STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of **CHEMUNG COUNTY** for modification of the Part 360 permit for its municipal solid waste landfill on County Route 60 in Elmira, Town of Chemung.

(Application No. 8-0728-00004/00013)

MEMORANDUM OF LAW OF NEW ENGLAND WASTE SERVICES OF N.Y., INC. IN SUPPORT OF MOTION FOR EXPEDITED REVIEW AND DISMISSAL AND/OR DENIAL OF THE APPEAL BY RESIDENTS FOR THE PROTECTION OF LOWMAN AND CHEMUNG

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PRELIMINARY STATEMENT

New England Waste Services of N.Y., Inc. ("NEWSNY") respectfully submits this Memorandum of Law and the accompanying October 12, 2010 Affirmation of Thomas S. West ("West Aff.") in support of its request for expedited review and summary dismissal and/or denial of the September 22, 2010 Appeal by RFPLC (the "RFPLC Appeal") of that part of (1) the September 3, 2010 Ruling of Administrative Law Judge, Edward Buhrmaster (the "ALJ"), summarily dismissing the "Marcellus waste issue,"[1] finding it to not be properly part of this proceeding (hereinafter, the "September Ruling"); and (2) the June 3, 2010 Ruling of the ALJ, striking parts of RFPLC's submissions offered on this issue (hereinafter, the "June Ruling").

The RFPLC Appeal raises only one issue – the propriety of disposal of Marcellus shale drilling cuttings in the County Landfill due to the alleged (but wholly unsubstantiated claim) that this waste stream is so radioactive that it should be barred from disposal in Part 360 facilities. In short, RFPLC seeks to inject into this proceeding an issue that has nothing to do with the requested Permit Modification. The Permit Modification application seeks solely a throughput increase, but *not* any alteration in the waste stream that has been, and continues to be, allowed under the current Part 360 permit. Thus, the ALJ got it exactly right when he found that this issue has no place in this Part 624 proceeding. Straightforwardly applying both common sense and well-established standards governing Part 624 proceedings, the ALJ properly summarily dismissed this issue as irrelevant to the underlying proceeding. Additionally, the ALJ acted wholly within the bounds of his discretion when he earlier rejected RFPLC's submissions on this issue that were unauthorized from the outset, irrelevant, or duplicative.

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1 More specifically, the "Marcellus waste issue" refers to RFPLC's contention that Marcellus shale drill cuttings qualify as concentrated or processed NORM and are highly radioactive so as to require disposal in a low-level radioactive waste disposal facility, as opposed to a Part 360 landfill like the Chemung County Landfill (the "County Landfill" or "Landfill").

The Rulings notwithstanding, RFPLC has ample opportunity to air this issue in accord with lawful procedures – namely, pursuant to 6 NYCRR Part 619, Part 621.13, or through participation in the ongoing supplemental environmental review relative to horizontal drilling of shales by high volume hydrofracturing methodologies. What RFPLC may not lawfully do is commandeer and bog down the Part 624 process (and delay the ultimate determination on the permit modification application) to advance its own personal agenda by touting disingenuous, speculative claims that bear not one iota of relevance to the application at hand. Indeed, the ALJ should be applauded for decidedly putting an end to RFPLC's obfuscation and delay tactics. His Rulings should be affirmed in this regard, and the RFPLC Appeal should be summarily dismissed in its entirety on an expedited basis.

Moreover, even if the RFPLC Appeal were to be reviewed on the merits, denial is plainly warranted. RFPLC's disingenuousness, speculation, and lack of competent evidence did not and cannot meet its burden to demonstrate a substantive and significant issue. In any event, there can be no bona fide issue, since radiological monitoring (incorporated as a permit condition) will prevent any improper materials from entering the Landfill. Accordingly, even if the Marcellus waste issue were a proper subject in this Permit Modification proceeding (which it is not), there is nothing to adjudicate, and the RFPLC Appeal must be denied.

