STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

IN THE MATTER OF THE APPLICATION OF CWM CHEMICAL SERVICES, LLC Pursuant to Titles 7 and 11 of Article 27 of the Environmental Conservation Law, for required permits and approvals for the RMU-2 Hazardous Waste Landfill to be located in the Towns of Lewiston and Porter, New York	X
Project Application Nos. 9-2934-00022/0025, 9-2934-00022/00231, 9-2934-00022/00232, 9-23934-00022/00049, and a Hazardous Waste Facility Siting Application.	X

REPLACEMENT APPEAL FROM THE RULING ON PROPOSED ISSUES FOR ADJUDICATION AND PETITIONS FOR FULL PARTY STATUS AND AMICUS STATUS SUBMITTED ON BEHALF OF THE RESIDENTS FOR RESPONSIBLE GOVERNMENT, INC., THE LEWISTON-PORTER CENTRAL SCHOOL DISTRICT, AND THE NIAGARA COUNTY FARM BUREAU.

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PRELIMINARY STATEMENT

The following Replacement Appeal is filed on behalf of three parties, Residents For Responsible Government, Inc. [RRG], the Lewiston-Porter Central School District [Lew-Port], and the Niagara County Farm Bureau [the Farm Bureau]. These parties are collectively represented herein by the University at Buffalo Law School Clinical Education Program, the State University of New York, R. Nils Olsen, Jr. of counsel. The appeal addresses the Ruling on Proposed Issues and Petitions For Full Party Status and Amicus Status [Ruling], announced by the Honorable Daniel P. O'Connell, New York State Department of Environmental Conservation, Administrative Law Judge, [the ALJ] in a 153-page opinion, filed on December 22, 2015. Appeals were to be received by 3:30 p.m. on Friday, March 4, 2016. By an Order dated March 7, Judge O'Connell extended the time to file a Supplement or Replacement Appeal to March 9, 2016 by 3:30 p.m.

PRIOR PROCEEDINGS

CWM, Chemical Services, Inc. [the Applicant], a wholly owned subsidiary of the large, multinational corporation Waste Management, Inc., has sought approval from the New York Department of Environmental Conservation [DEC], the United States Environmental Conservation, Agency [EPA], and the United States Army Corps of Engineers to construct and operate a new hazardous waste landfill, designated Residuals Management Unit #2 [RMU-2], at their facility located in Model City, situated within the Towns of Lewiston and Porter, New York [the Model City facility]. The current proceedings pertain to a combined proceeding involving a Hazardous Waste Facility Siting Board [Facility Siting Board], convened by Governor

Andrew Cuomo pursuant to ECL Article 27, Title 11, and required permit applications pending before the DEC.

CWM initiated proceedings on May 15, 2003, filing applications for a Certificate of Environmental Safety and Public Necessity [pursuant to 6 NYCRR Part 361] and for a permit to construct and operate the proposed RMU-2 hazardous waste landfill along with other required modifications to their Model City facility [pursuant to 6 NYCRR Part 373]. A Preliminary Draft Environmental Impact Statement [DEIS] was also provided at that time.

A long and tortuous process ensued. In April 2004, the DEC informed the Town of Porter that it would serve as the lead agency, pursuant to the New York State Environmental Quality Review Act [SEQRA, ECL Article 8]. The DEC issued an obligatory positive declaration with respect to Applicant's request to modify its site-wide permit for the Model City facility to accommodate construction and operation of RMUI-2, rendering it a Type 1 action. A scoping process was conducted, with public comments submitted on the scope of the DEIS. After a number of drafts and a public hearing, CWM submitted its present version of the DEIS on January 14, 2014, with the Agency soliciting public review and comment.

The DEC also determined that the application by Applicant for the site-wide permit modification was complete. As a result, on May 5, 2014, a combined notice was issued providing notice of a completion of the draft DEIS, the application for site-wide permit modification, the availability of the draft Part 373 permit modification, and the draft freshwater wetlands permit. The notice also provided opportunity for a public comment period for the DEIS and the site-wide permit

modification request. Due notice was provided by Applicant through publication in designated local newspapers and broadcasts on local radio stations.

Also on May 5, 2014, the DEC provided a copy of the combined notice to Governor Andrew Cuomo, who subsequently constituted a Facility Siting Board [Siting Board] to consider CWM's application for a Certificate of Environmental Safety and Public Necessity. The Siting Board convened a public meeting on July 2, 2014 in Youngstown, New York, and adopted a memorandum agreement which, on July 8, 2014, was signed by Judge O'Connell and the DEC Commissioner's designee, providing for a unified consideration of pending permitting issues and the Certificate of Environmental Safety and Public Necessity.

A joint public hearing was conducted on July 7, 2014 at the Lewiston-Porter High School, located a little more than one mile from the Model City Facility and directly on the transportation route for the hazardous waste trucks, before the ALJ and the Siting Board members. An overwhelming number of local residents, who were neither employed by nor contracted with CWM, testified against the proposed expansion of the Model City Facility and the construction and operation of RMU-2.

After several extensions of the applicable time period for public comment and applications for party status, including one entered in the twelfth hour as a result of heavy lake effect snow in the Buffalo, New York region, the Office of Hearings and Mediation Services timely received applications for full party status from a number of prospective parties including: a joint petition on behalf of RRG, Lew-Port, and the Farm Bureau [the Interveners]; a joint petition on behalf of Niagara County, the Town of Lewiston, and the Villages of Youngstown and

Lewiston [the Municipalities]; an individual petition on behalf of Amy Witryol, a environmentalist and resident of the Town of Lewiston [Ms. Witryol]; and the Honorable Rick Dykstra [Dykstra], Member of the Canadian Parliament representing St. Catherines, Ontario.[1]

After a telephone conference with the party applicants on December 11, 2014, the ALJ issued an order that provided the participants an opportunity to respond to comments from CWM's representative, seeking to relitigate the Department's finding in the Final Hazardous Waste Facility Siting Plan that there was no need for the proposed hazardous waste landfill RMU-2 and to the respective applications of Interveners, the municipalities, Ms. Witryol, and Dykstra. Written replies were timely received from all parties (other than Dykstra), including the DEC.

On March 11, 2015, the ALJ published notice of the scheduling of an issues conference beginning on April 28, 2015 in the Youngstown First Presbyterian Church. The issues conference was attended by all of the prospective parties, again with the exception of Dykstra, and including the Applicant, and the DEC, which, pursuant to the memorandum agreement of July 2, 2014, was presided over by the ALJ with the presence and participation of the Siting Board. The issues conference concluded on April 30, 2014.

After several exchanges of additional information from the prospective parties, Applicant, and DEC, the ALJ issued his Ruling on December 22, 2015. The

[1] Dykstra ultimately informed the ALJ that he was seeking amicus status. Finally, after a change in the national government of Canada, he was dismissed from the proceeding.

