

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

CWM Chemical Services, LLC,

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

DEC Permit Application Nos.:      9-2934-00022/00225  
   9-2934-00022/00231  
   9-2934-00022/00232  
   9-2934-00022/00249

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NEW YORK STATE FACILITY SITING BOARD

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In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR Part 361 (Siting of Industrial Hazardous Waste Facilities) by

CWM Chemical Services, LLC,

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

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INTERIM DECISION OF THE FACILITY SITING BOARD

August 11, 2016

## Introduction

CWM Chemical Services, LLC (CWM or applicant) submitted applications for the siting, construction and operation of a new hazardous waste and non-hazardous industrial waste landfill, referred to as residuals management unit 2 (RMU-2), located at CWM's Model City facility at 1550 Balmer Road on property in the Towns of Porter and Lewiston, Niagara County. The proposed landfill would occupy about 43.5 acres of the 710 acres at the Model City facility. The construction of the landfill would also require deconstruction and relocation of several features at the facility.

Applicant applied to the New York State Department of Environmental Conservation (Department or DEC) for a State Facility Permit (air), Hazardous Waste Management Facility Permit, Freshwater Wetlands Permit, and State Pollutant Discharge Elimination System (SPDES) Permit pursuant to 6 NYCRR parts 201-5, 373, 663 and 750, respectively; and a Water Quality Certification pursuant to Section 401 of the federal Clean Water Act (CWA) and 6 NYCRR 608.9. Applicant also applied for a Certificate of Environmental Safety and Public Necessity (Siting Certificate) pursuant to 6 NYCRR Part 361.

Under the State Environmental Quality Review Act (ECL article 8, [SEQRA]), the proposed project is classified as a Type I action. The Department is serving as lead agency, and a draft environmental impact statement (DEIS) has been prepared.

Department staff referred the matter to the Department's Office of Hearings and Mediation Services (OHMS) on May 19, 2014.<sup>1</sup> The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. Consistent with ECL 27-1105(3)(d), Governor Cuomo

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<sup>1</sup> At the time of the issues conference and the Issues Ruling, the Air State Facility Permit application and the SPDES application have not been referred to the Office of Hearings and Mediation Services.

constituted the Facility Siting Board (Siting Board) to consider CWM's application for the Siting Certificate (see also 6 NYCRR 361.4[a]).<sup>2</sup>

In addition to applicant and Department staff, the following municipalities, entities and individuals submitted petitions for full party status: Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities); Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau); and Amy Witryol (collectively, the petitioners). In addition, a petition for amicus status was filed by the Honorable Rick Dykstra, Member of Parliament, St. Catherines, Ontario, Canada.

ALJ O'Connell conducted the issues conference in Youngstown, New York on April 28, 29 and 30, 2015. All of the Siting Board members attended the issues conference.

### Ruling

In his December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (Ruling), ALJ O'Connell granted full party status to the Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol (see Ruling at 151-152). Because Mr. Dykstra was not re-elected to his seat in Parliament and failed to advise the ALJ if he wished to continue participating in the proceeding, the ALJ considered his petition for amicus status withdrawn (see Ruling at 151).

The ALJ identified several issues for adjudication including: transportation (limited to noise impacts); groundwater (the adequacy of geological and hydrogeological characterization of

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<sup>2</sup> The Siting Board is "composed of the commissioners of transportation, environmental conservation, health and commerce, the secretary of state and three ad hoc members appointed by the governor, two of whom must be residents of the county in which the facility is primarily proposed to be located." (See ECL 27-1105[3][d].)

the site, the ability to monitor RMU-2, and factual issues related to geologic contours, hydraulic conductivity, direction and rate of flow of groundwater, types of contaminants and where the contaminants are present); CWM's record of compliance (to be produced as directed in the ruling and distributed to the parties, but no testimony to be heard); impacts on property values, property tax receipts and second home purchases; impacts on economic development (attracting other projects); and impacts on marketability of agricultural products.