ARGUMENT

POINT I

PART 624 PROCEEDINGS: FUNCTION AND STANDARDS

The function of and standards applicable to Part 624 proceedings are well-settled. *See generally,* 6 NYCRR §§ 624.4, 624.5, 624.8; *see also Matter of Consolidated Edison Co. of N.Y., Inc.,* Interim Decision of Commissioner, 2001 WL 651612 (June 4, 2001). In the first instance,

the Issues Conference is intended to serve a "gatekeeper" function. *Matter of Crossroads Ventures, LLC,* Interim Decision of Deputy Commissioner, 2006 WL 3873403, *4 (December 29, 2006). That is, the Issues Conference is meant to *narrow* the issues *pertinent to the application,* resolve what can be resolved without resort to taking testimony, and then adjudicate only those *relevant* matters *bearing on the application* that meet the standards of Part 624.4(c). 6 NYCRR §§ 624.4(b)(2)(ii) & (iii).

Accordingly, a threshold question is whether an issue raised by a petitioner is pertinent to the proposed project (i.e., the underlying application). If it is not, it is not to be heard in the Part 624 proceeding. *See, e.g., Consolidated Edison Co. of N.Y., Inc.,* 2001 WL 651612, *6-*7 (stating that air emissions from facility's boilers were "not part of, and therefore not relevant to" the Applicant's pending air permit application or the related PSL Article X certificate application; therefore finding that the alternative fuel issue proposed by intervenors was not properly in the proceeding; also rejecting environmental justice issue as being limited to PSD permitting program); *see also Consolidated Edison Co. of N.Y., Inc.,* Issues Ruling, 2001 WL 470661, *11.

If the threshold matter of relevancy is met, then the standards of Part 624.4(c) apply. Where, as in this case, Department Staff agrees that the applicant complies with all statutory and regulatory requirements, the burden of persuasion is on the party proposing an issue that the issue is both substantive and significant. *See* 6 NYCRR § 624.4(c)(4). Moreover, "the burden on the intervening party [in such cases] is not a superficial one." *Consolidated Edison Co. of N.Y., Inc.,* 2001 WL 651612, * 2.

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria, such that a reasonable person would require further inquiry.

6 NYCRR § 624.4(c)(2). An issue is significant if it has the potential to result in permit denial, a major modification of the project, or the imposition of significant permit conditions beyond those in the draft permit. 6 NYCRR § 624.4(c)(3).

In determining if an adjudicable issue exists, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments [that the ALJ authorizes]." 6 NYCRR § 624.4(c)(2). Notably, offers of proof by an intervenor may be completely rebutted by reference to application materials, Staff's analysis, the draft permit and the Issues Conference record. *Consolidated Edison Co. of N.Y., Inc.,* 2001 WL 651612, *3. Indeed, in areas of Department Staff's expertise, its evaluation of the applicant's supporting documentation is an important consideration in determining adjudicability. *Matter of Thalle Industries, Inc.,* Decision of Deputy Commissioner, 2004 WL 3089235, *7 (November 3, 2004).

Finally, proposed mitigation (as incorporated into permit conditions) is a vital consideration in determining if adjudication is warranted; where permit conditions are incorporated or adjusted to eliminate the asserted concern, "logically no adjudicable issue can be found." *See Matter of Astoria Energy, LLC,* Decision of Commissioner, 2001 WL 827904, *4 (July 17, 2001); *see also Matter of AKZO Nobel Salt,* Interim Decision of Commissioner, 1996 WL 172632, *7-*8 (January 31, 1996) (noting need to consider relevance of disputed materials to ultimate permit decision in determining adjudicability; stating that proffered reports must be considered in light of proposed draft permit conditions); *accord Matter of Application of Jay Giardina,* Interim Decision of Commissioner, 1990 WL 181271, *2-*3 (September 21, 1990).

POINT II

THE MARCELLUS WASTE ISSUE IS IRRELEVANT TO THE PERMIT MODIFICATION APPLICATION, THUS MANDATING SUMMARY DISMISSAL OF THE RFPLC APPEAL

As fully detailed in the West Affirmation (¶¶ 11-15, 29-34) and as summarized below, the ALJ's September Ruling astutely and properly recognizes that RFPLC's Marcellus waste disposal issue is independent of, and irrelevant to, the Permit Modification application which is the subject of this proceeding. Accordingly, the ALJ's summary dismissal of this issue is proper, and the June and September Rulings must, therefore, be affirmed in this regard. RFPLC's recourse lies in the lawful procedures afforded to it under the Department's regulations (i.e., Part 619 and Part 621.13) and/or participation in the environmental impact review process relative to high-volume hydrofracturing of shales that is currently underway in New York State. West Aff. ¶¶ 17-19, 32, 33.

