitting purposes only when potential emissions are associated with certain operations. However, such regulated operations would not be undertaken at the Model City facility, according to staff. (*See* Staff's reply at 15.)

Discussion and Rulings: The December 2015 ruling (at 121-128, 135-137) considered proposed issues about the November 2009 SEMMP and its subsequent revisions dated November 2013 and May 2015. After considering the parties' appeals and replies, the Siting Board granted the municipalities' appeal, and acknowledged that the SEMMP relates to the site-wide Part 373 renewal permit, which is subject to the Department's jurisdiction. However, the Board also recognized its responsibility with respect to making the findings required by ECL 27-1105(3)(f), and the siting criteria (*see* 6 NYCRR 377.7 [formerly 361.7]). The Board determined, among other things, that the sufficiency of the radiological surveys and the adequacy of the SEMMP are issues that could lead to the denial or further conditioning of the Siting Certificate. The Board concluded that these issues are appropriate for adjudication. (*See* Interim Decision, dated August 11, 2016, at 17-18.) Subsequently, CWM circulated the November 2016 SEMMP.[9]

Department staff correctly noted that the record from the April 28, 2015 issues conference concerning proposed issues about the adequacy of the SEMMP is closed (*see* Staff's reply at 15). The Siting Board issued its August 11, 2016 Interim Decision. However, appeals remain pending before the Deputy Commissioner. Accordingly, the parties and I await the

[9] With a cover letter dated November 18, 2016 from Mr. Darragh, CWM circulated a copy of the SEMMP, revised November 2016, to the issues conference participants.

Deputy Commissioner's determination and guidance about how to proceed with the proposed issues concerning the sufficiency of the radiological surveys and the adequacy of the SEMMP (Tr. at 105).

If any proposed secure landburial facility would contain particulate matter that may be dispersed by the wind, 6 NYCRR 373-2.14(c)(10) requires the owner or operator to manage the facility to control wind dispersal. As a result of this regulatory requirement, CWM has prepared Attachment L (*Fugitive Dust Control Plan* [revised June 2017]). The August 18, 2017 NOCA provided members of the public with the opportunity to comment about the draft ASF permit and the revised *Fugitive Dust Control Plan*, among other things.

With a cover letter dated October 23, 2017, Mr. Abraham filed comments about the draft ASF permit on behalf of the municipalities that included comments from Dr. Sahu. In these comments (at 9-12), Dr. Sahu discussed the revised *Fugitive Dust Control Plan*, among other things. The municipalities' May 4, 2018 supplemental petition also included a memorandum by Dr. Sahu dated April 30, 2018. In his April 30, 2018 memorandum (at 1), Dr. Sahu incorporated by reference his October 2017 comments concerning the revised *Fugitive Dust Control Plan*. None of the other intervening parties commented about the revised *Fugitive Dust Control Plan* either during the public comment period provided by the August 18, 2017 NOCA concerning the draft ASF permit, or in their respective supplemental petitions for party status or petitions for amicus status.

The municipalities' comments about the revised *Fugitive Dust Control Plan* do not identify any substantive and significant issues for adjudication (*see* 6 NYCRR 624.4[c]).

Attachment N (*Air & Meteorological Monitoring Plan* [revised June 2017]) would require CWM to operate and maintain at least six monitoring sites and one meteorological monitoring station at the Model City facility (Tr. at 77). In addition, the *Air & Meteorological Monitoring Plan* would require CWM to prepare a monitoring plan consistent with the guidance outlined in DER-10. (*See* Attachment N at 1, *see also* DER-10 at 31 and Appendices 1A and 1B.) Department staff are applying the guidance outlined in DER-10 to the Model City facility because the site-wide Part 373 renewal permit for the Model City facility includes corrective action requirements similar to those outlined in the current site-wide permit (*see* Module II [Corrective Action Requirements] and Attachment E [Corrective Action Requirements] to the draft site-wide Part 373 renewal permit). Furthermore, the activities related to the construction of the proposed RMU-2 landfill would be *intrusive* (*see* DER-10 at 31).