The Ruling also preserved several legal arguments for the parties to offer at the conclusion of the adjudicatory hearing, including:

- whether administrative precedents interpreting the meaning of the term "endanger" should be applied to this matter;<sup>3</sup>
- whether CWM has met its burden to demonstrate that there is no endangerment to residential areas and contiguous populations;<sup>4</sup>
- whether the Niagara Communities Comprehensive Plan 2030 is relevant to the municipal effect siting criterion, and if so, is the proposal for RMU-2 consistent with the County Plan;<sup>5</sup>
- whether the proposal for RMU-2 is consistent with the Town of Porter Comprehensive Plan;<sup>6</sup>
- whether the proposal is consistent with the 2010 Siting Plan regarding equitable geographic distribution, the presence of non-operating hazardous waste landfills, and CWM's record of compliance;<sup>7</sup> and
- 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.<sup>8</sup>

Pursuant to 6 NYCRR § 361.4(e), the Siting Board, by its Chairman, and the ALJ executed a memorandum of agreement dated July 9, 2014, which outlined the respective roles of the ALJ and the Siting Board in the conduct of the issues conference. Generally, the relationship between the ALJ and the Siting Board was stated to be the same as that between the ALJ and the

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<sup>3</sup> See Ruling at 39.

<sup>4</sup> Id.

<sup>5</sup> Id. at 51.

<sup>6</sup> Id.

<sup>7</sup> Id. at 60-61, 73-76, and 79-81.

<sup>8</sup> See Memorandum of March 25, 2016 Telephone Conference Call at 2.

DEC Commissioner under 6 NYCRR Part 624. The memorandum of agreement notes, however, that certain issues and matters addressed during the proceeding are primarily certificate-related and within the jurisdiction of the Siting Board; some are primarily permit-related and within the jurisdiction of the DEC Commissioner; and some matters are appropriate for referral to both the DEC Commissioner and the Siting Board. In furtherance of the memorandum of agreement, the ALJ attached Appendix IR-C to the Ruling outlining the proposed issues and to whom an appeal should be directed.

Appeals were taken from the Ruling by Department staff; the Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol. Replies to the appeals were filed by applicant; Department staff; the Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol.

The Siting Board adopts the ALJ's Ruling with respect to the parties' status and determination of those issues within the Siting Board's jurisdiction, subject to the Siting Board's comments below.

### **DISCUSSION**

On these appeals, the Siting Board must determine whether the ALJ's Ruling properly applied the standard for adjudicable issues as set forth in 6 NYCRR 624.4(c). The contested issues in this proceeding are not the result of a dispute between applicant and Department staff (see 6 NYCRR 624.4[c][1][i] and [ii]), but are proposed by petitioners. Therefore, the petitioners' proposed issues must be "both substantive and significant" to be adjudicable (see 6 NYCRR 624.4[c][1][iii]).

The Siting Board will consider the various impacts of the proposed RMU-2 that are evaluated in the siting criteria regardless of whether those impacts are disputed issues or adjudicated. (See Ruling at 39.) In addition, the lack of a disputed issue or lack of adjudication

of an issue does not lead to the conclusion that the applicant has met its burden of proof related to each of the siting criteria. The same holds true when the Siting Board is considering potential impacts and applicant's burden of proof for the remaining determinations that must be made by the Siting Board pursuant ECL 27-1105(3)(f) and 6 NYCRR 361.7(c)(4).

The Ruling discusses the standards for adjudicable issues, and those regulatory requirements will not be discussed further here. (See Ruling at 26-27.) The Siting Board, however, finds precedent to be instructive when considering offers of persuasion related to proposed issues.