While RFPLC is free to avail itself of these procedural mechanisms, what it may *not* do is commandeer and waylay the Part 624 process here: (1) with issues of no pertinence to the ultimate determination on the Permit Modification application, and (2) where adjudication can have no practical benefit, since existing draft permit conditions already assure protection against the acceptance of any improper waste and any alleged radiological hazard. *See generally,* West Aff. ¶¶ 11-15, 29-31. Accordingly, the June and September Rulings must be affirmed relative to the Marcellus waste issue, and the RFPLC Appeal must be dismissed *in toto*.

A. The September Ruling's Summary Dismissal Of The Marcellus Waste Issue Is Proper And Must Be Affirmed

The September Ruling's summary dismissal of the Marcellus waste issue – i.e., the allegation that the radioactivity level of Marcellus shale drill cuttings renders them unsuitable for disposal in a Part 360 facility such as the County Landfill – is unassailable and must be affirmed.

See West Aff. ¶¶ 11-15, 29-34. It is axiomatic that, in a Part 624 proceeding, only those issues that are relevant to the application under review (i.e., the proposed project/activity) may be considered for possible adjudication. *See* Point I, *supra.* Here, the ALJ got it exactly right when he held that the Marcellus waste issue was not germane to the underlying proceeding and, thus, summarily dismissed the issue. *See* West Aff. ¶¶ 29-34.

The "proposed project/activity" is the proposal set forth in the Permit Modification application to increase the throughput of the County Landfill from 120,000 tons to 180,000 tons per year. West Aff. ¶ 11; September Ruling, at 1. The Permit Modification application does *not* seek to alter the waste stream already allowed under the existing Part 360 permit; and, notably, the Marcellus shale drill cuttings that RFPLC contests are *already an allowable, acceptable* waste stream that has been going to the County Landfill (with Department approval) and will continue to go to the County Landfill under the existing Part 360 permit, regardless of the ultimate decision on the Permit Modification application. *See* West Aff. ¶¶ 11, 12. Too, the Permit Modification application was initiated in 2006 (to increase the Landfill's economic viability by taking advantage of other available markets), and at this time, drilling of shale plays was not even an issue in the oil/gas industry. *See* West Aff. ¶ 13. Thus, the undisputed facts demonstrate that the Permit Modification application is, in no way, tied to the issue of Marcellus shale drill cutting wastes. *See* West Aff. ¶¶ 11-15, 29; *see also* September Ruling, at 33-35, 36.

For these reasons, among others, the ALJ correctly found that this is an independent issue, not at all pertinent to the decision on the underlying Permit Modification application; therefore, this issue has no place in this proceeding. *See* West Aff. ¶¶ 29, 34; September Ruling, at 33-38. In reaching this decision and summarily dismissing this issue, the ALJ did nothing more than apply the straightforward, established rule that potential issues raised by intervenors

must be germane to the proceeding. *See, e.g., Matter of Application of Town of Carmel Water Dist. #13,* Ruling on Issues and Party Status, 2002 WL 430418, *5 (March 15, 2002) (addressing Town's application for water supply permit; focusing inquiry on matters relevant to review of the permit application, and finding that other asserted issues not germane to the application – i.e., Town's compliance with SEQRA, referendum procedures, and propriety of expenditures – needed to be raised in a different forum); *Matter of AKZO Nobel Salt, Inc.,* Decision of Commissioner, 1996 WL 172632, *7-*8 (January 31, 1996) (stating that the relevance of disputed material to the ultimate permit decision must be kept in mind in determining whether adjudication is warranted); *see also Matter of Consolidated Edison Co. of N.Y., Inc.*, 2001 WL 651612, *6, *supra.*

Accordingly, the ALJ's rationale and result are sound, and the September Ruling must be affirmed on this issue. Moreover, because the Marcellus waste issue has no place in this proceeding, RFPLC's complaints relative to the June Ruling are of no moment. *See* West Aff. ¶¶ 28, 34. Thus, the RFPLC Appeal must be summarily dismissed in its entirety.