The August 18, 2017 NOCA provided members of the public with an opportunity to comment about the draft ASF permit as well as the revised *Air & Meteorological Plan*. As noted above, the municipalities' October 2017 comments included comments from Dr. Sahu, who also addressed the revised *Air & Meteorological Plan*, among other things. The municipalities' May 4, 2018 supplemental petition incorporated Dr. Sahu's October 2017 comments by reference. I note that none of the other intervening parties commented about the revised *Air & Meteorological Plan* either during the public comment period provided by the August 18, 2017 NOCA concerning the draft ASF permit, or in their respective supplemental petitions for party status or petitions for amicus status.

In his October 2017 comments (at 10-11), Dr. Sahu noted that a meaningful review of the *Air & Meteorological Plan* was not possible because CWM would not be required to prepare the air monitoring plan until prior to the construction of the proposed RMU-2 landfill. Given this circumstance, Dr. Sahu observed that the public would have no opportunity to comment about the air monitoring plan prior to permit issuance.

As noted above, the guidance provided in DER-10 relates to the investigation and remediation of contaminated sites. Generally, remediation projects administered by the Department's Division of Environmental Remediation are not associated with the review of permit applications. However, the ongoing corrective action associated with the operation of the Model City facility is related to the proposed RMU-2 landfill, which is the subject of a public hearing. Accordingly, CWM must prepare the air monitoring plan identified in Attachment N prior to the commencement of the adjudicatory hearing.

If the Deputy Commissioner concurs with the Siting Board's August 11, 2016 determination concerning the need to adjudicate the sufficiency of the radiological surveys and the adequacy of the SEMMP, I recommend addressing the parties' concerns related to the air monitoring plan with any issues related to the SEMMP.

4. Summary

With a cover letter from Jill Banaszak, Technical Manager, dated October 23, 2017, CWM filed comments about the draft ASF permit during the public comment period provided by the August 18, 2017 NOCA. Upon review of these comments, Department staff agreed to make some minor changes to the draft ASF permit. No dispute exists between Department staff and applicant over any substantial term or condition of the draft ASF permit (*see* 6 NYCRR 624.4[c][1][i]). (Tr. at 180-188.)

Based on the forgoing discussion, the intervening parties have not raised any substantive and significant issues for adjudication concerning the draft ASF permit. In addition, the intervening parties did not identify any substantive and significant issues for adjudication about the *Fugitive Dust Control Plan* (*see* Attachment L [revised June 2017], draft site-wide Part 373 renewal permit).

CWM shall prepare the air monitoring plan identified in Attachment N (at 1), consistent with the guidance provided in DER-10 prior to the commencement of the adjudicatory hearing. Depending on the Deputy Commissioner's review of the pending appeals and replies concerning the SEMMP, the parties' concerns related to the air monitoring plan would be addressed at the adjudicatory hearing along with any issues related to the SEMMP.

III. Municipal Effects

The Siting Board must determine whether the proposed RMU-2 landfill and related modifications to the Model City facility would conform to the siting criteria outlined at ECL 27-1103 (*see also* ECL 27-1105[3][f]). The implementing regulations at 6 NYCRR 377.7 (*formerly* 361.7) expand upon the statutory criteria. The Siting Board must consider whether the proposed hazardous waste management facility would be consistent with the intent of the municipal land use plan (*see* 6 NYCRR 377.1[c][12], *formerly* 6 NYCRR 361.1[c][12]), and with local laws, ordinances, rules and regulations that have not been adopted pursuant to a master land use plan, among other things (*see* 6 NYCRR 377.7[b][6], *formerly* 6 NYCRR 361.7[b][6].)

Discussion and Ruling: In the December 2015 ruling (at 51), I took official notice (*see* 6 NYCRR 624.9[a][6]) of the master plan for the Town of Porter and the Niagara County plan referenced in RRG's petition for full party status. I did not take official notice of the master plan for the Town of Lewiston because I was not able to find a copy of the document, and no party offered a copy of the master plan for the Town of Lewiston. Accordingly, I requested that CWM provide a copy (*see* December 2015 ruling at 51 n 6). With an email dated December 23, 2015 from Mr. Darragh, CWM provided electronic copies of the Town of Lewiston comprehensive plan and draft generic environmental impact statement (GEIS) dated August 2000, the 2011 Town of Lewiston comprehensive plan update, and the July 20, 2005 correspondence. Now that the Town of Lewiston August 2000 comprehensive plan and draft GEIS, as well as the 2011 update have been identified, I take official notice of these documents pursuant to 6 NYCRR 624.9(a)(6).

