Amy Witryol
4726 Lower River Rd.
Lewiston, NY 14092

March 9, 2016

James T. McClymonds,
Chief Administrative Law Judge,
Office of Hearings and Mediation Services,
625 Broadway, 1st Floor
Albany, New York, 12233-1550 by email and by First Class U.S. Mail

RE: **Appeals to Issues Conference Ruling in the matter of CWM Chemical Services, LLC RMU-2**

Dear Judge McClymonds,

Enclosed are the original and three hard copies of my appeals to the CWM Issues Conference Ruling. This letter also serves as the transmittal letter to the Siting Board and the Commissioner Designee.

Since I was unclear as to which of the copies would be distributed to the Commissioner –Designee, I ask that the last appeal be removed from his package (Consistency with Plan) as it does not specify SEQR.

General Topic of Appeal	Siting Board	DEC Commissioner
TRAFFIC / CLAY / SOURCES OF WASTE / NOISE	X	X
REVENUE / EXPENSE TRADEOFF (incl. SEQR)	X	X
COMPLIANCE	X	X
PUBLIC PARTICIPATION	X	X
CONTIGUOUS POPULATIONS (incl. SEQR)	X	X
NFSS / PLUTONIUM / EXCAVATION	X	X
SURFACE / STORMWATER / AIR / ENDANGERED SPECIES	X	X
CONSISTENCY WITH SITING PLAN	X	

Please note that I am not an attorney. Most issues for the Commissioner are the result of the Ruling's misinterpreting the *insufficiency* of applications, i.e., the absence of mitigation of adverse impacts under SEQR, as solely a Completeness dispute. My petition Preface (iv) addresses its organization (absent guidance to the public from DEC during this process) and its applicability to all CWM applications and governing regulation.

Thank you.

Sincerely,

Amy H. Witryol

cc: CWM RMU-2 Service List

TRAFFIC / CLAY / SOURCES OF WASTE / NOISE

1. Introduction and Appeal of Expected Sources of Waste
2. SEQR Applicability
3. CAC Agreement
4. Standards – DOT Guidance
5. Data Gaps - Accidents, Restrictions and Rates
6. Traffic Volume Changes
   - Omission of Leachate truck volume
   - Land disposal truck volume would increase
7. Rail – Deceit and Segmentation
8. Dust and Leaking Trucks – Significant and Substantive, no Mitigation
9. Wrong Designated Truck Route studied
10. Alternate Truck Route Omission – Environmental Justice and Fatal Accident
11. Partial Update-2011 of Obsolete 1993 Traffic Study of wrong truck route
12. Appeal Traffic, Clay, Sources of Waste Disputes/Noise – No Cumulative Impacts Evaluation

---

"ECL§27-1103. Criteria for siting industrial hazardous waste treatment, storage and disposal facilities:

3. The criteria issued by the commissioner pursuant to subdivision one of this section prescribing the form of an application for a certificate of environmental safety and public necessity to construct an industrial hazardous waste treatment, storage and disposal facility shall require the applicant to supply **detailed** information regarding:

c. The expected sources of hazardous wastes for the facility, the proposed methods of transporting such wastes to and from the facility, and the routes which deliveries will traverse"

1. Introduction: The Traffic Appeal addresses the reasons contributing to the conclusion that a "redo" of the CWM Traffic Study is necessary. The flaws and omissions are significant enough to alter: 1) whether to approve or deny the RMU-2 application, or, 2) conditions necessary to incorporate into a Permit and or Siting Certificate for same.

   The Ruling denied the Traffic issue as significant and substantive because of:

   Standards: *"the petition did not explain why the procedures outlined in the NYS DOT Highway Design Manual should be relied upon to essentially redo the referenced traffic analyses"*

   Data Gaps: *"the data related to the number of truck trips, the levels of service at intersections along the designated transportation route, and any accident reports associated with the current RMU-1 landfill are either referenced or presented in the DEIS and application materials. The data have been collected since operations began in 1993, and represent a substantial historical record that may be relied upon to make the required determinations."(p.45)*

   No Change in Volume: *"The DEIS and application materials state that the level of operation at the Model City facility would not increase if CWM obtains all approvals for its proposal."*

   Rail: *"CWM's proposal does not include a rail transport component. Accordingly, a consideration of rail transport would not be relevant to this proceeding."(p.46)*

   Up front, may I emphasize:

   - A reasonable person would ask why accident and other data is missing for a significant portion of the Designated transportation route
   - A reasonable person would ask why accident data is missing for over 90% of CWM waste transporters and 100% of clay transporters. With no source of data cited.
   - A reasonable person would ask why much of CWM data presented excludes the entire 22-year operational period of RMU-1, and why it excludes volume from the new SPDES plan to ship RMU-2 leachate offsite (not disclosed to petitioners until Nov. 2015)
   - A reasonable person would ask why, in those cases where CWM presents data for a fraction of the RMU-1 operational period, it presented periods of *lowest* activity rather than the *representative* activity expected to be *more than double* the past 10 years (if we are to believe CWM's assertion that RMU-2 traffic would be similar to RMU-1 traffic).
   - A reasonable person would ask why CWM did not present comparable statistics or update its 1993 Traffic Impact Study in accordance with DOT Guidance.

