

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter

-of-

In the Matter of Applications for Permits pursuant to Articles 17, 19, 24, and 27 of the Environmental Conservation Law (ECL); Parts 201-5 (State Facility Permits), 373 (Hazardous Waste Management Facilities), 663 (Freshwater Wetlands Permit Requirements), 750 (State Pollutant Discharge Elimination System [SPDES] Permits) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR); Section 401 of the federal Clean Water Act (CWA); and 6 NYCRR 608.9 (Water Quality Certifications),

-by-

CWM Chemical Services, LLC,

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

DEC Permit ID Nos. 9-2934-00022/00225
9-2934-00022/00231
9-2934-00022/00232
9-2934-00022/00233
9-2934-00022/00249

DECISION OF THE REGIONAL DIRECTOR

October 2, 2025

DECISION¹

CWM Chemical Services, LLC (CWM or Applicant) proposes to construct and operate additional secure landfill disposal capacity for hazardous and industrial non-hazardous waste, referred to as residuals management unit 2 (RMU-2), at its Model City facility located at 1550 Balmer Road in the Towns of Porter and Lewiston, Niagara County (Facility or Site).

CWM relies on existing permits issued by the New York State Department of Environmental Conservation (DEC or Department) for the current operations at the Facility, including residuals management unit one (RMU-1) landfill and its related facilities. In order to construct and operate RMU-2, CWM applied for modifications to existing permits and submitted applications for new permits. Specifically, this proceeding concerns the following applications submitted by CWM:

- (i) 6 NYCRR Part 750 State Pollutant Discharge Elimination System (SPDES) Permit Modification Application (ECL Article 17, Title 8) (DEC Permit Application No. 9-2934-00022/00049);
- (ii) 6 NYCRR Section 608.9 Water Quality Certification (WQC) Application (Section 401 of the federal Clean Water Act) (DEC Permit Application No. 9-2934-00022/00232);²
- (iii) 6 NYCRR Part 663 State Freshwater Wetlands (FWW) Permit Application (ECL Article 24, Title 7) (DEC Permit Application No. 9-2934-00022/00231);
- (iv) 6 NYCRR Subpart 201-5 Air State Facility (ASF) Permit Modification Application (ECL Article 19, Title 3) (DEC Permit Application No. 9-2934-00022/00233);
- (v) 6 NYCRR Part 373 RCRA Hazardous Waste Treatment, Storage and Disposal Facility (TSDF) Permit Modification Application (ECL Article 27, Title 9) (DEC Permit Application No. 9-2934-00022/00225);³ and
- (vi) 6 NYCRR Part 377 (former 6 NYCRR Part 361) Hazardous Waste Facility Siting Application for a Certificate of Environmental Safety and Public Necessity (Siting Certificate) (ECL Article 27, Title 11).

This Decision pertains to the SPDES permit modification application, WQC application, FWW permit application, ASF permit modification application, and RCRA TSDF permit modification application (collectively, Environmental Permit Applications). On September 29, 2025, the Facility Siting Board issued⁴ a final determination regarding CWM's application for a Siting Certificate (ECL 27-1105[3][f]-[g]; 6 NYCRR 377.4[f]-[g]; 6 NYCRR 377.7[a]). Both this Decision and the Facility Siting Board's final determination are based on a joint proceeding,

¹ By memorandum dated May 23, 2024, then Interim Commissioner Sean Mahar delegated decision making authority with respect to the applications for permits subject to the jurisdiction of the DEC in this matter to Randall Young, Regional Director, DEC Region 6.

² With respect to freshwater wetlands, CWM filed a joint application with the United States Army Corps of Engineers (ACE) and the Department pursuant to federal Clean Water Act Section 404 and ECL Article 24, respectively. Because ACE is reviewing an application pursuant to federal Clean Water Act Section 404, the Department has authority to consider an application for a WQC pursuant to federal Clean Water Act Section 401.

³ RCRA refers to the Resource Conservation and Recovery Act (42 USC § 6901 *et seq.*), the federal law that also provides, in part, for the regulation of hazardous waste management facilities. The United States Environmental Protection Agency authorized the Department to administer the RCRA permitting program.

including a joint evidentiary hearing, conducted pursuant to the procedures set forth in 6 NYCRR Part 624.⁴

The Department is the lead agency for this proposed action pursuant to the State Environmental Quality Review Act (ECL Article 8 [SEQRA]). Consequently, this Decision also addresses the Department's obligations pursuant to SEQRA with respect to this proceeding and CWM's Environmental Permit Applications.