“Assertions by potential parties cannot simply be conclusory or speculative but must have a factual or scientific foundation (see Matter of Bonded Concrete, Interim Decision of the Commissioner, June 4, 1990, at 2). The petition for party status must provide specifics on those elements of the application or proposal that are being challenged or questioned. Mere speculation is insufficient to establish that an issue is substantive and significant. Conducting an adjudicatory hearing where offers of proof, at best, raise [potential] uncertainties or where such a hearing would dissolve into an academic debate is not the intent of the Department's hearing process (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [citing Matter of AKZO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]).” (Matter of Crossroads Ventures, LLC, Interim Decision of the Commissioner, December 29, 2006, at 7-8 [internal quotations omitted].)

“Furthermore, it is not the purpose of post-issues conference briefing to allow a party to supplement, expand upon or otherwise remedy a deficient petition for party status.” (Id. at 8.)

Where the Siting Board determines that the substantive and significant standard has not been properly applied, the Siting Board conducts an independent review. With respect to legal

and policy issues, the Siting Board's review is de novo, and provides the opportunity to offer guidance "to optimize the [siting] process and focus the hearing (Matter of Saratoga County Landfill, Second Interim Decision of the Commissioner, October 3, 1995, at 3)." (Matter of Crossroads Ventures, LLC, at 10-11 [internal quotations omitted].)

#### Siting Criteria Pursuant to 6 NYCRR 361.7

Each of the specific siting criteria that must be considered by the Siting Board describes three possible options to score each of the criteria, from most favorable to least favorable. The applicant has the burden of proof to demonstrate that the site conforms to the descriptions in the most favorable or less favorable categories. The burden of proof standard applied in this proceeding is preponderance of the evidence. If the applicant fails to meet its burden, the Siting Board must find that, without any evidence on the record to the contrary, the site falls within the least favorable category. (See Matter of NYSDEC Division of Water, Decision of the Siting Board, 1982 WL 178103, \*16, 1982 NY Lexis 42, \*48 [April 22, 1982], vacated on other grounds, sub nom., Washington County Cease, Inc. v. Persico, 120 Misc2d 207 [Sup Ct, Washington County 1983], affd 99 AD2d 321 [3d Dept 1984]), affd 64 NY2d 923 [1985]).

#### SEQRA and the Joint Hearing Process

In this proceeding, a number of proposed issues raised by intervenors are comments on the DEIS or relate to matters pertaining to the sufficiency of the DEIS. In this joint proceeding, the Department serves as lead agency and required the preparation of the DEIS. The determination of whether to adjudicate issues relating to the sufficiency of a draft environmental impact statement or the ability of the Department to make SEQRA findings is made in accordance with the same standards that apply to the identification of issues generally – that the

issue is both substantive and significant (see 6 NYCRR 624.4[c][6][i][b]). SEQRA, however, does not require an adjudicatory hearing to be convened to address comments on a DEIS. (See Ruling at 133; see also Matter of Crossroads Ventures, LLC, Decision and Ruling of the Commissioner, July 10, 2015 at 15.)

The Department's review under SEQRA requires evaluation of the total project impact to determine whether adverse environmental effects will be minimized or avoided taking into account social, economic and other relevant considerations. (See ECL 8-0109[8].) The Siting Board is an involved agency under SEQRA, and its SEQR review applies those considerations to the siting criteria and to the acceptability of a site for the proposed type of waste management activity. As a result, at the time the Siting Board issues a final decision on the application for a Siting Certificate, the Siting Board will issue a Findings Statement in support of its decision, pursuant to ECL 8-0109(8) and 6 NYCRR Part 617.

## **APPEALS**

### Appeal of Department Staff - Geological and Hydrogeological Characterization

Department staff appeals from that portion of the Ruling that joins issues related to the adequacy of the geological and hydrogeological characterization of the site including the ability to monitor RMU-2, and factual issues related to geologic contours, hydraulic conductivity, direction and rate of flow of groundwater. The related issue of groundwater contamination and transport is also joined for adjudication. (See Ruling at 99-100.)