Ruling granted full party status to Interveners, the Municipalities, and Ms. Witryol, and concluded that Dykstra had withdrawn his petition for amicus status from further consideration [Ruling at pp. 151-152]. It required all appeals to be received by the Honorable James T. McClemmons, Chief Administrative Law Judge of the Office of Hears and Mediation Services, by 3:30 P.M. on Friday, March 4, 2016, with copies to the revised service list, by mail and e-mail, and all replies to be submitted by 3:30 P.M. on Friday, April 1, 2016. [Ruling at p. 152 - 153] By an Order dated March 7, the ALJ extended the time to file a supplement or replacement appeal by March 9, 2016 by 3:30 P.M.

The following replacement appeal addresses selected proposed issues raised by Interveners and rejected, in whole or in part, by the ALJ.

BRIEF STATEMENT OF THE FACTS

The Model City hazardous waste landfill facility, owned and operated by Applicant, is situated on a 710-acre facility, located within the Towns of Lewiston and Porter, Niagara County, New York. The facility is comprised, but not limited to, Residual Management 1 [RMU-1], a currently inactive hazardous waste landfill of approximately 47 acres, which has received approximately 5,271,100 tons of hazardous waste[2]. Additionally, during the active life of the facility, managed by a range of operators including Chem-Trol, the Service Corporation of America [SCA], and the Applicant, a number of additional hazardous waste landfills were opened, filled, permanently closed, and which are subject to "perpetual" care, monitoring,

[2] It is assumed that 1.0 cubic yards of hazardous waste equals approximately 1.5 tons of waste. For convenience sake, this appeal will refer to capacities at the facilities in tons.

and treatment, including Secure Landfills [SLF] 1 – 12, which, as found by the ALJ, [Ruling at pp. 79 – 80] resulted in the permanent burial of the following:

- SLF 1 – 6, which contain more than 300,000 tons of hazardous waste.
- SLF – 7, which contains more than 370,000 tons of hazardous waste.
- SLF – 10, which contains more than 240,000 tons of hazardous waste.
- SLF – 11, which contains approximately 1,380,000 tons of hazardous waste.
- SLF – 12, which contains approximately 1,400,000 tons of hazardous waste.

As a result, the aggregate total of waste permanently buried at the Model City site exceeds 8,900,000 tons. If the Applicant ultimately obtains permission for construction and operation of RMU-2, with its approximate capacity of nearly 6,000,000 tons of additional hazardous waste to be permanently buried on its site, the total burden on the Municipalities and its citizens would reach a staggering total of nearly 14,900,000 tons. This waste will be buried forever on site, and will require perpetual oversight and treatment by the Applicant.

The DEC's final Hazardous Waste Facility Siting Plan, [Final Siting Plan], published in 2010, after careful analysis, concluded that the site is the only hazardous waste landfill operating in New York State, http://www.dec.ny.gov/docs/materials minerals pdf/hwspfinal.pdf, pp. 6-12 - 6-15. The Final Siting Plan further made a critically important, and statutorily-mandated, finding concerning the need for further hazardous waste landfills in New York State:

Conclusion regarding Facility Need [Emphasis in original]

> Based on the national availability of facilities, there are sufficient available TSD facilities for management of RCRA hazardous waste generated in New York, and will be for the foreseeable future… For PCB wastes that can be landfilled, landfill capacity is estimated to exist through 2021, with landfill capacity for "Mega Rule" PCB remediation waste estimated to exist beyond 2100 for the northeast quarter of the country. *Final Hazardous Waste Facility Siting Plan (2010) at pp. 6-4, 6-9.*

The facility is located 1.9 miles east of New York State Route 18, approximately one mile from the Lew-Port consolidated school campus which, during the school year, has resident 2,500 individuals, mostly comprised of highly susceptible children of ages five through eighteen (grades K -12 are housed on the campus) [Intervener's Petition at p. 15]. The transportation route of all fully laden hazardous waste truck traffic runs directly in front of the Lew-Port campus.

Throughout its more than four decades of operation, the facility's management has resulted in numerous violations of state and federal safety regulations by Applicant, and its predecessors [Intervener's Petition, pp. 33 - 36; Exhibit # 4]; *Siting of Hazardous Waste Management Facilities and Public Opposition,* the United States Department of Environmental Conservation, SW 809, November 1979 at pp. 260-267. These violations have been both continuous and serious, raising legitimate concerns for the health and safety of contiguous residents of the host communities.

At least three scientific public health studies have been conducted that included areas within the Towns of Lewiston and Porter and including the Lew-Port School campus. [Intervener's Petition, pp. 22 – 26; 36; Exhibit 5]. Employing an examination of the New York State Cancer Registry, the New York State Department of Health reported significantly elevated cancers across the community, many of

which could be caused by the hazardous materials already landfilled and those the Applicant seeks to contribute to its toxic mix in RMU-2 [Intervener's Petition at pp. 22 – 26].

The Model City Facility is situated amongst rich farmland in the nearby Towns of Lewiston and Porter and the Hamlet of Ransomville. A number of local farms are located near 4 Mile and 12 Mile Creeks, which are both impacted by the Model City Facility. The hazardous waste landfills are filled with PCB and heavy metals, among other dangerous materials. The scientific literature is clear and consistent that heavy metals, including lead, zinc, and nickel, as well as cadmium, barium and PCBs migrate through evaporation from soil or water and can contaminate food crops and farm animals [Intervener's Petition at pp. 46 – 52]. The Applicant and DEC have failed to conduct soils tests in proximate agricultural properties affected by 4 Mile and 12 Mile Creeks Intervener's [Intervener's Petition at p. 16, note 4].

SUMMARY OF INTERVENER'S CLAIMS AND THEIR DISPOSITION IN THE RULING

1. Issue Raised Jointly By RRG, Lew-Port and the Farm Bureau

RRG, Lew-Port, and the Farm Bureau raised a total of nine issues in their Petition for Full Party Status. The three raised one common issue, *viz*, that: "The DEC Finding that the Proposed Facility is Not Necessary May Not Be Reconsidered in the Present Proceeding" [Intervener's Petition at pp. 19 – 22]. This argument was raised in response to an argument by Applicant in its application for the 6 NYCRR Part 361 Permit, that the DEC had made an error of law when it reached its critical finding that there was no need for additional hazardous waste landfill capacity to manage

hazardous waste generated in the state. The ALJ's Ruling sustained the common issue and it is, accordingly not appealed.

2. Issues Raised Jointly by RRG and Lew-Port

RRG and Lew-Port raised two common issues. The first, relying upon 6 NYCRR 361.7(b), asserted that: "The Proposed Hazardous Waste Landfill is Not in the Public Interest as it Presents Unacceptable Risks to Contiguous Populations" [Intervener's Petition at pp. 22 – 26]. This argument was predicated upon public health studies undertaken of the municipal areas proximate to the Model City Facility and transportation routes. Two proffers from well-qualified physicians were offered in support of the application. Acknowledging the scientific impossibility of ascribing a causative factor for most human cancers, the proffers asserted that appropriate consideration of combined factors, including: the total amount of waste [Intervener's Petition at p. 25], the presence of hazardous materials that could be responsible for the elevated cancer rates, the lack of land use regulatory authority [Issues Conference at pp. 315-317], the fact that the proposed facility is not necessary, and the unbroken record of consistent permit violations that threatened public health [Intervener's Petition at p. 36], required denial of a Certificate of Environmental Safety and Public Necessity.