I. Brief Procedural History and Background

On April 30, 2004, Department staff advised CWM and the Town of Porter that the Department would serve as the SEQRA lead agency. On October 12, 2005, the Department issued a positive declaration that identified the involved agencies, declared that CWM's RMU-2 proposal constituted a Type I action, and stated that an environmental impact statement (EIS) was required.

The Department issued a combined notice concerning the completeness of the draft EIS (DEIS) and some of CWM's Environmental Permit Applications pursuant to the Uniform Procedures Act on May 5, 2014.

On May 19, 2014, the Department's Office of Hearings and Mediation Services (OHMS) received the initial permit hearing referral concerning this proceeding from Department staff. The matter was then assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell.

Consistent with 6 NYCRR 624.4 (a), public comment hearing sessions were held at the Lewiston-Porter High School in Youngstown, New York on July 7, 2014, on some of the Environmental Permit Applications and the DEIS. The public comment period spanned a period of 141 days from July 7, 2014 to November 25, 2014.

Pursuant to 6 NYCRR 624.4(b), ALJ O'Connell convened an issues conference from April 28 through April 30, 2015, in the Fellowship Hall at the First Presbyterian Church located at 100 Church Street in Youngstown, New York. On December 22, 2015, ALJ O'Connell issued an Issues Ruling identifying the adjudicable issues and excluding others (2015 WL 9581260) (Issues Ruling). The Issues Ruling also made determinations regarding petitions for full party status and amicus status (*see* 6 NYCRR 624.4[b][5]). In addition to Department staff and the Applicant, the Issues Ruling identified the following as full parties to the proceeding: (i) Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities); (ii) Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau) (collectively, RRG); and (iv) Amy Witryol.

On August 11, 2016, the Facility Siting Board issued an Interim Decision that affirmed, in part, and modified, in part, the issues identified in the Issues Ruling (2016 WL 11970379) (August 2016 Siting Board Interim Decision).

With a memorandum dated June 1, 2017, Department staff referred CWM's SPDES modification permit application and related documents, including public comments, to OHMS. On

⁴ 6 NYCRR Part 624 was amended effective August 21, 2024.

December 8, 2017, OHMS received Department staff's hearing referral concerning CWM's ASF permit modification application, and related documents, including the public comments.

On July 10, 2018, ALJ O'Connell reconvened the issues conference to consider proposed issues regarding the SPDES permit modification application and the ASF permit modification application. On February 14, 2019, ALJ O'Connell issued a Supplemental Issues Ruling on the proposed issues for adjudication (2019 WL 913284) (Supplemental Issues Ruling). In addition to the full parties identified in the Issues Ruling, the Supplemental Issues Ruling granted amicus party status to the Tuscarora Nation and Buffalo-Niagara Waterkeeper.

On September 10, 2019, the Facility Siting Board issued a Ruling and Interim Decision (2019 WL 4567319), that affirmed, in part, and modified, in part, the rulings outlined in the Supplemental Issues Ruling (September 2019 Siting Board Interim Decision).

On June 23, 2021, DEC Deputy Commissioner Louis Alexander issued the First Interim Decision that affirmed, in part, the issues identified in the Issues Ruling and concurred with the determinations outlined in the August 2016 Siting Board Interim Decision (2021 WL 2744879) (June 2021 DEC Interim Decision).⁵

On August 11, 2023, DEC Deputy Commissioner Alexander issued the Second Interim Decision that affirmed the rulings in the Supplemental Issues Ruling related to CWM's SPDES modification permit application and modified the rulings related to CWM's ASF modification permit application (2023 WL 5322622) (August 2023 DEC Interim Decision).

ALJ O'Connell presided over a multi-day adjudicatory hearing, which was held virtually in various sessions between April 11, 2022 to April 15, 2024. On October 1, 2024, CWM, Department staff, the Municipalities, RRG, Ms. Witryol, the Tuscarora Nation, and Buffalo-Niagara Waterkeeper filed closing briefs.