The December 2015 ruling (at 51) identifies the legal questions that the parties will have the opportunity to brief at the end of the adjudicatory hearing with respect to the siting criterion related to municipal effects. The December 2015 ruling is modified to add the following question:

> Whether CWM's RMU-2 landfill proposal would be consistent with the August 2000 comprehensive plan and draft GEIS, as well as the 2011 update for the Town of Lewiston.

Except for the addition of this question concerning the comprehensive plan for the Town of Lewiston, the discussion and ruling in the December 2015 ruling (at 51-52) concerning the municipal siting criterion at 6 NYCRR 377.7(b)(6) (*formerly* 6 NYCRR 361.7[b][6]) is not otherwise changed or modified. (Tr. at 145-147.)

IV. Supplemental Petitions

This portion of the supplemental rulings considers the additional proposed issues, not related to the draft SPDES permit or the draft ASF permit, as outlined in Ms. Witryol's supplemental petition and RRG's supplemental petition. The standards for late-filed petitions, provided for in 6 NYCRR 624.5(c), apply to new issues raised by petitioners after the deadline for party status petitions has passed and the issues conference concluded (*see Matter of Finger*

Lakes LPG Storage, LLC, Rulings of the Chief Administrative Law Judge on Issues and Party Status, September 8, 2017, at 42; *Matter of Thalle Indus., Inc.*, Rulings of the Administrative Law Judge on Party Status and Issues, December 10, 2003, at 24). In addition to carrying its burden of persuasion to demonstrate that any proposed issue is substantive and significant (*see* 6 NYCRR 624.4[c][2] and [3]), a petitioner must also demonstrate good cause for the late filing and that consideration of the filing will materially assist in the determination of the issues for adjudication (*see* 6 NYCRR 624.5[c][2][i] and [iii]).[10]

1. Otherwise Necessary or In the Public Interest

Pursuant to ECL 27-1105(3)(f), the Siting Board must find that a proposed facility would be otherwise necessary or in the public interest when, as here, the adopted siting plan concludes that additional hazardous waste management facilities are not needed. Consequently, the Siting Board is required to determine whether the proposed RMU-2 landfill and related modifications to the Model City facility would be otherwise necessary or in the public interest.

In their respective petitions for party status, the intervening parties initially proposed several issues related to this required finding. The participants discussed the proposed issues during the April 2015 issues conference, and I ruled on the proposed issues in the December 2015 ruling (at 81-92). A summary of the adjudicable issues associated with whether the proposed RMU-2 landfill would be otherwise necessary or in the public interest (*see* ECL 27-1105[3][f]) is provided in the December 2015 ruling (at 92). The Siting Board affirmed these rulings in the August 11, 2016 Interim Decision (at 19).

Referring to Section 5 of her supplemental petition (at 28-33) titled, *Adverse Socio-Economic Impacts*, and related Appendices (E, F, G, H, I, and J), Ms. Witryol moved for the following relief (Tr at 110-136). First, Ms. Witryol identified Patrick Whalen, President, Niagara Global Tourism Institute, as a new witness who would testify about a report titled, *Niagara Falls Prospect Survey*, dated December 2015. Given the date of the report (December 2015), Ms. Witryol explained that the report was not available when she was preparing her initial petition in November 2014, or at the April 2015 issues conference. Accordingly, the information is new, and Ms. Witryol argued that this new information is relevant to the question of municipal and school property taxes. (Tr. at 119-120, 131-134.) During the July 10, 2018 issues conference, I granted this portion of Ms. Witryol's motion. Mr. Whalen may testify about the December 2015 report as it relates to whether CWM's proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts, as well as the related subtopic concerning potential effects on second home purchases as a measure of tourism spending. (Tr. at 134-135; *see* December 2015 ruling at 82-85, 92.)