B. RFPLC's Recourse Lies In Part 619, Part 621.13, And/Or The Ongoing Environmental Review Process Relative To Horizontal Drilling Of Shales By High-Volume Hydrofracturing

As amply discussed at the Issues Conference, and as ultimately properly found by the ALJ, RFPLC has a number of lawful procedural avenues available to it to air this issue: namely, Part 619, Part 621.13, and the supplemental generic environmental impact statement ("SGEIS") review process relative to horizontal drilling of shales by high-volume hyrdofracturing that is currently ongoing in New York. *See* West Aff. ¶¶ 17-19, 32, 33.

More specifically, RFPLC may seek a declaratory ruling under 6 NYCRR Part 619. Particularly since RFPLC's allegations about the unsuitability of Marcellus waste disposal in Part 360 landfills apply statewide (and not just relative to the County Landfill), a declaratory

ruling is the appropriate means for seeking a determination on this issue (i.e., rather than in a specific proceeding pertinent to only one facility). *See* West Aff. ¶¶ 17, 32, 33. Indeed, the ALJ properly recognized as much. *See* West Aff. ¶¶ 32, 33; September Ruling, at 33, 35-36; *see also Matter of American Marine Rail, LLC,* Ruling on Issues and Party Status, 2000 WL 1299571, *38-*39 (August 25, 2000) (finding intervenor's recycling issue to not be relevant to the permit application; also stating that it should be addressed in law since the issue applied equally to all transfer stations, and not solely the one under review).

However, to the extent RFPLC continues to direct its cries of harm against the County Landfill, it still has a remedy. It may petition the Department under 6 NYCRR § 621.13 for a modification of the County Landfill's Part 360 permit. *See* West Aff. ¶¶ 18, 32; September Ruling, at 33, 36-37. And it matters not that the same process available under Part 624 is not automatically available to petitioners under Part 621. In short, this difference does not alter the applicability or standards of the respective regulations, lest petitioners be allowed to re-write the Department's regulations on an ad hoc basis to serve their own whims and agendas.

In the end, if RFPLC elects not to avail itself of Part 619, participate in the above-noted SGEIS process, or utilize Part 621.13 because it believes that Staff will deny its request for a permit modification, that is its choice; however, that does not give RFPLC free license to create its own avenues of relief – particularly where, as here, such runs afoul of the Department's regulations and precedent. *See* West Aff. ¶ 18, 19, 32-34; September Ruling, at 33, 35-36, 36-37.

POINT III

THE RFPLC APPEAL MUST BE SUMMARILY DENIED ON THE MERITS

A. RFPLC Failed To Raise A Substantive And Significant Issue; Therefore, The RFPLC Appeal Must Be Denied

RFPLC's offers of proof and its argument regarding the Marcellus waste issue, throughout this proceeding and in its Appeal, demonstrate not only disingenuousness and obfuscation, but, dispositively, a patent lack of any factual basis. Therefore, the RFPLC Appeal must be denied on the merits as well. *See* West Aff. ¶¶ 35-41.

The main thrust of RFPLC's argument relies on processes and waste types that are *not* drill cuttings and that never have (and never will) come to the County Landfill under the existing permit or the Permit Modification - namely, hydrofracturing fluids, production brine, produced waters, and related sludge and scale. West Aff. ¶ 36, *citing RFPLC* Appeal, at 5 & 7 (relying on Department of Health ["DOH"] commentary on the draft SGEIS relative to horizontal high-volume hydrofracturing of shales applying to production brine and other liquids pertaining to hydrofracturing of the well). However, as irrefutably established at the Issues Conference (and as observed by the ALJ), these production-related wastes (1) arise from a wholly distinct part of the well construction process; (2) have nothing at all to do with the "rock fragment" drill cuttings taken by the County Landfill; and (3) are barred by permit condition in any event. West Aff. ¶ 36; *see also* September Ruling, at 35. Therefore, this argument is nothing short of disingenuous, and RFPLC's Appeal must be denied.