The ALJ's Ruling rejected this issue. The Ruling concluded that the health studies and proffers did "not show a cause and effect relationship between the operation of CWM's Model City facility and the number of cancer cases in three study areas." [Ruling at p. 37] It further noted that the small numbers of interviews in the study "do not allow further evaluation of the possible association of these

incidences with school attendance," [*id.*] and that the age of the women diagnosed with breast and urinary bladder cancers "would have been past high school age when the Lewiston-Porter schools opened at the current location." [Ruling at p. 38]. RRG and Lew-Port appeal this decision.

The second issue raised jointly by Lew-Port and RRG argued that: "The Proposed RMU-2 Landfill is Not Otherwise Necessary or in the Public Interest Because It Will Have Negative Effects on Property Values in the Community and Upon the Municipal and School Property Tax Receipts." After summarizing the extensive literature establishing the effects of hazardous waste facilities on property values in a host community, Lew-Port and RRG demonstrated, first, the substantial news coverage of the Model City Facility and the proposed expansion of RMU-2, rendering potential purchasers of real estate in the community fully aware of the disamenity. They further argued that the proximity of the facility to the Lew-Port campus, and the transportation route running directly in front of the schools, expanded the affected area to the Lew-Port catchment area. Lew-Port and RRG tendered the testimony of Kenneth M. Acks of the Cost-Benefit Group, who would testify that, based upon a detailed, scientific-based study, there was a substantial negative effect on property values as a result of the Model City Facility and the Proposed RMU-2 expansion. Additional support was a proffer from Beverley Vandusen and Timothy Henderson, who conducted a survey of purchasers of homes in the Village of Youngstown in 2011 and 2012, that resulted in the conclusion that a disproportionate number of local families were purchasers, while out-of-towners were significantly underrepresented [Intervener's Petition at pp. 26 – 31].

The Ruling of the ALJ accepted this issue, with the exception of proffered testimony from Professor Vincent Agnello [Ruling at p. 84], which RRG and Lew-Port will not appeal. While the Ruling will result in no appeal from RRG and Lew-Port on this issue, because they will be collaborating on the issue of loss of property values in the host communities, they collectively support the appeal of Ms. Witryol concerning the effects on tourism spending on the purchase of second homes.

3. Issue Raised by Lew-Port

Lew-Port raised an issue that the facility's proximity had caused: "The Significant Decrease in Students Enrolled in the District and the Associated Decrease in Teaching and Non-academic Employees. " Testimony of the President of the Lewiston-Porter Central School District Board of Education was proffered that, as a result of the presence of hazardous waste trucks and the proximity of the Model City Facility to Lew-Port, the District has experienced a significant decrease in the number of enrolled students and associated teaching and other employees. Because the landfill is unnecessary, direct proof of causation is not necessary, considering the dramatic "decrease in the number of school-aged children in the community, which has proceeded in tandem with the statistically significant incidence of cancer and the wholesale loss of property value and associated real property tax receipts and the continued operations and expansions of the CWM hazardous waste dump." [Intervener's Petition at pp. 31 – 33].

The Ruling, again relies upon a lack of proof to substantiate causation to find this proposed issue is neither substantive nor significant. Lew-Port will appeal this determination [Ruling at pp. 88-89].

4. Issues Raised by RRG

RRG raised four issues in the Petition. The first issue stated: "The Chronic and Multiple Violations of Its Permits Demonstrate that Siting RMU-2 is Not Otherwise Necessary or in the Public Interest." Joining the Municipalities and Ms. Witryol, RRG enumerated the "history of facility operations in an area" [*Final Siting Plan* pp.9-5], and the continual violations that occurred throughout the life of the Model City Facility and at other hazardous waste sites operated by CWM and Waste Management [Intervener's Petition at pp. 33 – 36], which threatened the health and safety of host community residents. Moreover RRG noted at the issues conference that the host community has no authority to regulate the operations at the proposed RMU-2 and at the Model City Facility, and that the Siting Board was required to undertake its review of the Applicant's proposal with extra vigilance to protect the health and safety of the host community residents. [Issues Conference at pp. 315-317].

The Ruling considered this issue in great detail [Ruling at pp. 64 -76]. The ALJ discussed the original and supplemental submissions of the Applicant concerning noncompliance. After acknowledging the central importance of noncompliance, the ALJ quotes the DEC response to the CWM record from November 2000 to November 2008 as "serious" and "deplorable," while still purporting to consider the extensive regulatory overlay to establish the acceptability of the facility; but the agency did not explain how "deplorable" violations became acceptable under such an analysis [Ruling at p. 69]. Applying the Interim Decision in *Waste Management of New York (Towpath)* (May 15, 2000), the ALJ , found "CWM's record of compliance is a

substantive and significant issue for adjudication" [Ruling at p. 74], and found it relevant, both to the site-wide Part 373 modification permit process and to the issuance of a siting certificate. He ordered the Applicant to disclose permit and other environmental violations for the Model City site back to January 1, 1993 to the present. [*id.*] With respect to CWM subsidiaries outside New York State, the Applicant was ordered to disclose such violations from January 1, 1995 to the present, with both having a monetary threshold of $25,000. [Ruling at p. 75] He declined to receive the Report proffered by RRG prepared by the District Attorney from San Diego, California. [*id.*]

RRG will not appeal this portion of the ruling directly, but will argue that the totality of the violations, including those elucidated by the San Diego, California District Attorney, appropriately pertain to obviate the ALJ-imposed requirement of causation with respect to the public health and agricultural effects of the proposed RMU-2 landfill. RRG will further argue that it is entitled to a broader consideration of all violations committed during the life of the Model City facility by the Facility Siting Board than that imposed by the ALJ's Ruling with respect to the licensing requirements.

The second issue presented by RRG is that: "The Total Amount of Waste Permanently Landfilled at CWM Is Inequitable and Unfair and Demonstrates that Siting of RMU-2 is Not Otherwise Necessary or In the Public Interest" [Interveners' Petition at pp. 37 – 40]. While raising the issue in substantial part as an expanded view of "environmental justice," the argument also noted that the argument pertains to the equitable distribution claim [Intervener's Petition at p. 38]. RRG

further argued relevance of the issue to Chapter 9 of the Final Siting Plan, which instructs the Facility Siting Board, in considering whether to grant or deny a Certificate of Environmental Safety and Public Necessity when there is no need for additional hazardous waste landfills, to determine if the proposal is otherwise necessary or in the public interest. One of the relevant factors identified includes: "*the history of facility operations* in an area and the presence of non-operating facilities, such as closed hazardous waste sites… [and] the facility's size and impact on the surrounding area." [Final Siting Plan at 9-4 and 9-5; Intervener's Petition at p. 38, emphasis added].