This portion of Ms. Witryol's motion meets the applicable criteria at 6 NYCRR 624.5(c)(2). The December 2015 report was not available prior to the April 2015 issues

[10] Petitioners must also demonstrate that including additional issues would not significantly delay the proceeding or unreasonably prejudice the other parties (*see* 6 NYCRR 624.5[c][2][ii]). This criterion, however, does not apply here because appeals from the December 2015 ruling are pending before the Deputy Commissioner, and the adjudicatory hearing has not commenced.

conference, which demonstrates good cause for why Ms. Witryol offered it with her supplemental petition rather than with her November 2014 petition or at the April 2015 issues conference (*see* 6 NYCRR 624.5[c][2][i]). In addition, this offer of proof relates to an issue already joined for adjudication. Therefore, the material will assist in the determination of that issue (*see* 6 NYCRR 624.5[c][2][iii]).

In the December 2015 issues ruling, I denied Ms. Witryol's proposed issue concerning the potential effects that CWM's proposal may have on local tourism. Rather, I limited the issue to a consideration of whether CWM's proposal would have any effect on second home purchases as a measure of tourism spending (*see* December 2015 ruling at 84-85, 92). The Siting Board affirmed these rulings in the August 11, 2016 Interim Decision (at 19). As part of the second component of her motion, Ms. Witryol seeks to expand the scope of the issue to include potential effects on tourism in addition to second home purchases (*see* Ms. Witryol's supplemental petition at 30-31 and Appendix G; Tr. at 120, 126-129, 134). I denied Ms. Witryol's request to expand the scope of this issue (Tr. at 129-130, 134-136). This portion of Ms. Witryol's motion does not meet the applicable criteria at 6 NYCRR 624.5(c)(2).

The third component of Ms. Witryol's motion relates to the no-action alternative (Tr. at 114-118, 125-126, 134, 136). According to Ms. Witryol, the application materials, including the draft DEIS, are deficient because they lack a discussion about the potential economic effects related to the no-action alternative. (*See* Ms. Witryol's supplemental petition at 29-30, and Appendix F1 [Letter dated April 9, 2018 by Robert Simons, Ph.D., RS&A, of Robert A. Simons, LLC].) Ms. Witryol offered the expert testimony of Robert Simons, Ph.D. Along with other experiences, Dr. Simons is a Professor of Urban Planning and Real Estate Development at the Levin College of Urban Affairs, Cleveland State University (Cleveland, Ohio). (*See* Ms. Witryol's supplemental petition, Appendix F2). I denied Ms. Witryol's request to make a presentation about the no-action alternative. I determined that the proposed issue was untimely raised. I said that Ms. Witryol did not raise this issue in her November 2014 petition for party status (*see* 6 NYCRR 624.5[c][2][i]). Consequently, the proposed issue was not discussed at the April 2015 issues conference, where the proposed issue would have been considered in the first instance. (Tr. at 125-126, 136.)

Finally, Ms. Witryol and I discussed the proposed scope of Dr. Rockler's testimony in relationship to the issues affirmed by the Siting Board (Tr. at 111-114). Nicholas Rockler holds a Ph.D. in Urban Studies and Planning from the Massachusetts Institute of Technology (Cambridge, Massachusetts) (*see* Ms. Witryol's supplemental petition, Appendix E2). With her supplemental petition, Ms. Witryol provided a letter dated May 2, 2018 from Dr. Rockler. In part, this letter discusses the Regional Impact Modeling System II (RIMS II),[11] which is used to develop an economic multiplier, discussed in the DEIS (at 154). (*See* Ms. Witryol's supplemental petition at 29, and Appendix E1 at 4-5.) The December 2015 issues ruling (at 86-88) addressed Ms. Witryol's proposed issue concerning the RIMS II multiplier as discussed in the DEIS. During the July 10, 2018 issues conference (Tr. at 113-114), Ms. Witryol acknowledged that she was attempting to supplement what was initially offered in her November 2014 petition for party status. I observed that the discussion in Dr. Rockler's May 2, 2018 letter

[11] In the December 2015 ruling (at 87), RIMS II is identified as the Regional Input-Output Modeling System II (*see* DEIS at 154). It is unknown whether this difference in terminology is significant.