Department staff's appeal argues there is more than enough geological and hydrogeological characterization of the site given the decades of data, and hundreds of wells and monitoring wells that are distributed throughout the Model City facility. Staff states in its appeal



that it is only appealing these issues as they relate to the part 373 hazardous waste permit and recognizes that the issue may still be heard by the Siting Board as part of the Siting Certificate application (see Staff Appeal at 5, fn 1).

The Ruling concluded that the resolution of the geological and hydrogeological issues was necessary to determine whether the application complied with “the following regulatory requirements:

1. “Whether the pending application to modify the 2013 site-wide Part 373 renewal permit includes adequate information to protect ground water pursuant to 6 NYCRR 373-1.5(a)(3);
2. “Whether CWM has provided an adequate ground water monitoring and response program to respond to any release of hazardous constituents from the proposed RMU-2 landfill given the ongoing implementation of the corrective action program associated with legacy contamination at the site of the Model City facility pursuant to 6 NYCRR 373-2.6; and
3. “Whether the soil underlying the footprint of the proposed RMU-2 landfill has a hydraulic conductivity of  $1 \times 10^{-5}$  cm/s or less, as required by 6 NYCRR 373-2.14(b)(1).” (Ruling at 100.)

Moreover, the ALJ noted that the “Siting Board may rely on the factual record that will be developed about these three topics to determine whether CWM’s proposal would conform to the siting criterion at 6 NYCRR 361.7(b)(7) concerning ground water considerations.” (Id.)

CWM supports staff’s appeal of this issue and argues the Municipalities’ proffer was not sufficient to raise a significant and substantive issue with regard to the regulatory requirements related to the geology, hydrogeology, and groundwater flow at the Site. (See CWM Reply at 26.)

The Municipalities reply and oppose Department staff’s appeal. The Municipalities argue that the Ruling recognized more data is needed regarding the geological and

hydrogeological characteristics of the site. Additionally, the Municipalities point out that CWM is currently undergoing its second post-petition groundwater study “to address the Municipalities’ concerns with the extent and permeability of deep sand and gravel deposits in that area.” (See Municipalities Reply at 2-3.) Therefore, it would be appropriate to consider the new data in the context of the adjudicatory proceeding. (Id. at 3.)

The Municipalities also argue that staff’s reliance on the data obtained from the hundreds of monitoring wells is misplaced due to the depth of the wells or their locations. The Municipalities claim staff misrepresents the actual data collected over the years. (Id. at 10-11.) The Municipalities argue that the available data would be supplemented through the hearing process. (Id. at 13-16.) Lastly, the Municipalities contend that corrective action at the site has not adequately addressed contamination and there is no indication from staff that contaminant releases from RMU-2 would be distinguished from prior contamination in the impacted areas. (Id. at 17.)

Ms. Witryol’s reply opposes Department staff’s appeal because off-site and on-site contamination are not adequately monitored and reported, DEC does not independently monitor groundwater at the site, DEC failed to provide referenced documents, and the rate of groundwater flow has not been adequately addressed. (See Witryol Reply at 3-5.)

The Siting Board acknowledges that the resolution of staff’s appeal of these part 373 permit issues is the jurisdiction of the Commissioner. The Siting Board, however, does not agree with Department staff’s apparent position that the part 373 and part 361 requirements can be divorced from one another in this instance. If Department staff were to prevail on its appeal, the factual record referenced by the ALJ would not be developed, and the Siting Board would be left to determine the ground water considerations based on the application materials, post-petition

groundwater studies and the draft part 373 permit without the benefit of examination and cross-examination of witnesses. The Siting Board recommends that the Commissioner deny Department staff's appeal.