On April 16, 2025, ALJ O'Connell issued his comprehensive 189-page Hearing Report and Recommended Decision, exclusive of appendices (HR/RD) (2025 WL 1427117). On June 30, 2025, CWM, the Municipalities, RRG, Ms. Witryol, the Tuscarora Nation, and Buffalo-Niagara Waterkeeper filed briefs on exceptions to the HR/RD. On July 25, 2025, CWM, Department staff, the Municipalities, RRG, Ms. Witryol, the Tuscarora Nation, and Buffalo-Niagara Waterkeeper filed briefs opposing exceptions.

The complete background and procedural history concerning CWM's Environmental Permit Applications and this proceeding overall are provided in greater detail in the HR/RD, the Issues Ruling, the Supplemental Issues Ruling, the June 2021 DEC Interim Decision, and August 2023 DEC Interim Decision. For the sake of brevity, that extensive background and history will not be repeated here.

⁵ Deputy Commissioner Alexander had been designated as the DEC decision-maker in this case prior to DEC Regional Director Randall Young. Upon Deputy Commissioner Alexander's retirement from DEC, Regional Director Young was designated as the decision-maker for DEC in May 2024 (*supra* n.1).

II. Discussion

Based upon my review of the robust and comprehensive record in this proceeding, I concur with and adopt ALJ O'Connell's HR/RD, including the findings of fact and conclusions of law, as my own, subject to my comments herein. I further adopt the recommendations of ALJ O'Connell as set forth in the HR/RD and incorporate by reference ALJ O'Connell's discussion and reasoning in support of those adopted recommendations, which will not be repeated here. I also incorporate by reference the June 2021 DEC Interim Decision and August 2023 DEC Interim Decision in this Decision.

This Decision is based on the HR/RD, the evidentiary record, closing briefs, the briefs on exceptions to the HR/RD, the briefs opposing exceptions, public comments, as well as applicable laws, regulations and policies. For conciseness, this Decision primarily focuses on those aspects of the HR/RD to which the various parties have raised exceptions.

A. Environmental Permit Applications

Although the issues regarding CWM's Environmental Permit Applications are satisfactorily addressed, as discussed herein and in the HR/RD, I am compelled to acknowledge the contemporaneous decision of the Siting Board in this matter. I concur with ALJ O'Connell that the issuance of the requested Environmental Permits is nugatory based on the Siting Board's decision to deny CWM's application for a Siting Certificate (HR/RD, 2025 WL 1427117, at *150, 152-53, 163, 178). Given the denial of the Siting Certificate application, it would be inappropriate for DEC to approve CWM's Environmental Permit Applications for the proposed RMU-2 (6 NYCRR 377.5 ["If the [Siting] [B]oard denies the [Siting] [C]ertificate before the [D]epartment takes action on any permit application(s), all such permit applications shall be deemed denied."]).⁶ CWM requires all relevant permits and approvals to proceed with the construction and operation of RMU-2. Without a Siting Certificate, issuance of Environmental Permits to construct and operate RMU-2 would be futile. Therefore, CWM's Environmental Permit Applications are denied without prejudice (*see* 6 NYCRR 377.5).

The Facility Siting Board and the previous Deputy Commissioner identified a limited number of issues for adjudication concerning some of the Environmental Permit Applications (*see* Issues Ruling, 2015 WL 9581260, at *98-99, 115, *affirmed* and *modified* August 2016 Siting Board Interim Decision, 2016 WL 11970379, at *4-11, and June 2021 DEC Interim Decision, 2021 WL 2744879, at *10-17; *see also* Supplemental Issues Ruling, *affirmed* and *modified* September 2019 Siting Board Interim Decision, 2019 WL 4567319, at *4-9, and August 2023 DEC Interim Decision, 2023 WL 5322622, at *12-23).