The ALJ concluded that the Siting Board might consider the issue of equitable distribution of hazardous waste landfills in the state in determining whether CWM's proposal is consistent with the Final Siting Plan. [Ruling at p. 61] He also ruled that the Final Siting Plan permits consideration of "the presence of non-operating facilities, such as closed hazardous waste landfills" [Final Siting Plan at 9-4], but declined to interpret "the history of facility operations" to include record of compliance beyond that mandated by the permitting process. Finally, the ALJ rejected the issue of the Environmental Justice aspect of the Model City Facility and the RMU-2 proposal. [Ruling at 63 – 64], but found the issue to be "better characterized as part of the equity issue…" [Ruling at p. 64] RRG will appeal that portion of the Ruling that declined to mandate consideration of the totality of facility violations by the Siting Board in its consideration of "this history of facility operations."

The third issue raised by RRG was that: "The Proposed RMU-2 Hazardous Waste Landfill is Inconsistent With New York State's Preferred Statewide Hazardous Waste Management Practices Hierarchy." After demonstrating the exponential growth of hazardous waste landfilling at the Model City Facility [Intervener's Petition at p. 40], RRG drew on the Final Siting Plan's description of the CWM Model City's Facility [Intervener's Petition at pp. 40 – 41], a well-qualified witness was proffered, Dr. Kristen B. Moysich, who would testify that many of the chemicals contained in the Facility's Toxic Release Inventory "could pose a significant threat to human health, and thus is, in fact, a hazardous waste landfill; and the RMU-2 expansion would be in violation of the Hierarchy.

The ALJ ruled that any challenge to the land disposal restriction rules would not be considered; nor would a challenge to whether the RMU-2 proposal would promote moving up the facility. Rather, the burden of establishing these criteria would remain with the Applicant. [Ruling at pp. 78 – 79]. RRG will appeal the ALJ decision on this issue.

The final issue raised by RRG was that: "The Proposed RMU-2 is Inconsistent With the Master Plans of the Host Communities" in contravention of NYCRR Part 361, section 361.7(b)(6)(i). In support of this proposition, RRG specifically directed attention to several "planning schemes" with clear, irreconcilable conflicts with the proposed hazardous waste landfill expansion. First, *The Niagara Communities Comprehensive Plan 2030: A Plan to Communicate, Collaborate & Connect Niagara County New York (July 2009)*, self-described as "Niagara County's first-ever comprehensive planning document that is dedicated solely to the entire County and

its twenty municipalities." *Niagara Communities Comprehensive Plan,* at page 1. In addition, attention was directed to the *Comprehensive Plan for the Town of Porter: Connecting Our Past With the Future (August 2004).*

The ALJ ruled that, at the close of adjudicatory hearing, the parties would be provided opportunity to address: whether *The Niagara County Communities Comprehensive Plan* is relevant to the issue described in 6 NYCRR 361.1(c)(12); if the Niagara County Plan is in fact considered relevant to the municipal siting criterion at 6 NYCRR 361.7(b)(6), whether CWM's RMU-2 proposal would be consistent with it; and whether the proposal would be consistent with the Town of Porter Comprehensive Plan [Ruling at p. 51]. Accordingly, RRG does not appeal this ruling.

5. Issue Raised By the Farm Bureau

The Farm Bureau presents one issue, that: "The Proposed Construction and Operation of RMU-2 Threatens the Crops, Animals and Marketability of Local Community Agriculture." In support, the Bureau proffered a highly qualified expert, Professor Murray McBride from Cornell University, who would testify concerning: the potential for transmission of PCB cogeners that can persist in soils for decades; the risk of animal and human exposure to PCBs escaping from hazardous waste landfills in particular; the impacts of toxic metals on soils and agricultural systems; the release of dust or aerosols from the Model City Facility and RMU-2 that could contaminate food crops and forages; and the presence of massive amounts of soil and waste contaminated by these heavy metals immediately adjacent to productive farmland that represents a potential risk to soil productivity and the food chain.

The Bureau also proffered testimony from two local farmers, Thomas Freck and Thomas Tower. Freck would testify concerning: the flooding of 12 Mile Creek on his property on which he raises crops and animals; the effects of clay trucks utilized in landfill construction on his homestead; and the negative effect on the reputation and adverse effects on marketing from his location near the Model City Facility. Tower would testify concerning the effects on public consumer fears about the purity of the food they put on their tables and the effects that the Model City Facility and proposed RMU-2 would have on prospective markets [Intervener's Petition at pp. 50 – 52].

The ALJ declined to consider the Farm Bureau's issue as it pertained to the dangers to crops and human health that could result from proximity to the Model City Facility and proposed RMU-2 due to PCB and metals contamination. Concluding that the issue was similar to the public health impacts issue discussed above, he found that, absent an offer of proof that PCBs and heavy metals had in fact contaminated lands, that he would not permit further inquiry [Ruling at p. 90]. The Farm Bureau will appeal this ruling. However, the ALJ did conclude that the proffered testimony of Messrs. Tower and Freck presented a significant issue. Accordingly, the Farm Bureau does not appeal this ruling – except to the extent that its failure to discuss Freck's proffer concerning the effects of the flooding of 12 Mile Creek and clay trucks associated with landfill construction at the Model City Facility have on his farm was intended as a *sub silento* denial.

ARGUMENT

I.

The Proposed RMU-2 Hazardous Waste Landfill Presents an Unacceptable Danger to Residential and Contiguous Populations in Contravention of 6 N.Y.C.R.R. section 361.7(c)(4)

The Interveners assert that the proposed RMU-2 hazardous waste landfill presents an unacceptable danger to residential and contiguous populations in contravention of 6 N.Y.C.R.R. section 361.7(c)(4). Supporting the assertion, they rely upon an offer of proof from knowledgeable and well qualified public health professionals, including David O. Carpenter, M.D., Director of the Institute for Health and the Environment of the University at Albany, the State University of New York, and Thomas Hughes, M.D., a member of the Niagara County Board of Health, with decades of experience as a general practitioner with a family medicine practice in Niagara County.

Focusing upon a public health study undertaken by the Cancer Surveillance Program of the Bureau of Chronic Disease Epidemiology and Surveillance Center for Community Health, with assistance from the Center for Environmental Health, New York Department of Health, entitled *Investigation of Cancer Incidence in the Area Surrounding the Niagara Falls Storage Site and the Former Lake Ontario Ordinance Works, Towns of Lewiston and Porter, Niagara County, New York, 1991-2000,* Interveners made the following proffer:

- Dr. Carpenter stated: "Using the NYS Cancer Registry, the NYSDOH reported significantly elevated rates of a number of cancers. In study area #1 (which approximates the Lewiston-Porter school district),

they found significantly elevated rates of all cancers in men. This was primarily a result of very much-elevated rates of prostate and testicular cancers. There were also significantly elevated rates of breast and urinary bladder cancer in women. There was a significantly elevated incidence of cancer in children, particularly of germ cell, trophoblastic and other gonadal neoplasms. Several other cancers were found at rates above expected, although because of small numbers did not reach statistical significance. These include esophagus, colorectal, urinary bladder in men and leukemia.