#### Appeal of the Municipalities – Radiological Contamination and the Project-Specific SEMMP

The Municipalities argue, as a proposed issue, “[l]egacy surface and subsurface radiological contamination in the areas to be excavated for the RMU-2 project has not been adequately characterized.” (See Municipalities Petition at 42.) Therefore, the Municipalities argue that the major excavation proposed for RMU-2 threatens to disperse radiological contaminants into the air and pose a health risk to workers and local receptors. The Municipalities argue that the RMU-2 proposal will depart from the safety standard established for small excavations. As a result, the RMU-2 project-specific soil excavation monitoring and management plan (SEMMP) is unsafe as it would not adequately characterize the site before excavation or address remediation of chemical and radiological contamination of the site. The Municipalities contend that CWM must perform additional surface and subsurface surveys prior to excavation in order to characterize the site adequately. (See Municipalities Petition at 58-60). The Municipalities also argue that Fac Pond 8 was not properly remediated (see Municipalities Petition at 65-72) and Fac Pond 3 has not been properly investigated (see Municipalities Petition at 73).

The Municipalities offered Dr. Marvin Resnikoff to testify regarding the radiological history of the site and the radiological surveys performed over the years. Dr. Resnikoff would testify regarding the methodology used in the radiological surveys and the reliability of the resulting reports.

The ALJ concluded that no further radiological investigative surveys would be required and that the Municipalities' argument that the May 2015 SEMMP would not protect public health and the environment was without merit. (Ruling at 135.) The ALJ noted that the SEMMP had been reviewed and accepted by DEC and New York State Department of Health (DOH). The Ruling concludes that the Municipalities' offer of proof was insufficient to lead to further inquiry; therefore, the proposed issue was not substantive. (Ruling at 137.)

The Municipalities appeal from the Ruling's conclusion that further radiological surveys are not needed and that the Municipalities did not raise a substantive issue in relation to the project-specific SEMMP. In support of their appeal, the Municipalities argue:

- a. The history of the site operations and radiological investigations demonstrates a potential for widespread contamination at the site, but rather than considering petitioner's offer of proof, the Ruling relied on an inaccurate and incomplete account of the radiological status of the site and Department staff's misapprehension of the status of Fac Pond 8;<sup>9</sup>
- b. The deficiencies and limited scope of CWM's radiological investigations are overlooked in the Ruling, and lead to the issue of whether the surface areas will be surveyed at all prior to excavation as some areas have never been surveyed in the first instance; and given the paucity of information obtained from CWM's subsurface investigation; the petitioners question whether excavation can be done safely;<sup>10</sup>
- c. The SEMMP is unsafe as the areas to be excavated will be evaluated for radiological contamination after the soils have been excavated and spread out in another area rather than before the soils are excavated; and the SEMMP does not address the municipalities concerns regarding exposure to airborne radioactivity during excavation;<sup>11</sup> and
- d. Contaminated soils would be illegally stockpiled on the site.<sup>12</sup>

In short, the Municipalities argue, "[t]he Department should not allow mass excavation

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<sup>9</sup> See Municipalities' Appeal at 13-19.

<sup>10</sup> Id. at 19-26.

<sup>11</sup> Id. at 26-29.

<sup>12</sup> Id. at 29-30.

and movement of soils without conditioning such excavations on a prior defensible investigation determining in advance where buried radioactive constituents are located.” (See Municipalities’ Appeal at 32.)

Department staff’s reply argues that the Municipalities’ appeal of the proposed issue regarding the need for additional radiological surveys fails to rebut the ALJ’s analysis and fails to demonstrate that the ALJ misapplied the substantive and significant standard. Staff states the appeal merely reargues the elements of the petition and post Issues Conference submissions, all of which were considered by the ALJ. (See Staff Reply at 8-9.)

Regarding the Municipalities’ appeal of the project-specific SEMMP, Department staff notes that the Ruling found the petitioner’s respective offers of proof were rebutted by the record and the acceptance of the SEMMP by DEC and DOH. (See Staff Reply at 9-10.) Staff argues that the appeals do not advance an argument to rebut the ALJ’s analysis or demonstrate the ALJ misapplied the substantive and significant standard. (Id. at 10.) For the same reasons, Staff argues the appeals of the Ruling regarding Fac Ponds 3 and 8 should also be denied. (Id. at 11-12.)

