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)

AFFIRMATION OF THOMAS S. WEST IN SUPPORT OF MOTION FOR EXPEDITED REVIEW AND SUMMARY JUDGMENT DISMISSING AND/OR DENYING APPEAL OF THE RESIDENTS FOR THE PROTECTON OF LOWMAN AND CHEMUNG ("RFPLC")

Thomas S. West, Esq., affirms, subject to the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules ("CPLR"):

1. I am an attorney admitted to practice law in the State of New York and am personally familiar with the underlying facts, circumstances, legal arguments, and commentary from all parties relative to (1) the June 3, 2010 Ruling of Administrative Law Judge Edward Buhrmaster (the "ALJ") striking portions of submissions offered by RFPLC relative to its proposed issue respecting the radioactivity level of Marcellus shale drill cutting wastes and the propriety of disposing of this waste stream in the Chemung County Landfill (hereinafter, the "June Ruling"); (2) the September 3, 2010 Ruling of the ALJ, which among other things summarily dismissed RFPLC's "Marcellus waste issue" as being irrelevant to the underlying proceedings (hereinafter, the "September Ruling"); and (3) the September 22, 2010 submissions by RPLC appealing the June and September Rulings (hereinafter, the "RFPLC Appeal").

2. My personal familiarity with the aforementioned facts and circumstances is based upon my experience with the environmental statutes, rules, regulations and program policies generally, including but not limited to those pertaining to the permitting of solid waste

management facilities in the State of New York. These include, without limitation, Environmental Conservation Law ("ECL") Article 27, Title 7; Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR Part 360"); and Program Policies of the New York State Department of Environmental Conservation (the "DEC" or "Department"). I am also familiar with the general practices of the Department through more than three decades of practice before the Department.

3. My familiarity with the statutes, rules and regulations and the practices of the Department pertinent to solid waste management facilities is also based upon my representation of a large number of clients during the course of my 30 years of practice in New York State, including Casella Waste Systems, Inc. ("Casella") and its subsidiary New England Waste Services of N.Y., Inc. ("NEWSNY"), that is a party to this proceeding, and other clients that are engaged in the operation of solid waste management facilities. From the course of my representation of NEWSNY and/or Casella over the last 12 years (including in this proceeding), I have personal knowledge of all legal matters relative to the Chemung County Landfill (the "County Landfill" or "Landfill"), including, but not limited to, all aspects, both substantive and procedural, of the permit modification application at issue here, which seeks to increase the maximum waste acceptance rate at the Landfill from 120,000 to 180,000 tons per year (hereinafter, the "Permit Modification").

4. In addition to my experience with the permitting of solid waste management facilities, such as the County Landfill, through my general practice of environmental law for more than three decades in New York, I am also personally familiar with the Department's regulations and uniform procedures, including, without limitation, those respecting the

adjudicatory hearing process governed by 6 NYCRR Part 624, declaratory rulings governed by 6 NYCRR Part 619, and the procedures set forth in 6 NYCRR Part 621.

5. I have also been personally involved representing NEWSNY in connection with this Permit Modification, including, but not limited to, appearances on behalf of NEWSNY at the April 28, 2010 Issues Conference, participation and preparation of submissions relative to the ALJ's June Ruling, preparation and/or review of post-Issues Conference submissions authorized by the ALJ, review of the June Ruling and September Ruling, preparation of appeals from the September Ruling, and review of the RFPLC Appeal. The RFPLC Appeal challenges (1) the September Ruling's summary dismissal of the Marcellus waste issue, which the ALJ dismissed as being not relevant to the underlying Permit Modification proceeding; and (2) the June Ruling's striking of reports or parts of reports proffered by RFPLC that were either duplicative of evidence presented at the Issues Conference or irrelevant or unresponsive to NEWNSY's submissions respecting the Marcellus waste issue and, hence, beyond the scope of what the ALJ authorized.