(at 4-5), was comparable to what Mr. Barufaldi had previously offered about the development of a multiplier using RIMS II, and which the Siting Board rejected as an issue for adjudication (*see* Interim Decision, dated August 11, 2016, at 19). (Tr. at 113.)

This portion of Ms. Witryol's supplemental petition does not meet the applicable criteria at 6 NYCRR 624.5(c)(2). Ms. Witryol did not demonstrate good cause (*see* 6 NYCRR 624.5[c][2][i]), and this offer of proof relates to an issue excluded from adjudication by the Siting Board's Interim Decision (at 19) (*see* 6 NYCRR 624.5[c][2][iii]).

I acknowledged at the issues conference that the parties may substitute witnesses, who were not part of an initial offer of proof, or offer new witnesses to supplement a particular presentation as parties develop their respective strategies and prepare their cases for the hearing (Tr. at 124-125). Because the Siting Board has already considered appeals and replies from my December 2015 rulings about Ms. Witryol's proposed issue concerning the economic multiplier, and affirmed them, Dr. Rockler may not offer any testimony about this topic. However, with respect to issues already joined concerning whether CWM's proposal would be otherwise necessary or in the public interest, Dr. Rockler may offer relevant testimony, in addition to, or in lieu of, Mr. Barufaldi.

2. Section 6 of Ms. Witryol's Supplemental Petition

In addition to the topics related to the local municipal land use plans (*supra* § III [Municipal Effects]), Section 6 (*Compliance*) of Ms. Witryol's supplemental petition (at 34-40) also included a discussion about CWM's record of compliance, among other things. Pursuant to ECL 27-0913(3), the Commissioner must assure that permits authorizing hazardous waste treatment facilities are held by qualified or suitable persons. The December 2015 ruling (at 64-76) considered the parties' arguments about the scope of the issue, and outlined the process for developing a complete record for the Deputy Commissioner's consideration. Although the Siting Board affirmed these rulings in the August 11, 2016 Interim Decision (at 19), appeals from these rulings are pending before the Deputy Commissioner.

During the July 10, 2018 issues conference, I determined that the information provided in Section 6 of Ms. Witryol's supplemental petition was either not relevant, or had already been considered (*see e.g.* December 2015 ruling at 76). Accordingly, I denied Ms. Witryol's request to otherwise change the scope of the issue related to CWM's record of compliance as outlined in the December 2015 ruling (at 73-76). (Tr. at 147-148.) This portion of Ms. Witryol's supplemental petition does not meet the applicable criteria at 6 NYCRR 624.5(c)(2).

3. Site Surveys

In Section 9 (*Radiation*) of her supplemental petition (at 74-77, and Appendices N1, N2, N3, N4, and N5), Ms. Witryol identified two witnesses not initially included in her November 2014 petition. Sean C. Chapel is President of International Radiation Safety Consulting, Inc. (IRSC) (Stoughton, Massachusetts). Mr. Chapel holds a Certificate in Geographic Information

Technology and a Bachelor of Science in Geology from the University of Massachusetts (Boston, Massachusetts). Mr. Chapel's experiences include working as a radiation safety officer. Karen K. Barcal is a health physicist who does consulting work for IRSC. Ms. Barcal has completed her course work for a Ph.D. in Biomedical Engineering and Biotechnology from the University of Massachusetts (Lowell, Massachusetts), and holds a Master of Science in Radiological Sciences from the same institution. (*See* Ms. Witryol's supplemental petition at 74, and Appendices N3 and N4.)

Referring to the Board's August 11, 2015 Interim Decision (at 18), Ms. Witryol said that Mr. Chapel and Ms. Barcal would testify about the sufficiency of the radiological surveys that CWM would rely upon in developing and implementing the SEMMP. Ms. Witryol also asserted that the testimony by Mr. Chapel and Ms. Barcal would be relevant to air modeling and the health risk assessment. (Tr. at 153-157.)