Notably, the aforementioned rulings and decisions did not identify any substantive and significant issues regarding CWM's SPDES permit modification application or the WQC and FWW permit applications. Consequently, no issues regarding the SPDES permit modification application were adjudicated at hearing, and all arguments pertaining to the SPDES permit

⁶ This is also consistent with past Departmental proceedings regarding proposed hazardous waste landfill facilities where the Facility Siting Board denied the Siting Certificate (*see, e.g., In the Matter of the Application of Cecos International, Inc.*, 1990 WL 98269 [Decision Mar. 12, 1990]).

application were previously addressed and decided by the August 2023 DEC Interim Decision (August 2023 DEC Interim Decision, 2023 WL 5322622, at *9-18). To the extent any parties continue to raise arguments regarding the SPDES permit modification application in their briefs, including Buffalo Niagara Waterkeeper and the Municipalities, nothing maintained within those briefs has compelled me to overturn or disturb the August 2023 DEC Interim Decision (*see* Buffalo Niagara Waterkeeper Br. on Exceptions at 2-3; Municipalities Br. Opposing Exceptions at 2, 9). Importantly, those briefs did not identify any changes in law, regulation, policy, or facts since the August 2023 DEC Interim Decision which would alter that holding.

While the denial of CWM's Environmental Permit Applications has rendered a discussion on the adjudicable issues regarding the Environmental Permit Applications academic, it is nonetheless appropriate for this Decision to address them.

i. RCRA TSDF Permit Modification Application

6 NYCRR Part 373 imposes a series of permit requirements and construction and operation standards for TSDFs and owner and operators of TSDFs, including related to groundwater (*e.g.*, 6 NYCRR Section 373-1.5[a][3]; 6 NYCRR 373-2.6). The following were adjudicated issues related to the Part 373 permit application to determine compliance with Part 373 regulatory requirements: (i) the geology/hydrogeology setting and characteristics of the Site; and (ii) compliance with requirements in Part 373, including groundwater protection and engineering design (*e.g.*, 6 NYCRR Section 373-1.5[a][3]; 6 NYCRR 373-2.6; 6 NYCRR 373-2.14[c][1][i][b]).

The HR/RD includes a highly detailed evaluation of the geology/hydrogeology issues, including the geology/hydrogeology characteristics of the Site based on the evidentiary record and testimony from all witnesses (HR/RD, 2025 WL 1427117, at *102-04, 106-131). ALJ O'Connell issued findings of fact regarding the geology/hydrogeology characteristics and setting of the Site (HR/RD, 2025 WL 1427117, at *102-04 [Finding of Fact Nos. 1-15]). ALJ O'Connell also concluded that RMU-2 would comply with regulatory requirements outlined in 6 NYCRR Part 373 (HR/RD, 2025 WL 1427117, at *132-35).

The Municipalities take exception to the HR/RD's description of the hydrogeological characteristics and setting, including ALJ O'Connell's conclusions regarding the conductivity values of the underlying soils at the Site (Municipalities Br. on Exceptions at 8-22; Municipalities Br. Opposing Exceptions at 11-15). The Municipalities argued the surface contours of the bedrock plunges in a westerly direction and buried alluvial valleys on the Site that allows groundwater to flow to the west off-site based on the testimony of Dr. Michalski and evidence offered at hearing (*id.*). According to the Municipalities, evidence demonstrates that as a result of this hydrogeologic setting, the Site is vulnerable to the release of contaminants and, as a result, groundwater contamination could not be adequately monitored (Municipalities Br. on Exceptions at 8-22, 32-37). RRG supports the Municipalities exceptions and arguments (RRG Br. Opposing Exceptions at 14-15).

Department staff support the conclusion that the draft Part 373 permit meets all applicable regulatory requirements for the construction and operation of RMU-2 and argue that the record

adequately demonstrates that the proposed RMU-2 can be properly monitored through the terms and conditions of the draft Part 373 Permit (Department staff Br. Opposing Exceptions at 7-10). CWM similarly argues that the HR/RD correctly concludes that RMU-2 will satisfy all regulatory requirements regarding groundwater and the geologic/hydrogeologic issues identified for adjudication (CWM Br. Opposing Exceptions at 28-31).