6. Accordingly, based upon my personal knowledge and experience with the issues raised in this proceeding and supported by the above-noted Issues Conference record and post-Issues Conference submissions, I submit this Affirmation in support of NEWSNY's Motion for expedited review and summary dismissal and/or denial of the RFPLC Appeal on procedural and substantive grounds – namely, (1) procedurally, that the Marcellus waste issue raised in the RFPLC Appeal is wholly irrelevant to the underlying Permit Modification proceeding and therefore cannot be heard in this forum; and (2) substantively, that the RFPLC Appeal is facially defective and fails to raise an adjudicable issue. Simply stated, RFPLC's disingenuous, recycled

allegations that have no relevance to this proceeding and no basis in fact must be rejected and its Appeal dismissed and/or denied.

7. As detailed below, the June and September Rulings are proper in all respects as to the Marcellus waste issue. In the June Ruling, the ALJ acted appropriately and within the bounds of his discretion in striking RFPLC's duplicative, unresponsive, and unauthorized submissions. *See* June Ruling, at 1-5. As for the September Ruling, its summary dismissal of the Marcellus waste issue – i.e., the radioactivity level of Marcellus shale drill cuttings and the suitability of their disposal in a Part 360 facility such as the County Landfill – is unassailable. As the ALJ found, this issue is not at all pertinent to the decision on the underlying Permit Modification application and, therefore, has no place in this proceeding. *See* September Ruling, at 33-34, 38. The ALJ applied the well-established, straightforward rule that potential issues raised by an Intervenor must be germane to the proceeding and that, therefore, it would be improper to allow RFPLC to use the Department's Part 624 process to potentially adjudicate an issue having no bearing on the ultimate decision on the Permit Modification application. *See id.* The Permit Modification application does not seek a change in the allowable waste stream; Marcellus shale drill cuttings are allowed to be disposed (and have been being disposed) at the County Landfill under the existing Part 360 permit; and, hence, this proposed issue has nothing to do with the ultimate determination on the requested increased throughput (for an already allowable, permitted waste stream). *Id.* Indeed, as observed by the ALJ, with or without the Permit Modification, Marcellus shale drill cuttings will continue to be disposed at the County Landfill, and this underscores that RFPLC's Marcellus waste issue "does not arise from the tonnage increase, but exists independently." *Id.,* at 36.

8. Accordingly, as the ALJ also properly recognized, what RFPLC is truly seeking is a determination of statewide applicability, and it has the available remedy of seeking a declaratory ruling under 6 NYCRR Part 619. *See id.,* at 33, 36. To the extent RFPLC persists in focusing on the County Landfill, urging that disposal of Marcellus shale drill cuttings there is somehow improper, it also may petition the Department for modification of the permit under 6 NYCRR § 621.13. *Id.,* at 33, 36-37. Those are the allowable procedural avenues that RFPLC may pursue to obtain relief. What RFPLC may ***not*** lawfully do is commandeer this Part 624 proceeding to engage in endless administrative process on issues that, beyond being bereft of any factual basis, are also not germane to the underlying determination on the Permit Modification application, and thereby prejudice NEWSNY through the costs associated with the delay in the Permit Modification.

9. Additionally, beyond being procedurally infirm, the RFPLC Appeal fails on the merits as well. The RFPLC Appeal does nothing more than perpetuate the obfuscation, inaccuracies and disingenuous positions that RFPLC advanced at the Issues Conference, all of which were plainly refuted on that record and stand unrebutted by any competent evidence. In any event, the special permit condition voluntarily agreed to by NEWSNY and Staff respecting radiological monitoring assures that the Landfill will not receive any waste that constitutes a hazard. This resolves any potential for any outstanding issue regarding the radioactive content of Marcellus shale drill cuttings. Thus, even if this issue were relevant in this proceeding (which it is not), there is nothing "substantive and significant" meriting adjudication.