RFPLC's attack on NEWSNY's analytical evaluation of Marcellus drill cuttings (i.e., the Co-Physics Report) is equally meritless. *See* RFPLC Appeal, at 8-9, 11; West Aff. ¶ 37 and Exhibit A thereto. RFPLC attempts to impugn the competency and credibility of the Co-Physics Report by asserting statutes and DOH rules and regulations that apply solely to radiochemical

analysis of potable and non-potable water and are not at all applicable to the *solid* wastes at issue here (i.e., rock and soil). *See* RFPLC Appeal, at 8-9, 11; West Aff. ¶ 37 and Exhibit G thereto Notably, the inapplicability of the cited certification requirement to anything other than water samples is so plain from the DOH's listing of ELAP certified laboratories, that RFPLC's continued argument in this regard is, at best, disingenuous (if not unethical). *See* Exhibit G (DOH listing of certified laboratories, repeatedly noting applicability to "Drinking Water and Non-Potable Waters"). Thus, there is certainly no issue here.

Likewise unavailing are RFPLC's recycled allegations that the sampling reported in the Co-Physics Report is not representative of horizontal cuttings from Marcellus shale. *See* RFPLC Appeal, at 9-10; West Aff. ¶ 38. That matter was put to rest by NEWSNY's responsive submissions and Staff's agreement with the content and conclusions of the Co-Physics Report. West Aff. ¶ 38 and Exhibits H, I, and J thereto.

Finally, RFPLC's unsubstantiated speculation, defied by both logic and evidence submitted by NEWSNY as part of the Issue Conference record, cannot raise a bona fide issue as to whether the radioactive content of the drill cuttings is "processed and concentrated" so as to be subject to the Part 380 series of regulations (Parts 380, 382, and 383). *See* RFPLC Appeal, at 7-8; West Aff. ¶ 39. The liquid content of the drill cuttings is *physically* separated from the rock fragments by *mechanical* processes (e.g., shakers), which cannot possibly concentrate radionuclides. And RFPLC has not explained how mere physical separation of the liquid from the rock fragments results in concentrating radioactivity in the remaining rock fragments. Thus, RFPLC's unsubstantiated claims and abject speculation do not create an issue warranting adjudication. West Aff. ¶ 40; *see also Matter of Buffalo Crushed Stone, Inc.,* Decision of Commissioner, 2008 WL 5955358, *4, *6, *7 (November 17, 2008) (stating that speculative

comments or mere expressions of differing opinions without substantiation are insufficient to establish an issue for adjudication); *Matter of Crossroads Ventures, LLC,* Interim Decision of Deputy Commissioner, 2006 WL 3873403, *4 (December 29, 2006) (stating "[t]hat a consultant or expert for a potential party takes a position opposite of that of the applicant or Department Staff does not of itself raise an issue"), *citing Matter of Jay Giardina,* Interim Decision of Commissioner, 1990 WL 181271 (September 21, 1990).

Accordingly, RFPLC has failed to raise an adjudicable issue, and its Appeal must, therefore, be summarily denied on the merits. *See Matter of Application of CMW Industries, LLC,* Decision of Assistant Commissioner, 2010 WL 1652794, *5 (March 2, 2010) (stating that the "regulatory requirement of a substantive and significant issue ensures that the proceeding will not become a setting for academic or other generalized debate, but will address those issues relating to an applicant's ability to meet the applicable statutory or regulatory criteria, or have the potential to lead to the denial of a permit, a major modification or the imposition of significant permit conditions").

B. Special Permit Conditions Relative To Waste Stream Components And Radiological Monitoring Render Marcellus Waste Disposal A Non-Issue; Therefore, The RFPLC Appeal Must Be Denied

Notwithstanding the fatal defects in RFPLC's showing, the Marcellus waste disposal claim is a non-issue in any event due to special permit conditions already incorporated into the draft permit. West Aff. ¶ 41. First, as noted in the September Ruling, permit conditions confirm Staff's and NEWSNY's consistent understanding that production-related waste is prohibited from entering the County Landfill. September Ruling, at 32-33. Second, NEWSNY's voluntary commitment to preemptive radiological monitoring (with which Staff agrees) will preclude any inappropriate waste from entering the County Landfill in the first instance, therefore, leaving

nothing "substantive and significant" to adjudicate. *See* West Aff. ¶ 41; September Ruling, at 38.