I determined that Ms. Witryol's offer of proof would not be relevant to proposed issues concerning air modeling and the requested health risk assessment (Tr. at 154, 160). I provided rulings about these topics above (*supra* § II.1 [Health Risk Assessment]). However, depending on the Deputy Commissioner's determination with respect to SEMMP-related appeals, I ruled that Mr. Chapel and Ms. Barcal may offer relevant testimony (Tr. at 159-160). The scope of the testimony will depend on how such issues are framed in the Deputy Commissioner's Interim Decision.

4. April 21, 2016 Motion to Reconvene the Issues Conference

The materials provided in Sections 10 (*RMU-2 Conflict with NFSS Remediation Plan* [at 77-83]) and 11 (*RMU-2 Conflict with VP Investigation* [at 83-94], and Addendum 1 [Radiation Exhibits A and B at 101-109]) of Ms. Witryol's supplemental petition generally replicate the presentation made in Ms. Witryol's April 21, 2016 motion to reconvene the issue conference (Tr at 162-165). During the July 10, 2018 issues conference, I referred the parties to my ruling dated June 1, 2016 at 3-7 (Tr. at 165). This portion of Ms. Witryol's supplemental petition does not identify any substantive and significant issues for adjudication. As stated in the June 1, 2016 ruling (at 3-7), the proposed issues are not relevant to the captioned matters.

5. Sections 12 through 16 of Ms. Witryol's Supplemental Petition

In Sections 12 through 16 of her supplemental petition, Ms. Witryol identified the following topics: Section 12, *Flora and Fauna* (at 94-95); Section 13, *Traffic and Noise* (at 95-96); Section 14, *Visual Impacts Undefined* (at 96-97); Section 15, *Missing Ten-year Plan and Cumulative Impacts* (at 98); and Section 16, *CWM-Proffered Environmental Impacts* (at 99-100). Ms. Witryol said that she offered new information in each of these sections that was not available either when she filed her November 2014 petition, or during the period between the April 28, 2015 issues conference and the December 2015 ruling (Tr. at 166).

With respect to these topics, I noted during the July 10, 2018 issues conference that I considered many of these topics in the December 2015 ruling (at 45-46 [Transportation]; 55-56 [Preservation of Endangered, Threatened and Indigenous Species]; and 56-57 [Additional Siting Criteria]). I noted further that the Siting Board affirmed the rulings outlined in the referenced sections of the December 2015 ruling in the August 11, 2016 Interim Decision (at 18). (Tr. at 166.) This portion of Ms. Witryol's supplemental petition does not meet the applicable criteria at 6 NYCRR 624.5(c)(2). No additional substantive and significant issues for adjudication have been identified.

6. Buffer Zone

In its supplemental petition, RRG argued that the buffer zone between the Lewiston-Porter Central School campus and the Model City facility is insufficient compared to other Resource Conservation and Recovery Act (RCRA) landfill facilities. According to RRG, the average distance between such facilities and schools is greater than seven miles. (*See* RRG's supplemental petition at 15-16; *see also* Ms. Witryol's supplemental petition at 25.) During the issues conference, Mr. Olsen said that the distance between the boundaries of the school campus and the Model City facility is one mile. Mr. Olsen contended, on behalf of RRG, that EPA and guidance for constructing new schools cautions against building schools within one mile of hazardous waste disposal sites. (Tr. at 84-85.)

The intervening parties did not provide any reference prepared by either EPA or any other regulatory agency to support this contention. Nonetheless, the intervening parties are encouraged, in their respective closing briefs, to provide the authority for this contention, and may offer argument about whether and, if so, how this guidance would apply to the Board's siting determination.

V. Commissioner's Policy 42

Former Commissioner Alexander B. Grannis issued Commissioner's Policy (CP) 42 on March 27, 2009, titled, *Contact, Cooperation, and Consultation with Indian Nations*. CP-42 provides guidance to Department staff concerning cooperation and consultation with Indian Nations on issues related to protecting the environment and cultural resources in New York State. CP-42 recognizes the Tuscarora Nation, among other native peoples, and encourages Department staff to communicate with Indian Nation governments where, as here, there are environmental issues of mutual concern. CP-42 outlines the consultation process. (*See* CP-42 at 1-2.)