10. This Affirmation summarizes relevant factual background, as well as pertinent portions of the Issues Conference transcript, submissions by the parties, and the ALJ Rulings, all of which demonstrate that the ALJ got it exactly right in summarily dismissing the Marcellus

waste issue. This Affirmation also briefly discusses the hearing process inefficiencies and prejudice that will result to NEWSNY, the County and the Department absent the Commissioner's expedited review and summary affirmance of both the June Ruling and September Ruling on this issue. Respectfully, NEWSNY and the County should not be prejudiced by delaying approval of the Permit Modification any longer based on this irrelevant issue. Further, the parties should not be forced to spend time and money from both the public and private sector to prepare for and/or adjudicate this issue, where it is so wholly irrelevant to the underlying Permit Modification application *and* any potentiality for a radiological hazard has been resolved by permit condition (i.e., radiological monitoring). Accordingly, NEWSNY respectfully urges that the RFPLC Appeal be summarily dismissed and/or denied on an expedited basis.

AS ESTABLISHED AT THE ISSUES CONFERENCE, THE DRILL CUTTING ISSUE IS IRRELEVANT TO THE PERMIT MODIFICATION

11. As noted, the Permit Modification application seeks to increase the maximum waste acceptance rate at the County Landfill from 120,000 to 180,000 tons per year in order to increase the Landfill's economic viability. The application does ***not*** seek any change whatsoever in the allowable waste stream (i.e., waste stream components already allowable under the present Part 360 permit). This point was irrefutably established at the Issues Conference. *See* Issues Conference Transcript ("IC Tr.") 15-24, 34, 44-46.

12. Notably, the County Landfill has been accepting Marcellus shale drill cuttings for at least as long back as late 2009. September Ruling, at 27. In fact, Department Staff gave written acknowledgement and approval for this waste stream in January 2010. *Id.* Accordingly, this is an acceptable waste stream under the current Part 360 permit, and NEWSNY is not seeking any change in the allowable waste stream, be it relative to Marcellus shale drill cuttings

or any other waste stream component. *See id.* These points were irrefutably established at the Issues Conference. *See* IC Tr. 34, 44-47.

13. Importantly as well, the Permit Modification application dates back to December 2006, when it was first submitted to the Department, and this long pre-dates the recent activity relative to horizontal drilling of Marcellus shale. *See* IC Tr. 27-29; September Ruling, at 1-3, 34. Simply stated, the Permit Modification application was sought to take advantage of other markets and enhance the economic vitality of the Landfill, and drill cuttings from Marcellus shale were not a consideration at that time. IC Tr. 22-25, 27-29. These points were established at the Issues Conference, and are also plain from reviewing the full procedural history of this case (which is also accurately reflected in the September Ruling).[1] *See* IC Tr. 15-25, 27-29, 47, 184; September Ruling, at 34.

14. These facts establish two points. First, the purpose for which the County and NEWSNY sought the Permit Modification (which dates back all the way to 2006) has nothing to do with accommodating drill cuttings from shale plays. IC Tr. 15-25, 27-29, 47, 184. Second, since the Permit Modification application does not request any change in the waste stream already allowable under the Landfill's current Part 360 permit, RFPLC's proposed issue – the radioactivity level of Marcellus shale drill cuttings and their acceptability for disposal at the County Landfill – has no place in this proceeding. IC Tr. 34, 44-46, 206-207, 218; *see generally,* September Ruling, at 33-38.

15. Indisputably, the Issues Conference phase of the Part 624 process is meant to *narrow* issues and focus the inquiry on only those issues necessary to deciding whether the

[1] The full procedural history of the Permit Modification application is detailed in my September 22, 2010 Affirmation supporting NEWSNY's appeal of the September Ruling's finding that noise is adjudicable. I respectfully refer the Commissioner to that Affirmation for a complete rendition of the procedural background relative to the Permit Modification application.

applicant has met its burden of proof. *See* 6 NYCRR § 624.4(b)(2). Here, waste stream components are a non-issue because the underlying application seeks to modify an existing Part 360 permit *only* by increasing the waste acceptance rate, but does not seek any alteration or modification of the types of waste already allowable under the current Part 360 permit. An application to modify a permit does not open up the adjudicatory process to issues that have nothing to do with the modification request.