I find that the ALJ performed a thorough analysis of the hydrogeological characteristics and setting of the site and agree with the ALJ's determinations related to the evidence and testimony provided by the parties (HR/RD, 2025 WL 1427117, at *46, 102-104, 106-135). ALJ O'Connell's analysis is comprehensive, reasoned, and represents a well-balanced consideration of the record (*id.*). I concur with ALJ O'Connell's assessment of all evidence and testimony, including pertaining to credibility of witnesses. Pursuant to 6 NYCRR 624.8(b)(1), ALJs have the authority to admit or exclude evidence, determine the weight to be assigned to admitted evidence, and assess the credibility of a proffered witness. I concur with ALJ O'Connell that the geology and hydrogeology of the site of the Facility is not an impediment to CWM being able to monitor the proposed RMU-2 landfill in a manner consistent with regulatory requirements intended to protect ground water resources (*id.*). Ultimately, I adopt ALJ O'Connell's conclusion that construction and operation of RMU-2 pursuant to the terms and conditions of the draft Part 373 permit would comply with regulatory requirements outlined in 6 NYCRR Part 373.

Sufficiency of the radiological surveys and the adequacy of the Soil Excavation Monitoring and Management Plan (SEMMP) were also adjudicated issues.⁷ The Municipalities take exception to the HR/RD's finding that the surface walkover survey and subsurface investigation required by the SEMPP are adequate (Municipalities Br. on Exceptions at 22-32). In the HR/RD, ALJ O'Connell determined that the arguments regarding the adequacy of the surface walkover survey and subsurface investigation were without merit and that the November 2016 SEMMP would be consistent with the applicable terms and conditions of the draft site-wide Part 373 modification permit, as well as with other requirements including the Orders issued by the Department of Health (HR/RD, 2025 WL 1427117, at *141- 150). I adopt ALJ O'Connell's findings of fact regarding the radiological surveys and SEMMP (HR/RD, 2025 WL 1427117, at *109-11 [Finding of Fact Nos. 16-25]). I find that the ALJ performed a thorough analysis of the SEMMP and underlying surveys and agree with the ALJ's determinations related to the evidence and testimony provided by the parties on this point (*id.*). ALJ O'Connell's analysis is comprehensive, reasoned, and represents a well-balanced consideration of the record (*id.*). Ultimately, I concur with ALJ O'Connell that the 2016 SEMMP and radiological surveys are sufficient and adequate (*id.*).

The Municipalities also take exception to the HR/RD's conclusion that the Municipalities issues regarding the Residuals Management Unit 2 Air and Meteorological Monitoring Plan (RAMP) did not need to be adjudicated (Municipalities Br. on Exceptions at 2). While related to air monitoring, as directed by the August 2023 Second Interim Decision and 6 NYCRR Part 373, any issue regarding the RAMP must be raised and addressed with respect to the adjudication of the SEMMP. I adopt ALJ O'Connell's recommendation and conclude that the Municipalities concerns regarding the RAMP do not meet the substantive and significant standard for adjudication (HR/RD, 2025 WL 1427117, at *7-8).

⁷ Specifically, the project-specific SEMMP for the construction of the proposed RMU-2 landfill and associated facilities.

ii. ASF Permit Modification Application

An inquiry regarding the meteorological data used in the air dispersion modeling was an adjudicated issue. Specifically, the Siting Board and Deputy Commissioner directed that the record be developed regarding the implementation of the guidance outlined in Section V.2.5 of DAR-10, dated May 9, 2006, titled NYSDEC Guidelines on Dispersion Modeling Procedures for Air Quality Impact Analysis, concerning the reliance on meteorological data for air dispersion modeling at the hearing (August 2023 DEC Interim Decision, 2023 WL 5322622, at *20-22).

The HR/RD includes a detailed evaluation of the corresponding record regarding the reliance on meteorological data for air dispersion modeling (HR/RD, 2025 WL 1427117, at *154-63). I adopt ALJ O'Connell's finding that CWM and Department staff provided the requisite testimony and evidence responsive to the Deputy Commissioner's directives in the August 2023 Second Interim Decision regarding air dispersion modeling and that all elements related to this topic have been thoroughly addressed in the record (HR/RD, 2025 WL 1427117, at *163). As recommended by ALJ O'Connell, I conclude that Department staff properly exercised their regulatory discretion in approving CWM's air modeling protocol (*id.*).