Ms. Witryol concurs with the Municipalities and argues it would be better to deny the certificate and have the Army Corp of Engineers oversee remediation of the radiological contamination at the site. (See Witryol Reply at 6.)

CWM argues that the record fully supports the ALJ’s Ruling on these issues, and the Municipalities and Ms. Witryol failed to meet their burden of persuasion for their proposed issues. (See CWM Reply at 12-18.)

In this proceeding, it has already been demonstrated that the record regarding the

hydrogeological characteristics of the site needs further development. For the reasons that follow, the Siting Board finds the record needs further development regarding radiological contamination and the proposed project-specific SEMMP. The record details the history of radiological contamination of the site, the remediation of some of the Vicinity Properties (VPs), the lack of remediation of other VPs and the movement of soils around the site. Notably, DOH stated that the 2005-2008 radiological survey conducted by CWM was not designed as a characterization, remedial action or final status survey and was not intended to quantify contamination. Instead, the survey served as an indicator of the present state of the property. DOH noted that the SEMMPs must “ensure control and prevent migration of historic chemical and radiological contamination during soil excavation or soil disturbance activities.” (See Correspondence from DOH to Niagara County DOH dated July 16, 2010 attached to Correspondence from Gary A. Abraham to ALJ O’Connell, dated July 3, 2015.)

The project-specific SEMMP (revised May 2015) allows clearing and grubbing activities to be conducted without first performing additional radiological surveys. After clearing and grubbing activities are completed, a surface scan walkover would be performed on those areas requiring further excavation, but only on those areas that have not been scanned previously. (See Revised May 2015 project-specific SEMMP at 3.) After that limited walkover scan, soils will be excavated and moved until final grade is reached, and then a final walkover survey will be performed so long as access to the excavated area can be obtained safely. (See Revised May 2015 project-specific SEMMP at 4.) The excavated soil would be stockpiled and graded in its new location to be scanned by radiological monitors. (See Revised May 2015 project-specific SEMMP at 4.) This means the majority of the 266,947 cubic yards of soil excavated to reach the design subgrade for RMU-2 and Fac Pond 5 (see DEIS at 2.1) will be excavated, moved,

stockpiled and spread out in six-inch lifts before radiological scanning of the soil occurs. The average depth of excavation for RMU-2 will be 12 feet. (See DEIS at 2.6.5.)

DEC and DOH commented on the proposed SEMMP and required changes to the SEMMP before approving it. These comments are not part of this record so it is unclear to the Siting Board whether the review, comments and approvals adequately addressed the mitigation of potential impacts. Moreover, rather than controlling and preventing migration of historic chemical and radiological contamination, the proposed project-specific SEMMP increases the likelihood of such migration and elevates potential risks and impacts on human health and the environment. To mitigate these potential impacts control measures and monitoring are proposed. (See Revised May 2015 project-specific SEMMP at 8 and 10.)

In DEC staff's response to the Municipalities' petition, staff based its opposition to the petition on the radiological history of the site and the various surveys and removals conducted over the years as well as staff's experience in radiological clean ups and the successful remediation of sites in the FUSRAP program in Western New York.<sup>13</sup> (See DEC Staff's Response to Municipalities Petition at A-45 – A-46.) The record, however, does not demonstrate that the FUSRAP projects were conducted in the manner proposed here or if those projects were on a comparable scale. FUSRAP sites typically follow the steps mandated by CERCLA, requiring remedial investigation and feasibility studies, as well as the development of proposed plans subject to public comment before a record of decision is issued. Here DOH has stated that the surveys questioned by the Municipalities were not conducted for remedial purposes.