16. Importantly, too, it bears mention that the ALJ's summary dismissal of the Marcellus waste issue in the context of this Part 624 proceeding does not leave RFPLC without a remedy. As more fully discussed below, RFPLC's remedy lies in 6 NYCRR Parts 619 (requesting a declaratory ruling) and/or 621.13 (requesting the Department to modify the permit). *See also* IC Tr. 48, 87, 90-94, 126-130, 132-135. While RFPLC is free to seek relief under these provisions, what it may *not* do is convert the Part 624 adjudicatory process into its personal vehicle for endless adjudication on issues wholly irrelevant to the underlying application.

RFPLC MAY SEEK RELIEF UNDER 6 NYCRR PARTS 619 OR 621.13

17. The Department's regulations provide several procedural devices for RFPLC to air its concerns regarding Marcellus shale drill cuttings. Under 6 NYCRR Part 619, RFPLC may seek a declaratory ruling regarding whether Marcellus shale drill cuttings constitute NORM that has been concentrated or processed and hence must be disposed in a low-level radioactive waste ("LLRW") disposal facility. Indeed, the issue raised by RFPLC (to the extent it has any validity, which we respectfully maintain it does not) is a matter of statewide application and not merely pertinent to the County Landfill. Accordingly, a declaratory ruling is plainly a more appropriate procedural vehicle to hear RFPLC's claim. *See also* September Ruling, at 33, 35-36.

18. Further, to the extent RFPLC elects to focus its concerns about Marcellus shale drill cutting disposal solely on the County Landfill, it has another procedural remedy. It may avail itself of 6 NYCRR § 621.13 and request that the Department modify the Landfill's permit. Under 6 NYCRR § 621.13(a)(4), a "material change in environmental conditions" since issuance of the existing permit provides a basis for an interested party to petition the Department's regional permit administrator for modification of the permit pursuant to 6 NYCRR § 621.13(b). RFPLC may, therefore, pursue this avenue of relief. However, that RFPLC feels the Department will not grant its request (*see* RFPLC Appeal, at 11) does not allow it to bypass these lawful procedural venues (i.e., Parts 619 and 621.13) and bog down the Part 624 process with matters that have nothing to do with the underlying application. *See generally,* IC Tr. 48, 87, 90-94, 126-130, 132-135; *see also* September Ruling, at 33, 36-37.

19. Accordingly, as a matter of law, the Marcellus waste issue cannot be heard in this forum. Thus, summary dismissal of this issue (and RFPLC's related issue regarding the ALJ's striking of unauthorized submissions offered on this matter) is warranted, and the ALJ's June and September Rulings relative to the Marcellus waste issue should be affirmed.

THE ALJ'S RULINGS REGARDING THE MARCELLUS WASTE ISSUE ARE PROPER IN ALL RESPECTS

20. Contrary to RFPLC's unsupported contentions, as detailed below, the ALJ acted properly and wholly within the bounds of his discretion in his June Ruling, and the cogency of the September Ruling's rationale and result relative to the Marcellus waste issue are unassailable.

The June Ruling

21. The June Ruling arose in the context of responses to the Marcellus waste stream issue, as raised in RFPLC's petition for party status. *See* September Ruling, at 27-28.

In response, NEWSNY provided at the Issues Conference an April 2010 report by its consultant, Co-Physics, entitled Radiological Survey Report, Marcellus Shale Drill Cuttings (hereinafter, the "Co-Physics Report," Issues Conference Exhibit No. 10). A true and accurate copy of the Co-Physics Report is annexed hereto and incorporated herewith as Exhibit A. *See* September Ruling, at 28; June Ruling, at 1.

22. The Co-Physics Report presented a radiological survey of confirmed Marcellus shale samples collected at rig sites in northern Pennsylvania and drill cuttings as delivered to three of NEWSNY's landfills. *See generally,* Co-Physics Report. The Co-Physics Report concluded that drill cuttings from Marcellus shale drilling operations have radionuclide levels so low that they pose no environmental or health threat, and are acceptable for disposal in a Part 360 landfill, particularly with the installation of "preemptive" radiation monitors at truck scales (i.e., that would prevent improper materials from entering the Landfill in the first instance). *Id.;* June Ruling, at 2.