Study area #2 consisted of census tracts containing the towns of Youngstown and Ransomville. Elevation in rates of prostate cancer was the only significant finding, but non-significant elevations were observed for colorectal and urinary bladder in both males and females. Study area #3 was the zip code 14131. There were no cancers that showed a significant elevation in this zip code, but in men there was a non-significant elevated incidence of all cancers, colorectal, lung, prostate and bladder cancer.

The NYSDEC response to these findings is inaccurate and misleading. It is always difficult to identify causes of cancer within a relatively small geographic area, even when statistically significant results are found. However when overall rates are increased in a rather small area with environmental contamination, especially contamination with ionizing radiation, there is reason for special concern. It is totally

not true that 'these types of cancers are not known to be associated with exposures to radiation or to any chemicals', as stated by NYSDEC. Ionizing radiation is known to increase the risk of all kinds of cancer, as is clearly shown from studies of Hiroshima and Nagasaki. Many chemicals do the same, although some pose a greater risk for one kind of cancer than of others. When elevations above expected numbers are seen, even if the results don't meet statistical significance, it is not appropriate to dismiss them as demonstrating no association.

The data presented by the NYSDOH shows elevations in rates of cancer in the area of study in both children and adults, and these elevations are likely due to exposure to radiation and chemicals coming from the Niagara Falls Storage Site and the former Lake Ontario Ordnance Works, which includes CWM Chemical Services property." [Intervener's Petition at pp. Emphasis added]

- Dr. Hughes offered to testify that, with few exceptions, *e.g.* mesotheleoma, it is simply not possible for medical science to ascribe a specific causative factor for most human cancers, which can range from lifestyle, to genetics, to environmental causes. The hazardous chemicals that have been landfilled at the CWM facility over the course of its existence, and the toxins likely to be transported to the facility and buried in proposed RMU-2, could in fact be the cause of the cancers identified in the NYSDOH study and that this possibility cannot be disproved. In light of the DEC conclusion that the proposed

> RMU-2 is not necessary to dispose of hazardous waste to be generated in New York State for the next 20 years, it would be irresponsible and entirely inappropriate to permit the additional importation and burial in the community of 6,000,000 additional tons of hazardous materials. When informed of the finding of the Municipal Stakeholder interveners' hydro-geologist of potential contamination of subsurface water in a direction towards the school campus, through a highly transmissive east-west buried sand and gravel valley gouged from bedrock by the glacial process with a flow to the west [*Discussed in the Expert Hydrogeology Proffer Set Forth in the Petition of Municipal Stakeholders Interveners*], Dr. Hughes considers the denial of the requested certificate mandatory because the proposed RMU-2 landfill would pose an unacceptable risk to contiguous populations.

After fairly summarizing the arguments in detail, the ALJ, in pertinent part, ruled as follows:

- With respect to "statistically significant excesses … observed in the number of cases of women diagnosed with cancers of the breast and urinary bladder… [a]ccording to the report, the excesses were concentrated in older women, who would have been past high school age when the Lewiston-Porter schools opened at the current location.

Therefore, this group could not have attended the schools at their current location."[3]

- "The Department of Health report does not show a causal link between the Model City facility and the incidences of cancer. In addition, Dr. Hughes, the proffered expert witness, acknowledges the absence of a causal link. I note that the purpose of the applicable regulations is to insure the maximum safety of the public from hazards associated with the management of hazardous wastes [see ECL 27-1103(1)], which is intended to address Dr. Hughes' concern about the exposure to hazardous wastes from environmental releases (Tr. At 166). Also, Dr. Carpenter's proffer about the carcinogenic nature of the chemicals disposed at the site of the Model City facility (Tr. At 166) does not raise a factual dispute that requires adjudication."

There exist several critical and unique factors presented by the current application, which, in combination, support the proffer. First, it is critical that host communities in New York state ,such as the Towns of Lewiston and Porter, have been infantilized, and left to the protection of the DEC and Facilities Siting Board, by the unprecedented withdrawal of the well-established police power of land-use control and zoning, see *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), with respect to hazardous waste facilities, see *Niagara Recycling, Inc, et al.,*

[3] This factual assertion is not correct. The Lewiston-Porter Schools have been operating on site since before hazardous waste landfilling commenced in 1971. The age of high school students enrolled at that time would currently be 59 to 64 years of age – a group of women with higher than expected breast cancer.

v. Town of Niagara, 83 A..D. 2nd 316, 331, note 4 (4th Dept. 1981); [Issues Conference Transcript at pp. 476-479]. Second, the DEC Final Hazardous Waste Facility Siting Plan correctly found the instant application for a huge toxics mega-dump in the Model City facility to be unnecessary. And third, the unbroken record of serious environmental violations that have threatened the health and safety of Lewiston and Porter residents, most significantly including the students and staff at the consolidated Lewiston-Porter School District, supports the appropriateness of the proffer. [Issues Conference Transcript at pp. 315-317; 342] Finally, the Ruling places inappropriate emphasis upon causation and determinacy, resulting in an impossible burden being placed upon the community concerning its paramount concern to protect the public health of the contiguous population. [Issues Conference Transcript at pp. 155 – 156]

The fact that zoning is an enumerated factor to be considered by a Facilities Siting Board [ECL 27-1103(2)(g), does not in any way depreciate Interveners' claim that the host communities have been deprived of their authority to regulate the appropriate use of hazardous waste landfilling, through, for example, excluding the activity altogether or, as would be the case in the Towns of Lewiston and Porter with a preexisting facility, limiting the acreage that could be devoted to hazardous waste TSD facilities to current usage. Consistency with local zoning is only one of a number of factors relating to siting of a facility and, in no way, is determinative.

As early as 1979, a report issued by the United States Environmental Protection Bureau, made the following observation:

> "Local jurisdictions exercise regulatory control primarily through zoning…If these controls can hold veto power over site development, then the primary role of local jurisdiction will be to block siting attempts." *Siting of Hazardous Waste Management Facilities and Public Opposition,* the United States Department of Environmental Conservation, SW 809, November 1979 at p. 31.

The United States Congress ratified this hostile characterization of local land-use authority over hazardous waste disposal facilities, and the unstated but necessary conclusion that such power be withdrawn by the states. In 1987, the EPA issued a guidance document to state officials concerning the requirement imposed by the Superfund Amendments and Reauthorization Act (S.A.R.A.) that each state file with the E.P.A. a Capacity Assurance Plan which demonstrated adequate projected capacity to dispose of the hazardous waste expected to be generated in the state for the next twenty-years, at pain of denial of Superfund cleanup funding of remedial cleanup actions within the state, 42 U.S.C. section 960(c)(9)(A) (Supp. V. 1987). The EPA summarized the legislative history of the Capacity Assurance provision: "Congress did, however, provide guidance for states in developing successful siting programs that would provide the assurances that creation of and access to capacity would occur. Siting programs should recognize three 'key principals': sound technical analysis of sites selected for facilities; public participation in and education during the process of facility planning, site selection, and site approval; **and insulating decision-making from local veto power exercised on the basis of**

community political considerations." [Emphasis added] *Assurance of Hazardous Waste Capacity: Guidance to State Officials. Assistance in fulfilling the requirements of CERCLA 104(c)(9)*, the United States Environmental Conservation Bureau, OSWER Directive Number 9010.00, December 1988 at p.4 [in reference to S. Rep. No. 11, 99th Cong., 1st Sess. at p. 23 (1985), emphasis provided].