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<sup>13</sup> Formerly Utilized Sites Remedial Action Program (FUSRAP) was "initiated in 1974 to identify, investigate and clean up or control sites throughout the United States that became contaminated as a result of the Nation's early atomic energy program during the 1940s, 1950s and 1960s." (See <http://www.usace.army.mil/Missions/Environmental/FUSRAP.aspx> FAQs.)

Department staff's comparison of the site of the proposed RMU-2, Fac Pond 5 and supporting structures, where the effectiveness of prior remedial activities performed by DOE have been called into question and no further remedial investigation has occurred, to a FUSRAP site where a remedial investigation was performed prior to remediation, is unconvincing and does not address the issues raised by the Municipalities.

The Municipalities noted that excavation itself appears to be the “principal method of detecting potentially hazardous materials in the soils.” (See Municipalities Petition at 64.) DEC Staff responded, in part, “Relying on monitoring during excavation is an accepted practice for determining the eventual full extent of contamination.” (See DEC Staff's Response to Municipalities Petition at A-45 – A-46.) CWM, however, does not propose to monitor “during excavation.” As the project-specific SEMMP demonstrates, monitoring will only occur after the soil has been excavated, stockpiled and graded. The protocol that was approved for the Generic Small Project Soil Excavation Monitoring and Management Plan requires the soils to be scanned in six-inch lifts for radiological contamination. The scan is performed before each lift is excavated. The Siting Board concludes that the monitoring and excavation procedures required by the Generic Small Project Soil Excavation Monitoring and Management Plan constitute “monitoring during excavation.”

The Siting Board disagrees with the ALJ's conclusion that the Municipalities' arguments are without merit and that the proposed issue was not substantive. The ALJ relied, in part, on the review and acceptance of the SEMMP by DEC and DOH. As noted above, the record does not include the substance of that review and approval. Moreover, DOH's approval of the project-specific SEMMP contradicts DOH's response to a question from the Siting Board. The Siting Board asked (as rephrased by DOH), “How would the proposed construction activities affect any



future remediation of the radioactive materials at the CWM site?” DOH responded, “The Orders do not require additional remediation of the site to enable industrial or commercial use.

However, additional radiation surveys would need to be performed before any soil is displaced or excavated. DEC and DOH would evaluate those surveys to determine if additional remediation is appropriate.” (See letter from Justin D. Pfeiffer, Esq., Acting Director, Department of Health, Bureau of House Counsel to ALJ O’Connell, dated October 5, 2015, “Supplemental Information” at 2 [emphasis added].)

While the project-specific SEMMP falls squarely into the part 373 permit requirements, the Siting Board must determine whether the siting of the proposed RMU-2 and associated structures on a contaminated parcel of land endangers residential areas and contiguous populations and whether it is in the public interest to proceed as proposed with the project-specific SEMMP.<sup>14</sup> In addition, the Siting Board’s review of the siting criteria and the DEIS are implicated by the project-specific SEMMP.

The Siting Board concludes that on this record the Municipalities have raised a substantive and significant issue regarding the mass excavation and movement of soils at this site without first conducting the appropriate radiological and chemical surveys.

Accordingly, the Siting Board is compelled to inquire further to determine whether more than the limited walk over surveys proposed by the applicant in the project-specific SEMMP need to be performed. The Municipalities have taken the position that radiological monitoring for large excavations should be the same as required for small excavation projects, monitoring

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<sup>14</sup> The Siting Board notes that there is no guidance in the law and regulations or the Hazardous Waste Facility Siting Plan regarding the siting of a hazardous waste management facility on a contaminated site. Previous Siting Board decisions regarding the Model City facility have been silent on the existing contamination at the site.

before the excavation of each six-inch lift of soil. CWM has taken a position that this is not possible due to the size of the excavation and because the heavy equipment is not engineered to maintain a six inch removal cut of soil, as well as safety considerations. However, CWM has not demonstrated to the satisfaction of the Siting Board why radiological scanning in six-inch lifts is physically or economically impracticable.