23. The ALJ afforded RFPLC and Department Staff an opportunity to respond to the Co-Physics Report, but limited the responsive submissions to just that – i.e., responses to information contained in the Report. IC Tr. 359 (ALJ affording Staff and RFPLC an opportunity to review the Co-Physics Report "more carefully and consult with each other, if they so choose, … so that a response, *limited to the information in these documents,* can be provided to supplement the record…").

24. Typical of its consistent attempt to obfuscate the issues, bog down the process, and have matters devolve into an endless academic debate, RFPLC responded with four submissions, most of which were either repetitive of testimony provided at the Issues Conference

or irrelevant to anything contained in the Co-Physics Report. Alternatively, they were a belated effort to inject new issues and arguments into the proceeding.

25. RFPLC's four submissions – i.e., (1) the May 19, 2010 report from Dr. Marvin Resnikoff (the "Resnikoff Submission"); (2) the May 17, 2010 letter from Dr. Anthony Ingraffea, a newly and belatedly identified engineering expert (the "Ingraffea Submission"); (3) the May 19, 2010 letter of Dr. Conrad Volz, another belatedly identified putative environmental health expert (the "Volz Submission"); and (4) the May 18, 2010 letter from counsel Gary Abraham (the "Abraham Submission") – were quite blatant in going well beyond the content authorized by the ALJ and were, thus, stricken in part, upon motion by NEWSNY. A true and accurate copy of NEWSNY's Letter motion to strike, dated May 21, 2010, is annexed hereto and incorporated herewith as Exhibit B. True and accurate copies of the Resnikoff Submission, the Ingraffea Submission, the Volz Submission, and the Abraham Submission are annexed hereto and incorporated herewith, respectively, as Exhibits C, D, E, and F.

26. Specifically, the ALJ received the portions of the Resnikoff Submission that addressed the proposed use of radiation monitors and alleged mistakes in the Co-Physics Report's methodology; however, he struck the remainder of the report as unresponsive or duplicative. *See* June Ruling, at 3. The ALJ received the Ingraffea Submission to the extent it raised an issue as to whether the samples used in the Co-Physics Report originated from Marcellus shale. The ALJ struck as unresponsive the remainder of the Ingraffea Submission which purported to characterize the process by which drill cuttings are generated, the nature of the cuttings, and how the materials become concentrated with natural radioactivity in the shale. June Ruling, at 3-4. The ALJ received the Volz Submission to the extent it raised a question as to whether the samples in the Co-Physics Report were representative of waste from the

horizontal component of Marcellus shale drilling operations. However, he struck as unresponsive the Volz Submission's claim that radon levels should be evaluated before allowing disposal at a Part 360 landfill. June Ruling, at 4. Finally, the ALJ received the Abraham Submission only to the extent that it (1) questioned whether the samples in the Co-Physics Report originated from horizontal drilling in Marcellus shale and (2) defended Dr. Resnikoff's competency. The ALJ struck Mr. Abraham's repetitious arguments repeated from the Issues Conference that the drilling cuttings are "processed and concentrated," as well as his additional offerings that were irrelevant to the Co-Physics Report.

27. In effect, the ALJ found that all parties had had adequate time during the Issues Conference to argue their positions regarding whether drill cuttings were "processed" so as to concentrate the radioactivity, making the waste unacceptable for disposal at a Part 360 landfill. Hence, he authorized submissions solely to respond to the specifics of the Co-Physics Report. Responses beyond those bounds were not authorized and, hence, were stricken. In so finding, the ALJ acted wholly within his discretion under 6 NYCRR §§ 624.8(b)(x) & (xv).