Shortly after receiving this guidance, New York State adopted section 27-1107 of the Environmental Conservation Law, which provides in pertinent part: "Notwithstanding any other provisions of law, no municipality may… require any approval, consent, permit, certificate or other condition including conformity with local zoning or land use laws and ordinances, regarding the operation of a facility with respect to which a certificate [of environmental safety and public necessity] has been granted…" A clearer withdrawal of local land use authority can hardly be imagined. As a result, the citizens of the Towns of Lewiston and Porter are totally reliant upon the Facilities Siting Board, and the instant process, for protection of their health, safety, quality of life, and property values, *Niagara Recycling, Inc, et al., v. Town of Niagara*, *supra*. Any doubt, whatsoever about a proposed project's potential to harm the public's health *must* be resolved in favor of the community through the Siting Board's effective responsibility as *parens patriae* of the local host community.

This is particularly true when, as here, the proposed facility is indisputably unnecessary for the responsible and lawful treatment and disposal of the hazardous waste reasonably anticipated to be generated within New York State. See, *Final Hazardous Waste Facility Siting Plan (2010)* at pp. 6-4, 6-9. As a result, the primary

purpose to be served by RMU-2, and the nearly 6,000,000 tons of toxics it is projected to receive, is corporate profit for the Applicant, which simply cannot be permitted to trump concerns about the public's health.

Moreover, the extraordinary and devastating experience of the Towns of Lewiston and Porter with agency-permitted activities at the Balmer Road facility is most relevant to the Siting Board's consideration [Issues Conference Hearing at 315 – 316]. Hazardous waste landfilling at what is now CWM's Model City site began in 1971, when Chem-Trol Pollution Services, Inc. operated a facility reclaiming waste oils and land disposal of highly hazardous waste. This was a period of primitive regulation; with the Resource Conservation and Recovery Act (RCRA), Part C being adopted in 1965, the Hazardous Waste and Consolidated Permit Regulations published in 1980, and the Hazardous and Solid Waste Amendments (HSWA), and initial landfill ban of highly toxic chemicals promulgated in 1984. As a result, many toxins strictly banned from disposal in landfills today because of serious concerns over public health, found their way to the Lewiston-Porter community for permanent burial. [4]

The Service Corporation of America, [SCA], acquired the site in 1973. The name of the facility was changed to SCA Chemical Waste Services, Inc, and the indiscriminate dumping of a broad spectrum of hazardous waste continued. SCA is perhaps best known for its close ties to organized crime, and many of its officers

[4] The summary of some of the major violations at the Balmer Road facility is offered to emphasize why the ALJ's rejection of the health claims, requiring an impossible demonstration of causation, must be rejected. See Hughes proffer, summarized, *supra* at p. 4; [Issues Conference Hearing at 315-317; 342]

faced subsequent federal and state felony indictments, and its management of the facility was deeply flawed.

The host communities were subjected to activity that threatened health and property values by the activities of SCA. Thus, as reported by the EPA: "[I]n September of 1973… piles of salt generated by operations… were reportedly haphazardly stored and … resulted in the destruction of trees and other vegetation…The following spring a spill in Four Mile Creek resulted in a fish kill. In March of 1974, NCHD [the Niagara County Health Department] concluded that phenol in the creek which had originated [on the site] was responsible for the fish kill…In September of 1974, [Town] officials charged that [the facility] was discharging liquid wastes (variously described as aqueous wastes and as untreated acids) illegally into Four Mile Creek and thereby into Lake Ontario…In early 1976…a reported 1,500 gallons of wastewater containing phenols, dissolved metals, and organics spilled into Four Mile Creek, turning the creek and the snow along its banks blue…The following month a landfill caught fire and burned for several hours. A series of explosions was reported during the fire…In October [1976] another spill took place at the site when a lagoon wall collapsed. The wall had been undermined by a bulldozer… In January [1977] another spill occurred which discharged a 'green acid' into Lake Ontario… In early March [1979] SCA was fined $15,000.00 by U.S. EPA for improper storage of PCBs." *Siting of Hazardous Waste Management Facilities and Public Opposition, supra,* at pp. 260-267.

Chemical Waste Management, a subsidiary of Waste Management, Inc., acquired SCA Chemical Waste Services, Inc in 1984. The name of the company was

once again changed, this time to CWM Chemical Services, Inc. in 1986. In 1988, CWM converted to a Limited Liability Corporation; but the change from the environmentally challenged SCA operation to Waste Management and CWM did not end serious environmental enforcement violations.

The Applicant's record of operation is hardly better than that of its predecessors at the Model City site and does not lead to confidence within the host communities concerning its effects on the public health and welfare. Thus, the Company was charged with failing to test every truckload of PCB sludge as required by EPA and incurred fines of $25,000 a day for the 48 days of violation in 1988. The following year, CWM was fined $1,320,000 for failure to disclose "major modifications" to a PCB Detoxification Unit that they had acquired in 1985.

During the past twenty years, while the fines have decreased, the violations have occurred regularly, on an almost annual basis. For example, on October 17, 2008, an administrative Order of Consent between the DEC and CWM was entered. This Order imposed civil fines of $175,000 as a result of at least 76 separate violations, admitted by CWM, of DEC environmental regulations for the seven-year period from 2001 – 2007. These violations ranged from multiple instances of landfilling hazardous substances including mercury in violation of State and Federal land disposal bans; multiple unauthorized releases of untreated and partially treated hazardous waste into the environment; multiple failures to properly identify and treat reactive waste that resulted in uncontrolled reaction, explosions, and fire; receiving tanker truck loads of flammable waste during Lew-Port hours of

instruction and activity in violation of its operating permit; and landfilling hazardous waste without appropriate treatment.

In addition, from 1996-2002, five other Enforcement Orders were issued against CWM by DEC and the EPA with total fines amounting to $862,875, assessed for numerous violations of federal and state environmental regulations. Moreover, many instances of leaking trucks have been identified by DEC on-site monitors; and one large hazardous waste truck actually flipped over onto its side at the intersection of Creek and Balmer Roads, no more than one-half mile from the School campus, spilling its contents over the roadway. This record of consistent violations, standing alone or in conjunction with the potential health and property damage caused by the Applicant's management of the site, demonstrate that the three facility operators have failed to protect the health, safety, and quality of life of residents of the Towns and, most especially, the parents of the children attending the Lewiston-Porter School District.[5]

Finally, in concluding that Interveners had failed to establish clear causation of the hazardous waste landfilling for the cancers found by the public health study, the ALJ made a significant error. As candidly admitted by Dr. Hughes in his proffer, "with few exceptions, *e.g.* mesotheleoma, it is simply not possible for medical science to ascribe a causative factor for most human cancers, which can range from lifestyle, to genetics, to environmental causes. The hazardous chemicals that have

[5] Moreover, the dismal, and at times criminal environmental record of CWM at its incinerators in South Chicago and Sauget, Illinois, and at its hazardous waste landfills in Emille, Alabama and Kettleman City, California [Interveners petition at pp. 34-35] with more than $10,000,000 in fines assessed, further demonstrate the rationality and appropriateness of Intervener's insistence that public health issues be resolved in favor of the host community residents.

been landfilled at the CWM facility over the course of its existence, and the toxins likely to be transported to the facility and buried in proposed RMU-2 could in fact be the cause of the cancers identified in the NYSDOH study." Requiring a demonstration beyond the reach of current science was in error and very disappointing to the community, since under the Ruling, safety in these respects is a non-issue *per se*.