Accordingly, the RFPLC Appeal must be denied on the merits on this ground as well. *See, e.g., Matter of AKZO Nobel Salt, Inc.,* 1996 WL 172632, *7-*8 (stating that the relevance of disputed material to the ultimate permit decision must be kept in mind in determining whether adjudication is warranted; also stating that proffered reports need to be considered in light of the proposed draft permit conditions, especially as revised at the close of the issues conference); *see also Matter of Astoria Energy, LLC,* 2001 WL 827904, *4 (July 17, 2001) (stating that where permit conditions are adjusted based on matters raised during the Part 624 process, "logically no adjudicable issue can be found since the adjustment to the permit condition eliminates the concern"); *Stissing Valley Farms, Inc.,* 1996 WL 33142551, Issues Ruling (ALJ Casutto, December 4, 1996) (finding that noise impacts would be controlled by proposed mitigation and that, therefore, there was no adjudicable issue), *modified on other grounds but aff'g this ruling,* Interim Decision of Deputy Commissioner, 1997 WL 154610 (January 7, 1997).

C. The ALJ Acted Within The Bounds Of His Discretion In The June Ruling; Therefore, The RFPLC Appeal Of The June Ruling Must Be Denied

Under 6 NYCRR §§ 624.8(b)(x) and (xv), the ALJ has broad discretion in maintaining order and the efficient conduct of the hearing, including precluding irrelevant, unduly repetitious, tangential or speculative testimony or argument. Here, the ALJ certainly acted within the bounds of that discretion in his June Ruling when he struck the parts of RFPLC's submissions that either went wholly beyond the scope of what he had authorized (as post-Issues Conference submissions) or were duplicative, repetitive, belated or otherwise irrelevant. *See* West Aff. ¶¶ 20-28 and Exhibits thereto; *see also Matter of Waste Mgmt of N.Y., LLC,* Decision of Commissioner, 2003 WL 879145, *8 (February 10, 2003) (from ALJ Hearing Report, granting

motion to strike pre-filed testimony not relevant to issues to be adjudicated); *Bath Petroleum Storage,* ALJ Ruling on Motions to Quash Subpoena, 1998 WL 1780957 (January 9, 1998) (granting motion to quash subpoena where it called for information irrelevant to the proceeding). Accordingly, the June Ruling's findings relative to the Marcellus waste issue must be affirmed.

POINT IV

EXPEDITED REVIEW IS WARRANTED UNDER THESE FACTS

Whether this issue is summarily dismissed in response to this motion (as it was by the ALJ below) or if the issue is considered on the merits, expedited treatment is warranted. The standard for leave to file an expedited appeal is set forth in 6 NYCRR § 624.8(d). Pursuant to 6 NYCRR §§ 624.8(d)(2)(i), (ii) and (iii), respectively, a party may seek expedited review of an ALJ ruling excluding an issue for adjudication, determining a legal issue, or affecting party status. Under 6 NYCRR § 624.8(d)(2)(v):

> . . . by seeking leave to file an expedited appeal, any other ruling of the ALJ may be appealed on an expedited basis where it is demonstrated that the failure to decide such an appeal would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process. In all such cases, the commissioner's determination to entertain the appeal is discretionary.

Pursuant to 6 NYCRR § 624.8(d)(3), "[a] motion for leave to file an expedited appeal must demonstrate that the ruling in question falls within one of the categories set forth in subparagraph (2)(v) [above]." Pursuant to 6 NYCRR § 624.8(d)(4), "[t]he commissioner may review any ruling of the ALJ on an expedited basis upon the commissioner's determination . . .".