28. It is ironic, indeed, for RFPLC to argue, on appeal, that the ALJ abused his discretion in striking these submissions. In point of fact, it is RFPLC that has patently and repeatedly abused the Part 624 process by attempting to interject irrelevant, purely speculative, and duplicative/repetitive matters into this proceeding. The ALJ, as gatekeeper of the Part 624 process, properly exercised his discretion to limit the responsive submissions to those authorized and potentially relevant to the proceeding. Accordingly, the June Ruling on the Marcellus waste issue must stand, and the RFPLC Appeal in this regard must be dismissed or denied. In any event, given that the September Ruling summarily dismissed the Marcellus waste stream issue *in toto,* the propriety of the June Ruling is of no moment.

The September Ruling

29. In the September Ruling, the ALJ got it exactly right when he summarily dismissed RFPLC's Marcellus waste issue as being not germane to this proceeding. *See* September Ruling, at 33-37. Specifically, the ALJ found that "[t]he permit modification proposed by RFPLC, to prohibit the landfill's disposal of Marcellus Shale gas waste streams, is unrelated to and involves issues distinct from those bearing on the permit modification proposed by the County, to increase the tonnage of undifferentiated waste allowable at the landfill." *Id.,* at 33. The ALJ's explanation is explicit and cogent as to why he found the two matters to be distinct and unrelated, among them that: (1) the County's permit modification application "was not tied to the acceptance of Marcellus shale wastes"; (2) the County was not seeking to initiate receipt of such waste at the County Landfill, given that it was already receiving such waste with the Department's written approval; (3) the existing permit did not limit the allowable tonnage of any particular waste, and the Landfill could accept Marcellus shale drill cuttings now (with or without the Permit Modification); and (4) the County was not seeking to take in Marcellus waste streams other than what Department Staff had previously allowed. *Id.,* at 33. *See also, id.,* at 33-34 & 36.

30. The ALJ also astutely noted the host of wholly irrelevant matters raised by RFPLC in connection with this (already-irrelevant) issue – namely, documentary and testimonial evidence regarding production brine, flowback water, filter sludge and free phase liquids. *See id.,* at 33, 35. The ALJ observed that Staff's new special permit condition prohibiting these wastes "merely confirm[ed] its and the permittee's prior understanding that drill cuttings may be accepted but that these [aforementioned] wastes could not." *Id.,* at 33. Thus, the ALJ noted that

"such wastes [were] not allowed now, nor ha[d] the County sought permission to receive them." *Id.*, at 33.

31. Regarding RFPLC's speculative and unsubstantiated assertions of a radiological health hazard, and notwithstanding summary dismissal of the Marcellus waste issue as not germane to this proceeding, the ALJ also observed that the radiological monitoring agreed to by Staff and NEWSNY "should assure that the landfill does not receive wastes that would constitute a hazard to people or the environment." *Id.,* at 38. Accordingly, the health issue concern was mooted in any event by the permit condition (i.e., leaving nothing even remotely adjudicable unresolved).

32. Finally, the ALJ explained the remedies that remained available to RFPLC – namely, a request to the Department for modification of the Landfill permit under 6 NYCRR 621.13(b) (and 621.13[a][4]); or a petition to the Department for declaratory ruling under 6 NYCRR Part 619. September Ruling, at 33, 36-37.

33. The ALJ also observed that RFPLC's issue (i.e., its claim that Marcellus shale drill cuttings should be barred from Part 360 facilities and be required to be disposed in a LLRW disposal facility) is one of statewide import that "should be determined on the basis of regulations and policies applicable to all facilities, and not decided within the context of a particular permit application." *Id.,* at 35-36. Thus, the ALJ noted that this issue was presently before the Department in the context of the ongoing development of the supplemental generic environmental impact review regarding horizontal drilling by high volume hydraulic fracturing of shales. *Id.,* at 36. Accordingly, RFPLC could participate in that process as well to air this issue.