It is critical to note at the outset that the DEC and New York State did not require a demonstration of causation of potential human health impacts from a proposed environmental practice in its decision to bar private commercial activity exponentially greater than that proposed by Chemical Waste Management. Thus, after extensive consideration and several years of deliberation, the New York State Department of Health, in a public health assessment relied upon by the DEC, recommended that proposed high volume hydraulic fracturing and shale gas production [HVHF] should be prohibited.

In a transmittal letter to the extensive published report, Acting Commissioner of Health Howard A. Zucker, M.D. J.D., stated the overall conclusion: "As with most complex human activities in modern societies, *absolute scientific certainty regarding the relative contributions of positive and negative impacts of HVHF on public health is unlikely to ever be obtained*. In this instance, however, the overall weight of the evidence from the cumulative body of information contained in this Public Health Review demonstrates that *there are significant uncertainties about the kinds of adverse health outcomes that may be associated with HVHF, the likelihood of the occurrence of adverse health outcomes, and the effectiveness of some of the mitigation measures in reducing or preven*ting *environmental impacts which could*

adversely affect the public health. Until the science provides sufficient information to determine the level of risk to public health from HVHF to all New Yorkers and whether the risks can be adequately managed, DOH recommends that HVHF should not proceed in NYS." New York State Department of Health: A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development, letter of Howard A. Zucker, M.D., J.D., Acting Commissioner of Health, December 17, 2014, found at: www.health.ny.gov/press/reports/docs/high-volume-hydraulic-fracturing.pdf (last visited February 24, 2016). [Emphasis added]

The situation presented here is indisputable and much more compelling than the mere potential of high volume fracking. The Department has "protected" the interests of local residents by permitting the importation into the Towns of Lewiston and Porter, and the permanent burial there, of more than 9,000,000 tons of hazardous waste, including toxins that are appropriately banned from land disposal because of the extreme danger they present to proximate populations. At issue is a proposal by an operator of a facility with an extremely bad operational history to increase this obscene number by another 6,000,000 tons, resulting in a staggering total of hazardous waste buried in the Model City facility of nearly 14,900,000 tons, the landfilling of which is indisputably unnecessary and, per Intervener's proffer, could have negative effects on the health of contiguous communities.

Conversely, fracking was no more than a proposed practice, a glimmer in the energy sector's eye, which would not even be subject to a state override of local land-use regulation. See, *In the Matter of Mark S. Wallach as Chapter 7 Trustee for*

Norse Energy Corp. USA v. Town of Dryden et al, 16 N.E..3rd 1188 (NY Ct. of Appeals, 2014). The Department banned the activity, which was estimated to generate up to $1.5 billion in annual salaries, including those directly employed by the industry as well as those who would indirectly benefit, because its public health effects were indeterminate. Surely this precedent is ample to require the same analysis for the actual transport and burial of hazardous materials in poorly managed and unnecessary landfill.

The proffered testimony of Dr. Carpenter rendered an opinion concerning the applicable health study data that suggests the likelihood of environmental exposures, taking notice of the many toxic chemicals already landfilled, and proposed to be landfilled, at the Model City Facility. His opinion was clear and unequivocal. The proposed RMU-2 landfill will have negative effects on the health and well being of the proximate population. It was error for the ALJ to impose a scientifically impossible burden on Interveners to demonstrate direct causation of public health risks from the hazardous waste that will be brought into their community.[6]

II.

The Lew –Port Issue Concerning the Decrease in Students Enrolled in the District and the Associated Decrease in Teaching and Non-academic Employees Is Significant.

Lew-Port sought to raise an issue concerning the dramatic and significant decrease in the number of students enrolled in the District, as well as the associated

[6] See also the proffer of Dr. Kristin B. Moysich, an eminent epidemiologist, who will be called as an expert witness to testify, in part, that many of the chemicals present at the Model City Facility could pose a significant threat to human life.

drop in the number of teaching and non-academic employees, since operations commenced in the Model City facility. The ALJ rejected this issue, again based upon the failure to demonstrate a causal relationship between CWM and the decreases identified. As with the associated issue of health, Lew-Port has argued that, under the circumstances, such evidence is impossible to determine with any certainty, and that, under the circumstances it should not be required [Issues Conference Hearing at pp. 155-156]. The issue is appropriate for consideration by the Siting Board, which provides the only protection the community receives in the matter of the siting of hazardous waste landfills [Issues Conference Hearing at pp. 315 – 317].

III.

The Final Facility Siting Plan's Provision That the Facility Siting Board Consider "the history of facility operations in an area," Final Siting Plan at 9-4, Requires Independent Consideration of Environmental Violations at the Facility Beyond the Inquiry Mandated By Licensing Requirements.

At the issues conference, RRG elaborated on its argument that, as the effective protection for the community concerning the siting of an additional hazardous waste landfill, the Final Facility Siting Plan mandates a broader scope of its inquiry with respect to facility operations than that imposed by the DEC ROC-EGM requirements for permit approval. The Final Facility Siting Plan discusses the requirement that the Siting Board find that a proposed facility, which has been found not to be necessary to meet New York State's hazardous waste disposal requirements, to be otherwise necessary or in the public interest [Issues Conference Hearing at pp. 315-317; 342]. Specifically, RRG has argued that the Plan's direction to the Siting Board with respect to this requirement to consider "the history of facility operations in an area," is not redundant and has independent significance

beyond the narrow conditions imposed by the *Towpath* decision relied upon by the ALJ in rejecting this position. The requirement is independent of the further direction to consider closed landfills at the facility, and has meaning apart from the directions to the Applicant with respect to required disclosures in their permit applications.

RRG will not repeat the lengthy discussion above concerning the public health aspect of the proposal, but reiterates: 1) the proposed facility is unnecessary; 2) traditional land use regulatory authority has been withdrawn by statute concerning hazardous waste disposal facilities, and community protection is vested solely in the Facility Siting Board; and 3) the scope of the proposal for a new RMU-2 landfill is extraordinary and will, if approved, result in the permanent disposal of nearly 6,000,000 tons of hazardous waste in the host communities. Under these circumstances, the local citizenry are entitled to no less than the broadest possible scrutiny of the environmental violations by the Siting Board. The provision in the Final Facility Siting Plan is independent of the permitting requirements and not redundant. It should be interpreted to provide the maximum and broadest oversight of the adequacy of facility operations and protection that the Board can provide. No less is acceptable to the host communities.

IV.

The Proposed RMU-2 Hazardous Waste Landfill is Inconsistent With New York State's Preferred Statewide Hazardous Waste Management Practices Hierarchy.