NEWSNY respectfully maintains that, for the reasons set forth herein and in the West Affirmation, expedited review is warranted under § 624.8(d)(2)(v) and in the Commissioner's discretion. *See* 6 NYCRR §§ 624.8(d)(3) & (4); *see also* West Aff. ¶¶ 42-44. As amply and redundantly established in the Issues Conference record, the Marcellus waste issue is irrelevant

to this proceeding in the first instance. Even absent that, RFPLC failed to raise a bona fide issue, and, indeed, no issue can even possibly remain given that permit conditions bar production-related wastes and require radiological monitoring. In short, on the face of these facts, the Marcellus waste issue has no place here and should not be allowed to delay this proceeding any longer. *See generally,* West Aff. ¶¶ 11-15, 29-31, 41-44.

Indeed, the hearing process inefficiencies and prejudice to the parties that will result from the failure to expeditiously entertain this appeal are plain: among them, further delay of the Permit Modification, which would result in a significant cost to NEWSNY; and the colossal waste of time and resources, both public and private, if this issue is adjudicated. Beyond being irrelevant to the ultimate determination on the Permit Modification application, such adjudication will amount to nothing more than an academic exercise that, as noted, could not possibly affect the outcome of the Permit Modification decision, or result in any better mitigation than the preemptive radiological monitoring that is already included as a draft permit condition. *See* West Aff. ¶¶ 42, 43. In light of RFPLC's disingenuous and delay-oriented tactics invoked repeatedly and consistently throughout this proceeding (including on its Appeal), NEWSNY respectfully urges the Commissioner to send a strong message that this type of abuse of the Department's Part 624 process will not be tolerated. West Aff. ¶ 44.

Therefore, NEWSNY respectfully urges the Commissioner to grant expedited review and affirm the summary dismissal of the Marcellus waste issue by the ALJ below and/or deny the RFPLC Appeal on the merits.

CONCLUSION

For all the reasons set forth above, affirmance of the ALJ's June and September Rulings on the Marcellus waste issue is compelled. The hearing process is not meant to be a forum for

airing ad hoc, irrelevant issues that have nothing to do with the underlying application; nor is the Part 624 process meant to be a forum to engage in endless academic debate. Rather, it is meant to address real issues about an applicant's ability to meet statutory or regulatory standards and/or to develop permit conditions to assure compliance relative to the particular project that is proposed.

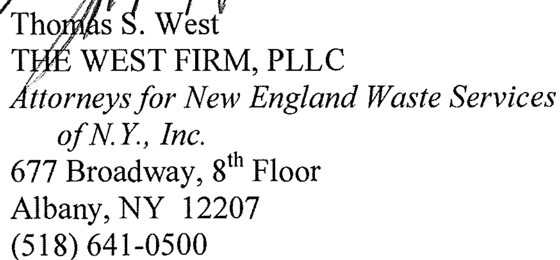
Here, there can be no doubt that RFPLC's Marcellus waste issue is irrelevant to this Permit Modification proceeding. The Permit Modification application does not seek to modify anything relative to waste stream components already allowed in the County Landfill, and the Landfill will continue to accept Marcellus shale drill cuttings, with or without the Permit Modification. Therefore, this matter is simply not germane to this proceeding, and the ALJ properly summarily rejected this issue. Indeed, to the extent this issue has any validity at all (which we respectfully maintain it does not), it is a matter of statewide applicability that should not be determined in the context of a specific application for a particular facility. RFPLC has other procedural avenues available to it to air this issue, but, respectfully, this proceeding is not one of them.

Additionally, it cannot escape notice that RFPLC's substantive arguments and offers of proof on this issue have consistently been nothing short of disingenuous. Most notably, RFPLC's focus on production-related liquid wastes – which have never, do not, and will never come to the County Landfill under the existing Part 360 permit or the Permit Modification – is a classic example of its repeated attempt to create issues where there are none by obfuscating what is really occurring here. In the end, however, it is all of no moment, given that the draft permit includes special conditions preventing acceptance of production-related wastes *and* requiring radiological monitoring to prevent the Landfill from inadvertently accepting any waste

presenting a radiological hazard. Thus, even if this issue were properly heard in this proceeding (which it is not), there is nothing substantive and significant meriting adjudication. Accordingly, the RFPLC Appeal, beyond being misplaced and improper in this forum, is also devoid of merit and, therefore, must be denied.

Dated: October 12, 2010
Albany, New York

Respectfully submitted,



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