34. In the end, the ALJ's rationale and result in the September Ruling – summary dismissal of the Marcellus waste issue due to its irrelevancy to the underlying Permit Modification application – are unassailable and must be affirmed. Due to the ALJ's summary dismissal of the Marcellus waste issue, RFPLC's alleged defects in the June Ruling are also irrelevant. Accordingly, the RFPLC Appeal should be summarily dismissed in its entirety.

RFPLC'S APPEAL MUST ALSO BE DENIED ON THE MERITS

35. As noted above, affirmance of the ALJ's Rulings on the Marcellus waste issue, and hence summary dismissal of the RFPLC Appeal, are warranted on procedural grounds. It also bears mention, however, that denial of the RFPLC Appeal is warranted on the merits as well. RFPLC's presentment of the Marcellus waste issue, both at the Issues Conference and in its Appeal, is a paradigm of obfuscation, disingenuousness, and a patent lack of any factual basis. Therefore, the RFPLC Appeal may (and should) be denied on the merits as well.

36. By way of example, the main thrust of RFPLC's argument relative to the Marcellus waste disposal issue is premised misguidedly, if not disingenuously, 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. *See, e.g.,* RFPLC Appeal, at 5 & 7 (citing Department of Health ["DOH"] commentary on draft SGEIS relative to horizontal high-volume hydrofracturing of shales, which commentary applies to production brine and other liquids pertaining to hydrofracturing of the well). As explained repetitively and *ad infinitum* 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. *See, e.g.,* IC Tr. 36-37, 83-84, 151, 155-159, 169, 170-171, 213-214, 235, 236; *see also* September Ruling, at 35. It is, therefore, nothing short of disingenuous for RFPLC to support its Appeal with concerns about a waste stream that has nothing at all to do with the waste stream taken in at the Landfill, which was explained by NEWSNY during the Issues Conference and acknowledged by the ALJ in his September Ruling. Moreover, the fact that by regulation, a certain liquid content is *allowable* in solid waste going to a Part 360 landfill does not somehow render that waste a "liquid waste" subject to a whole different set of requirements; by definition, under Part 360-2.17(n), those wastes qualify as "solid waste" and may be disposed in a Part 360 facility.

37. RFPLC's attack on NEWSNY's analytical evaluation of the Marcellus drill cuttings (i.e., the Co-Physics Report) is equally misguided. *See* RFPLC Appeal, at 8-9, 11. RFPLC attempts to impugn the competency and credibility of the Co-Physics Report by asserting statutes and DOH rules and regulations that are not applicable to assessing the radioactivity of the solid drill cuttings at issue here. *Id., citing* Public Health Law § 502; 10 NYCRR §§ 55-2.10(a) & 55-2.1. In other words, there is no laboratory certification requirement for this waste stream. Indeed, correspondence between Co-Physics Corporation and the DOH confirms that the DOH certifies laboratories for radiochemical analysis of potable and non-potable water only; and these media were not a subject of the Co-Physics study. Annexed hereto and incorporated herewith as Exhibit G are true and accurate copies of: (1) the May 5, 2010 letter from DOH to Co-Physics Corporation (advising that "ELAP requires an individual or firm engaged in radiochemical analysis of **Drinking Water and Non-Potable Water** hold certification . . . Direct radiochemical analysis of solid materials, **such as drill cuttings**, does not currently require certification . . . ." [emphasis added]); (2) the May 12, 2010 letter from Co-

Physics Corporation to DOH (confirming that the testing at issue involved rock and soil samples, but "[n]o drinking water, leachates, or surface waters"); and (3) a listing by the DOH of ELAP certified laboratories (confirming that only potable and non-potable water testing require certification). Thus, this issue – beyond being belatedly and improperly raised in a reply submission – has abjectly no merit.