Accordingly, the Siting Board finds the sufficiency of the radiological surveys and the adequacy of the SEMMP are issues that could lead to the denial or conditioning of the Siting Certificate and are appropriate for adjudication.

Regarding any radiological contamination and remediation of Fac Pond 8, the ALJ ruled that the 2013 site-wide Part 373 permit specifies how Fac Pond 8 will be closed. Therefore, the ALJ concluded that the issue is beyond the scope of this proceeding. The Siting Board agrees. In addition, the ALJ ruled that the Municipalities did not make an offer of proof related to Fac Pond 3. The Siting Board concludes that any excavation of Fac Pond 3 would be covered by the project-specific SEMMP, which has now been joined for adjudication.

#### Appeal of RRG, L-PCSD and Farm Bureau

RRG, L-PCSD and the Farm Bureau appeal from the ALJ's ruling on several issues including risk to residential areas and contiguous populations; changes in student enrollment; record of compliance; preferred statewide hazardous waste management practices hierarchy; and potential impacts on the local agricultural community. After considering the appeals of RRG, L-PCSD and Farm Bureau within the Siting Board's jurisdiction, the Siting Board agrees with the conclusions of the ALJ that those issues are not substantive and significant. Accordingly, the

appeals of RRG, L-PCSD and Farm Bureau are denied, and the record will not be further developed on those issues.

#### Appeal of Amy Witryol

Ms. Witryol appeals from the ALJ's ruling on several issues including transportation; municipal effects – public revenue, expense tradeoffs; record of compliance; public participation; risk to residential areas and contiguous populations; the Niagara Falls Storage Site; worst-case scenario and contingency; legacy contamination and project-specific excavations; surface and storm water; air impacts; preservation of endangered, threatened and indigenous species; and consistency with the siting plan. After considering Ms. Witryol's appeals within the Siting Board's jurisdiction, the Siting Board agrees with the conclusions of the ALJ that those issues are not substantive and significant. Accordingly, Ms. Witryol's appeals are denied, and the record will not be further developed on those issues.

### **CONCLUSION**

The Municipalities appeal regarding the radiological contamination and project-specific SEMMP is granted as discussed above. The Siting Board recommends that the Commissioner deny Department Staff's appeal regarding the geological and hydrogeological characterization of the site.

The remaining appeals within the Siting Board's jurisdiction are denied and the record will not be further developed on those issues. The Siting Board reiterates that an issue does not necessarily need to be adjudicated in order for the issue to be considered by the Board.

The Siting Board also concurs with the ALJ's acknowledgment that the intervenors may work together on issues that have been joined for adjudication. As part of that cooperative effort, an expert witness offered by a party in support of an issue found not to be adjudicable, may testify in support of another party's issue, so long as the testimony is relevant and the party does not attempt by that testimony to expand the scope of the issue.

Facility Siting Board

\_\_\_\_\_/s/  
PAUL D'AMATO, Designee-Chair for  
BASIL SEGGOS, Commissioner  
NYS Department of Environmental  
Conservation

\_\_\_\_\_/s/  
CHRISTOPHER BAUER, Designee for  
ROSSANNA ROSADO, Secretary of State  
NYS Department of State

\_\_\_\_\_/s/  
MATTHEW FORCUCCI, Designee for  
DR. HOWARD A. ZUCKER, Commissioner  
NYS Department of Health

\_\_\_\_\_/s/  
JOHN F. BENOIT, Member

\_\_\_\_\_/s/  
DARRELL KAMINSKI, P.E., Designee for  
MATTHEW J. DRISCOLL, Commissioner  
NYS Department of Transportation

\_\_\_\_\_/s/  
LEE SIMONSON, Member

\_\_\_\_\_/s/  
LYNN MARINELLI, Designee for  
HOWARD ZEMSKY, Commissioner  
NYS Department of Economic Development

\_\_\_\_\_/s/  
A. SCOTT WEBER, Ph.D., Member