ECL section 27-1105 provides: "It is hereby declared that the following preferred hazardous waste management practices hierarchy is to be used to guide

all hazardous waste policies and decisions: (a) The generation of hazardous waste is to be reduced or eliminated to the maximum extent possible; (b) Hazardous wastes that continue to be generated are to be recovered, reused, or recycled to the extend practical; (c) Detoxification, treatment or destruction technologies are to be utilized for hazardous wastes which cannot be reduced, recovered, reused or recycled; and (d) Land disposal of industrial hazardous wastes, treated residuals posing no significant threat to the public health or to the environment should be phased out as it is the least preferable method of industrial hazardous waste management." The Final HWFSP makes clear the relevance of this hierarchy to the deliberations of a Facility Siting Board, requiring consideration of "whether the facility will promote moving up the hierarchy for management of hazardous waste and employ sustainable options for the management of hazardous waste." Final HWFSP p. 9-6.

RRG argued that the Applicant's proposal to construct and operate a new mega-hazardous waste landfill, RMU-2, violates this mandate. As observed by RRG, hazardous waste landfilling at the Model City facility has actually *increased*, along with operator profits, over the past 45 years, and can hardly be said to "be phased out," from 11,110 tons in SLF-1 from 1971 – 1973 to an astronomical 5,250,000 from November 1993 to the present – a 500% increase [Intervener's Petition at pp. 39 -41]. Applicant seeks to create an even larger more disproportionate situation with its proposed RMU-2, and its permitted capacity of 6,000,000 tons. Without more, hazardous waste landfilling in the State of New York clearly has not been phased out, or even moved anywhere in that direction – it has been aggressively and significantly increased.

Responding to intimations by Applicant that their proposed facility is not really a hazardous waste landfill, since much of its proposed capacity will ultimately receive "treated residuals posing no significant threat to the public health or to the environment," RRG first directed the attention of the ALJ to the Final Facility Siting Plan, which states unequivocally that the Model City facility "is the only permitted hazardous waste land disposal facility in the State."[7] RRG also proffered the testimony of a highly qualified epidemiologist, Dr. Kristen B. Moysich, in part to establish that many of the toxic chemicals identified in the Model City facility's Toxic Release Inventory "could pose a significant threat to human life" [Intervener's Petition at p. 41].

The ALJ rejected these arguments, first concluding that RRG was making an inappropriate challenge to the underlying assumptions of the Land Disposal Restriction Rules found at 6 NYCRR Part 268. This misperceives the argument raised. Thus, in a colloquy between counsel for Applicant and RRG during the issues conference, the following clarification was provided:

> MR. DARRAGH [counsel for Applicant]: I'm asking whether his proffer is essentially to challenge the legitimacy of the land disposal restriction rules which are part of the Department's regulations?
>
> MR. OLSEN [counsel for RRG]: I'm not challenging the legitimacy of landfilling. I'm challenging the treatment of this landfill as a treatment

[7] Indeed, if RMU-2 were not a hazardous waste landfill, despite its reassuring identification as a residual management unit, the combined permitting and certificate proceedings would be inapplicable.

> center as opposed to a hazardous waste landfill [Issues Conference at p. 169].

Thus, the ruling was not relevant to the claim asserted and should be disregarded.

Identifying a second proposed issue (the only one in fact raised), that, as a hazardous waste landfill, RMU-2 would violate the hierarchy, the ALJ rejected the proposed issue, noting that RRG was obligated to demonstrate "that CWM's proposal would encourage, rather than discourage, the land disposal of hazardous waste" [Ruling at p. 78]. Considering the totality of the record, however, this requirement was inappropriate. In considering the hierarchy argument, it is imperative to keep the following clearly in mind. First, and most importantly, the proposal for RMU-2 is not required in any fashion to dispose of the hazardous waste projected to be produced within the state in the foreseeable future. Moreover, the proposed facility in question is not narrowly planned or constructed. Rather, it will permanently bury 6,000,000 tons of hazardous waste and require perpetual care. Under these circumstances, the presumption must be that RMU-2 will not "discourage the land disposal of hazardous waste." At a minimum, the Applicant should be required to demonstrate that its anticipated pricing structure will not hinder application of such preferred hazardous waste treatment technologies as thermal desorption, ion exchange, elementary neutralization, precipitation, oxidation and reduction, containment, and landfarming, to name but a few of such methodologies..

V.

The Proposed Construction and Operation of RMU-2 Threatens the Crops, Animals and Marketability of Local Community Agriculture.

There are two aspects to the Farm Bureau's claim: first, that the landfilling of millions of tons of hazardous PCB and heavy metals waste in the richly productive and economically significant agricultural properties situated in the host communities of the Towns of Lewiston and Porter and the rural hamlet of Ransomville presents a substantial and significant claim. Specifically, the Farm Bureau proffered the testimony of a highly qualified expert, Professor Murray McBride of the School of Integrative Plant Science, Crop and Soil Section, Cornell University, who would offer testimony concerning the transmission of PCB and heavy metal waste through a liquid medium, such as the 12 and 4 Mile Creeks which are impacted by the Model City Facility, and by the migration of soils from the proposed RMU-2 landfill to adjacent farmland. He would also testify that risk of animal and human exposure to PCBs and heavy metals escaping from landfills presents a very serious problem for facilities such as CWM's Model City operations.

The ALJ found this proffer unpersuasive, again primarily because of a lack of proof that there has in fact been such a migration of pollutants [Ruling at p. 90]. At the issues conference, it was argued that there was demonstrated by the Municipalities a potential pathway off the site that could be highly relevant to this issue. [Issues Conference Hearing 163 -165] Moreover, it is alleged that there has been no testing offsite, despite documented discharges of PCB and other hazardous materials into 4 Mile Creek [See Intervener's Petition at p. 16, note 4]. Finally, and

for the last time, the Farm Bureau incorporates the more extensive discussion of the inapplicability of making a demonstration of causation under the circumstances presented here [See discussion of the public health issue above at pp. 19 - 33].

Second, while the ALJ sustained the Farm Bureau's proffer as to the potentially devastating effects on the marketing of local crops and animal products, the Ruling fails to resolve the associated proffer of local farmer and Balmer Road neighbor of the Model City facility and proposed RMU-2 that his property has been adversely impacted by floods of 4 Mile Creek and by the extraordinary noise and particulate pollution generated by clay trucks required for landfill construction [See Intervener's Petition at pp. 50 – 51]. There is no evidence apparent in the record to rebut or otherwise diminish the proffer. In the event that the failure to resolve this aspect of the Farm Bureau proffer represents a *sub silento* rejection of it, the Bureau appeals. The evidence is highly relevant to the proffer of Professor McBride, who would testify of the potential pollution of soils and crops by PCB and heavy metal waste through leaching through shallow groundwater or by surface runoff [Intervener's Petition at pp. 48 – 50].

CONCLUSION

For the foregoing reasons, the Rulings appealed herein, and discussed above, must be reversed and the issues restored to the proceeding.

Respectfully Submitted

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