Furthermore, no party took exception to the ASF permit application recommendations in the HR/RD. To the extent Ms. Witryol incorporated by reference certain sections of her closing brief regarding meteorological data and windspeed data in her brief on exceptions, those arguments were fully addressed in the HR/RD (Witryol Br. on Exceptions at 50).

iii. Applicant's Compliance Record

RRG argues that the disclosed record of compliance may not be complete, and that CWM's environmental violations at the Site are very serious, especially when considering the Facility's proximity to public schools (RRG Br. on Exceptions at 10). The Tuscarora Nation argues that CWM's record of compliance demonstrates that CWM is an unqualified and unsuitable applicant (Tuscarora Nation Br. on Exceptions at 4-6). Department staff, however, opposed these exceptions and argued that the history of violations does not constitute willful noncompliance or a significant pattern of noncompliance with applicable environmental laws (DEC staff Br. Opposing Exceptions at 5-6). CWM also argues its compliance record is not an impediment to permitting RMU-2 (CWM Br. Opposing Exceptions at 27-28).

ALJ O'Connell assessed CWM's record of compliance and concluded that it would not form the basis for denial of the Environmental Permits or the Siting Certificate (HR/RD, 2025 WL 1427117, at *86-95). I concur with ALJ O'Connell that CWM's compliance record, as raised in this proceeding, is not an impediment to the issuance of the Environmental Permits. CWM's compliance record was identified in the Issues Ruling and parties had the opportunity to develop the record on this issue (HR/RD, 2025 WL 1427117, at *93-94). Accordingly, I do not question the completeness of the record based on RRG's assertion and the manner in which the record was developed regarding this issue, as has been previously addressed by the decisionmakers in this proceeding (*see id.*). I note that the nature of the violations outlined in CWM's record of compliance are serious. However, as fully outlined in the HR/RD, CWM acted responsibly in dealing with the violations, including by addressing them to the satisfaction of the Department

(*id.*). Therefore, I concur with ALJ O'Connell that CWM's compliance record, as raised in this proceeding, does not provide a basis for the denial of the Environmental Permit Applications and CWM's record of compliance aligns with the enforcement principles and goals in the Department's Record of Compliance Enforcement Policy (DEE-16).⁸

B. SEQRA

It is well established that compliance with any remaining, uncompleted requirements of an already commenced SEQRA review need not be completed when a permit application is denied (*In the Matter of An PC Group, LLC*, 2009 WL 2141503, at *11-13 [ALJ Ruling June 26, 2009]; *In the Matter of the Application of the Town of Oyster Bay*, 1985 WL 20921, at *4 [Order July 31, 1985]; *Matter of Logiudice v. Southold Town Bd. of Trustees*, 50 AD3d 800 [2d Dept 2008]; *Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead*, 301 AD2d 530 [2d Dept 2003]; *Matter of Cappelli Assoc. v. Meehan*, 247 AD2d 381 [2d Dept 1998]; *Matter of Wade v Kujawski*, 167 AD2d 409 [2d Dept 1990]).⁹ Considering the decision to deny CWM's Environmental Permit Applications (and the Siting Board's final determination), and consistent with the authorities cited here, it is not necessary to complete the remaining steps in the SEQRA review process for this proposal (*id.*). Because the Environmental Permit Applications are denied, no action having a significant effect on the environment is being undertaken (*Matter of Logiudice v. Southold Town Bd. of Trustees*, 50 AD3d 800, 801 [2d Dept 2008]; *Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead*, 301 AD2d 530, 531-32 [2d Dept 2003]; *Matter of Cappelli Assoc. v. Meehan*, 247 AD2d 381 [2d Dept 1998]; *Matter of Wade v Kujawski*, 167 AD2d 409, [2d Dept 1990]).

If SEQRA needed to be completed in this case, the DEIS and the comprehensive hearing and administrative record in this proceeding would constitute the final EIS (6 NYCRR 624.13[c][1]). Nonetheless, it is not required that the Department complete the remaining steps of SEQRA, including by finalizing the EIS or by issuing substantive findings, even as lead agency (*In the Matter of An PC Group, LLC*, 2009 WL 2141503, at *11-13 [ALJ Ruling June 26, 2009]; *In the Matter of the Application of the Town of Oyster Bay*, 1985 WL 20921, at *4 [Order July 31, 1985]; *Matter of Logiudice v. Southold Town Bd. of Trustees*, 50 AD3d 800 [2d Dept 2008]; *Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead*, 301 AD2d 530 [2d Dept 2003]; *Matter of Cappelli Assoc. v. Meehan*, 247 AD2d 381 [2d Dept 1998]; *Matter of Wade v Kujawski*, 167 AD2d 409 [2d Dept 1990]). If, however, the denial of a permit application is based on SEQRA, all SEQRA requirements must be completed. Any remaining SEQRA steps do not need to be completed when the denial of a permit application is on based on procedural grounds, as is this case here, or permit issuance standards. Moreover, this principle can only be applied when there is a final determination regarding a permit application. Staff must continue to abide by applicable procedural and SEQRA rules when processing permit applications, including commencing SEQRA reviews as appropriate.