38. To the extent RFPLC recycles its old allegations regarding whether the sampling reported in the Co-Physics Report is representative of horizontal cuttings from Marcellus shale (*see* RFPLC Appeal, at 9-10), that matter was put to rest by NEWSNY's responsive submissions: the June 9, 2010 letter from the undersigned to the ALJ, and the April 17, 2010 Billman Geologic Consultants Report, true and accurate copies of which are annexed hereto and incorporated herewith, respectively, as Exhibits H and I. Significantly as well, by letter dated May 18, 2010, Department Staff also expressed its agreement with the Co-Physics Report, including the Co-Physics Report's analysis and conclusion that Marcellus shale drill cuttings are an acceptable waste stream for a Part 360 facility such as the County Landfill. A true and accurate copy of Staff's May 18, 2010 Letter is annexed hereto and incorporated herewith as Exhibit J.

39. Finally, try as it might, RFPLC has not, and 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. Again, as irrefutably demonstrated at the Issues Conference, the liquid content of the drill cuttings is *physically* separated from the rock fragments by *mechanical* processes (e.g., shakers). IC Tr. 208-213, 242-247. This physical separation cannot concentrate radionuclides and, therefore, the drill cuttings are exempt from being regulated under the Part 380 series and

therefore are allowed to be disposed in a Part 360 landfill. *See id.; see also* September Ruling, at 37-38.

40. Notably, beyond focusing on waste streams not even at issue here (e.g., produced waters and related products) and beyond providing no explanation at all as to how mere mechanical physical separation of liquid from rock can concentrate radioactivity in the remaining rock fragments (*see* IC Tr. 211), RFPLC's so-called expert, Dr. Resnikoff, is of questionable competency at best and cannot raise a bona fide factual issue on the Marcellus waste issue. *See* IC Tr. 215-219 & IC Exhibit Nos. 15 & 16.

41. In any event, the permit conditions prohibiting production-related waste and committing to preemptive radiological monitoring will preclude any inappropriate waste from entering the County Landfill in the first instance, therefore, leaving nothing "substantive and significant" to adjudicate. *See* September Ruling, at 38; IC Tr. 172-183. Moreover, for the reasons already explained above (¶¶ 21-28), even if the Marcellus waste issue could be properly heard in this forum (which it cannot), the ALJ acted within the bounds of his discretion in rejecting RFPLC's speculative, duplicative, unauthorized or irrelevant submissions on this issue. Therefore, as a matter of law, denial of the RFPLC Appeal (as to both the June and September Rulings) is warranted on the merits as well.

EXPEDITED REVIEW & AFFIRMANCE OF THE ALJ'S RULINGS ARE WARRANTED

42. The hearing process inefficiencies that will result from failure to review and dismiss the RFPLC Appeal on an expedited basis are plain: namely, the Permit Modification will be delayed still longer than it has been already, and if adjudication of this issue is required, significant public and private sector resources will be wasted (1) on an issue that has no bearing on the Permit Modification, and (2) the outcome of which can offer no greater degree of

environmental or public health protection than already exists (i.e., since radiological monitoring, already incorporated as a draft permit condition, will assure that no improper materials are disposed in the Landfill, thus protecting the public against any potential radiological hazard).

43. Notably, the ALJ observed the hearing process inefficiencies that would result from entertaining this unrelated issue in the context of this proceeding: namely, that "its further consideration has the potential of delaying approval of th[e] [Permit] [M]odification..." September Ruling, at 36.

44. Finally, we respectfully maintain that there is a serious policy issue at stake. Where, as here, NIMBY-Intervenors attempt to bog down the adjudicatory process to promote their own agendas (with issues that have *nothing* to do with the underlying application) – and, thereby, strain the already over-taxed resources of the Department, municipalities, and responsible permittees – we respectfully urge the Commissioner to send a strong message that this will not be tolerated. The issuance of such a policy directive could not be more timely given the serious budget constraints presently faced by the State of New York, the resulting impact upon staffing levels at the Department, and the trickle-down impact to municipalities such as Chemung County. Accordingly, we respectfully urge the Commissioner to (1) invoke his discretion under 6 NYCRR Part 624.8(d) and entertain this motion on an expedited basis; (2) grant the instant motion for summary dismissal (and/or denial) of the RFPLC Appeal; and (3) affirm the June and September Rulings as herein described.

Date: October 12, 2010

Thomas S. West