During the July 10, 2018 issues conference, Ms. Macaulay explained, on behalf of the Tuscarora Nation, that members of the Nation and Department staff had previously participated in consultations about the proposed RMU-2 landfill. Ms. Macaulay expressed a desire to have further consultations with staff about CWM's proposal. Ms. Mucha, on behalf of Department staff, said that staff would welcome the opportunity. (Tr. at 74-77.)

The consultation process outlined in CP-42 is separate and distinct from the permit hearing process outlined in 6 NYCRR part 624. Members of Department staff implement the former policy, and the administrative law judges from OHMS implement the latter. Therefore, the consultation process may take place outside the context of the adjudicatory hearing. Accordingly, I encourage representatives from the Tuscarora Nation and Department staff to engage the consultation process as outlined in CP-42. In addition, the Tuscarora Nation may also participate in the adjudicatory hearing as amicus (*infra* § VI [Rulings on Petitions for Full Party Status and Amicus Status]).

VI. Rulings on Petitions for Full Party Status and Amicus Status

Pursuant to 6 NYCRR 624.5, the parties to any adjudicatory hearing are applicant, Department staff and those who have been granted full party status or amicus status. In November 2014, OHMS initially received petitions for full party status from RRG, the municipalities, and Ms. Witryol. As noted above, each of these parties also timely filed supplemental petitions before the July 10, 2018 issues conference.

The criteria for determining whether the ALJ should grant petitions for full party status are provided in 6 NYCRR 624.5(d)(1). I previously granted full party status to RRG, the municipalities and Ms. Witryol (*see* December 2015 ruling at 151-152). Nothing in these supplemental rulings changes that status. Accordingly, for the purpose of this administrative hearing, the following will continue to have full party status:

1. Residents for Responsible Government (RRG), jointly with the Lewiston-Porter Central School District (the School District), and the Niagara County Farm Bureau;

2. Niagara County, jointly with the Town and Village of Lewiston, and the Village of Youngstown (the municipalities); and

3. Amy Witryol.

Consistent with the February 28, 2018 notice that set a schedule for filing petitions, OHMS timely received petitions for amicus status (*see* 6 NYCRR 624.5[b][1] and [3]) from the Tuscarora Nation, and the Buffalo-Niagara Waterkeeper. During the July 10, 2018 issues conference, I granted the Tuscarora Nation's petition for amicus status (Tr. at 177-178), as well as Waterkeeper's petition for amicus status (Tr. at 46-47).

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed in writing within five days of the disputed ruling (*see* 6 NYCRR 624.6[e][1]). Allowing extra time due to the length of these supplemental rulings, any appeals

must be received before 3:30 P.M. on Friday, **April 5, 2019**. Replies are authorized (Tr. at 195), and must be received before 3:30 P.M. on **May 10, 2019**.

Send the original hard copy of any appeal plus three copies (for a total of four paper copies) to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services, 625 Broadway, 1st Floor, Albany, New York, 12233-1550. In addition, send one hard copy of any appeal to everyone on the service list (revised February 7, 2019), excluding the ALJ, at the same time and in the same manner as transmittal is made to the Chief Administrative Law Judge. Follow the same directions when filing replies. Upon receipt of timely filed appeals and replies, OHMS will distribute copies of the documents to the members of the Siting Board and to Deputy Commissioner Alexander for their review and consideration.

Appeals should address the ALJ's supplemental rulings directly, rather than merely restate a party's contentions. New materials enclosed with any appeal or reply will not be considered, and will be returned. In their respective appeals and replies, the parties must reference the July 10, 2018 issues conference transcript and the participants' submissions that have been identified throughout these supplemental rulings.

In addition to the required number of hard copies of appeals and replies, each party shall file one electronic copy in portable document format (PDF) – optical character recognized (OCR) – via email to everyone on the service list, including the ALJ. The electronic copies are due by 3:30 P.M. on the dates specified above. The parties may call me at 518-402-9003 for instructions to convert documents to optimized PDFs.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: February 14, 2019
Albany, New York

To: Attached Service List revised February 7, 2019