⁸ Issued on August 8, 1991, and revised on March 5, 1993, available at <https://dec.ny.gov/regulatory/guidance-and-policy-documents/dee-16-record-of-compliance-enforcement-policy> (last visited Aug. 27, 2025).

⁹ See also 9 N.Y.Prac., Environmental Law and Regulation in New York § 4:3 (2d ed. Aug. 2025 Update); 1 N.Y. Zoning Law & Prac. § 11:10 (5th ed. Dec. 2024 Update); 2 N.Y. Zoning Law & Prac. § 36:37 (5th ed. Dec. 2024 Update).

C. Disadvantaged Communities

The Tuscarora Nation takes exception to ALJ O'Connell's recommendation that the Environmental Justice Siting Law (EJ Siting Law) (2022 N.Y. Sess. Law Ch. 840; 2023 N.Y. Sess. Law Ch. 49) does not apply to this proceeding and the Environmental Permit Applications at issue (Tuscarora Nation Br. on Exceptions at 6-7). Ms. Witryol also addressed the topic of disadvantaged communities (Witryol Br. Opposing Exceptions at 52). I acknowledge the importance of concerns about environmental justice and potential impacts to disadvantaged communities. I also acknowledge and take official notice that the Tuscarora Nation's treaty-protected territory and the United States Census tract covering Ransomville in the Town of Porter are disadvantaged communities.¹⁰

However, the application of the specific procedures and other requirements of the EJ Siting Law and the Climate Leadership and Community Protection Act (CLCPA) Section 7(3) (2019 N.Y. Sess. Law Ch. 106) to this proceeding or to the Environmental Permit Applications at issue would be inappropriate. ALJ O'Connell correctly outlined the applicability of the EJ Siting Law, CLCPA Section 7(3), and implementing guidance and regulations to the Environmental Permit Applications at issue and to this proceeding in his HR/RD (HR/RD, 2025 WL 1427117, at *173-75). Importantly, Department staff concurs with ALJ O'Connell's interpretation and application of the EJ Siting Law and CLCPA Section 7(3) (DEC staff Br. Opposing Exceptions at 11-12).

Additionally, the applicability of and compliance with the EJ Siting Law and CLCPA Section 7(3) were not identified as issues for adjudication, and the evidentiary record was not developed regarding environmental justice or disadvantaged communities. In the event this record is reopened on other grounds or there is a new record opened regarding the Facility, the Department will apply the EJ Siting Law and CLCPA Section 7 to such future applications as required by law.

D. Municipalities Appeal Regarding Exclusion of Offer of Proof Regarding Air Quality

In its brief on exceptions, the Municipalities attempt to appeal the preclusion of portions of Dr. Sahu's rebuttal testimony (Municipalities Br. on Exceptions at 2). However, these exceptions, appeals, and issues raised by the Municipalities have already been substantively addressed and represent an effort to essentially reargue what had been decided before in this proceeding as part of previous appeals.

On April 22, 2024, the Municipalities requested permission to appeal ALJ O'Connell's April 15, 2024 ruling striking portions of Dr. Sahu's rebuttal testimony and associated exhibits from the record (April 2024 Ruling). In response to that request to appeal, on July 1, 2024, I issued a ruling that upheld the April 2024 Ruling and addressed the merits of the Municipalities' appeal.¹¹ I hereby incorporate by reference my July 1, 2024 ruling in this regard in this Decision.

¹⁰ N.Y. Dep't of Env't Conservation, Disadvantaged Communities Criteria Maps (Version 1.0, 2023), available at <https://climate.ny.gov/resources/disadvantaged-communities-criteria> (last visited Aug. 27, 2025).

¹¹ Ms. Witryol also requested permission to appeal ALJ O'Connell's April 15, 2024 Ruling, which I addressed in my July 1, 2024 ruling as well.

Pursuant to the law of the case doctrine, the relitigation of issues that have already been fully developed and fairly decided in this proceeding will not be authorized. The law of the case doctrine is a legal principle that requires a tribunal to follow its own prior decisions within an action and originates as “a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided” (*People v Evans*, 94 NY2d 499, 502-05 [N.Y. 2000]). The law of the case doctrine has been described as “intra-action issue preclusion” (Siegel, N.Y. Prac. § 448 [6th ed.]). While this doctrine has generally been applied in the judicial context, those same policy reasons are equally applicable in this forum and have been previously applied in Departmental proceedings (*see e.g., Matter of Pasquale Izzo et al.*, 2006 WL 853228, at *3 [ALJ Ruling Mar. 28, 2006]). Because my July 1, 2024 ruling directly addressed these issues and made final pronouncements on the merits, I will not afford the Municipalities a second opportunity to be heard on issues that have been previously litigated and adjudged in this proceeding.

E. Weighing Petitions for Party Status

The Tuscarora Nation asserted that the cultural resources information presented in its petition for party status are appropriate sources of evidence in this proceeding pursuant to 6 NYCRR 624.12(b) (Tuscarora Nation Br. Opposing Exceptions at 3-5). While the information regarding cultural resources in the Tuscarora Nation’s petition for party status pertains to the application for a Siting Certificate before the Facility Siting Board, the interpretation and application of 6 NYCRR Part 624 is solely the responsibility of the Department. Therefore, it is appropriate for me to address the role of information presented in petitions for party status in permit hearings conducted by the Department pursuant to Part 624.

While petitions for party status are necessarily part of the permit hearing record pursuant to 6 NYCRR 624.12(b), as unsworn statements such petitions do not constitute evidence. In the event parties would like information which was provided in a petition for party status entered or otherwise moved into evidence, a sponsoring witness for such information is required (*e.g.*, July 8, 2022 Tr. p. 30 ll. 6-18). Information in petitions for party status may also be utilized in other contexts, such as a basis for an ALJ to inquire further of the parties and potential parties at the issues conference. In fact, the Part 624 hearing regulations recognize that information in petitions for party status is not evidence. For example, pursuant to 6 NYCRR 624.5(b), a timely petition for full party status must include a description of the nature of the evidence the petitioner expects to present. Indeed, ALJ O’Connell acknowledged this basic principle by denying motions to have a petition for party status, or a portion of a petition for party status, moved into the evidentiary record without a sponsoring witness (*e.g.*, Oct. 16, 2023 Tr. pp. 93-94).

Additionally, it bears reminding that as an amicus party to the proceeding, the Tuscarora Nation cannot offer evidence into the permit hearing record in any event (6 NYCRR 624.1[e][5] [definition of amicus status]). Rather, the Tuscarora Nation is limited by applicable regulation to relying on the established evidentiary record to support its legal and policy arguments in written briefing (*see* 6 NYCRR 624.5[e][2]; *see also e.g., Matter of Crossroads Ventures, LLC*, 2005 WL 2178473, at *15 [ALJ Ruling Sept. 7, 2005]; *Matter of Saratoga County*, 1995 WL 1780808, at *46 [ALJ Ruling Aug. 1, 1995]).

III. Conclusion

ALJ O'Connell's April 16, 2025 Hearing Report and Recommended Decision, to the extent consistent with this Decision, is hereby adopted. Except as granted herein, all exceptions to the ALJ's Hearing Report and Recommended Decision are overruled. To the extent that any other issues have been raised that are subject to the Department's jurisdiction, these have been considered and are found to be lacking in merit, are dismissed, or otherwise rendered moot.

Based on the foregoing, CWM's Environmental Permit Applications to the Department are denied without prejudice. Specifically, CWM's SPDES permit modification application, WQC application, FWW permit application, ASF permit modification application, and RCRA TSDf permit modification application are denied without prejudice. CWM is directed to consult with Department staff on the proper next steps, if any, regarding any existing permits, including the SPDES, ASF, and TSDf permits, in order to continue current operations at the Facility.

For the New York State Department
of Environmental Conservation

By:


Randall Young
Regional Director, NYSDEC Region 6

Dated: October 2, 2025
Watertown, New York

TO: Applicant

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