[Notes: Please view electronic version of my petition in color for charts. We weren't told to submit B&W. All of the information in this section is referred to in my petition. It's Table of Contents can direct you to the similar section where otherwise not noted.}

2. **SEQR:**

On page 39 the Ruling cited applicable Siting regulation, but overlooked the SEQR requirement to evaluate adverse impacts for *all* types of project-related traffic: 6 NYCRR §17.7(c)(1)(i). This appeal applies not only to the Siting criteria on *hazardous waste* traffic and endangering contiguous populations, but to the SEQR requirement to identify and mitigate adverse traffic impacts for *all* types of RMU-2 related vehicles. SEQR also does not exclude the requirement to evaluate impacts if they happen to be outbound traffic.

3. **CAC Agreement:**

While its specific basis was unclear, the Ruling may have relied on CWM's contention that the 1993 CAC Agreement ("CACA") it proposes to incorporate in RMU-2 permit conditions provides adequate mitigation. However, the CACA did not provide appropriate mitigation for RMU-1 impacts.

- CACA did not reflect RMU-1 operating conditions (which did not exist at the time,) but rather SLF 12 conditions. The CACA is therefore irrelevant if we are to believe CWM's assertion that RMU-2 would be similar to RMU-1. As noted in my petition (p.10), SLF 12 was about 25% of both the *size and operational period* of RMU-1.

- CACA did not address all of the community concerns in 1993, only those CWM was willing to consider. Enormous traffic concerns to the community referenced in my petition such as traffic-related impacts or conditions on Creek Rd. Extension at 5:00a.m. (as opposed to in front of the Schools) and clay truck traffic for example were not addressed by the CACA.

- As noted in my petition (footnote 8), CACA conditions were not enforced outside of CWM's gate:

  - CWM began boycotting RMU-1 CAC meetings in 2007 rather than hear ongoing community concerns about the lack of regular monitoring for enforcement along the Designated route.[1] (DEC told CAC only CWM could not enforce its CACA transport conditions, not DEC or the Muni's.)

  - The Orders on Consent submitted by petitioners show CWM was fined by DEC for its failure to enforce chronic violations of the Transport Rules incorporated in CACA.[2]

  - A year of CACA transport condition monitoring by residents, covered by the media, lead to the Consent on Order and cannot be relied upon as sufficient, consistent enforcement over 20-30 years.

- CWM transporter penalties are insignificant as to transporter incentives to comply, as chronic violations resulting in the Consent Order evidence. (p.74-75)

[1] CAC Municipalities and DEC staff disagreed with CWM's assertion that CAC automatically dissolved after an Agreement was implemented. CAC statute ECL §27-1113 makes no reference to or otherwise requires Agreements.

[2] Numerous newspaper articles regarding the traffic enforcement problems and CAC boycott were referenced in Mr. Olen's petition with respect to image sensitivity diminishing property values, etc.

- My petition noted transporter fraud (p.18) for which I'd identified discrepancies and reported to DEC two years before CWM reported that transporter.

- Ruling Page 11: *"Given the hazardous nature of the materials brought to the Model City facility, many speakers expressed concerns about adverse public health impacts including the potential adverse impacts associated with the truck route passing through the community. Speakers objected to the hazardous nature of the materials hauled in the trucks, as well as the traffic and associated noise. Speakers noted that the designated route to the Model City facility requires trucks to drive past the Lewiston-Porter school campus."*

  The CAC Agreement did not mitigate traffic impacts on Creek Rd. Extension where residents are awakened at 4:30am-5:00am when CWM-bound trucks roll by. Instead, the Agreement attempted to mitigate impacts in front of the Schools. In addition, as the School Board President testified at the July 2014 Legislative Hearing, while the CACA was in effect; the School District still considered the CWM traffic impacts significant and adverse, i.e., not adequately mitigated.

The CACA facts noted above, alone, should be sufficient to cause a reasonable person to inquire further as to the historical traffic impacts from RMU-1, and, **whether mitigation** would be:

1) feasible and effective, and, 2) reasonably enforced.

4. **Regulatory Standards:** "*the petition did not explain why the procedures outlined in the NYS DOT Highway Design Manual should be relied upon to essentially redo the referenced traffic analyses"*

Ms. Bodewes referenced Ch. 5 of the NYSDOT Highway Design Manual (HDM) which sets forth DOT Guidance and a template[3] for a Traffic Analysis, which contains the primary components referred to in NYS DOT's Guidance for the preparation of a Traffic Impact Study (TIS.)[4]

DOT HDM Ch. 5 requires accident (or "crash") analyses for all traffic, not just hazardous waste traffic. As noted in the petition, CWM did not substantially include relevant traffic accident data in its application. (See "Data" section of this appeal.)

DOT HDM Ch. 5 requires an evaluation of increases in traffic. None was prepared.

- Starting at -0-: CWM closed its disposal operation in Nov. 2015 due to utilization of all permitted capacity. If RMU-2 were approved and ultimately constructed in 2017-18, it would therefore cause a sharp spike in truck traffic.

[3] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj0q_T-jpLLAhWIVT4KHXTjAYIQFggiMAE&url=https%3A%2F%2Fwww.dot.ny.gov%2Fdivisions%2Fengineering%2Fdesign%2Fdqab%2Fhdm%2Fhdm-repository%2FPIN_rpt_TIS_Shell_nonNYSDOT_Working_091614.doc&usg=AFQjCNHm5XtQA4C8IKWCovBH3Y-6_3sRIw&bvm=bv.115277099,bs.1,d.dmo

[4] https://www.dot.ny.gov/CommercialHWP/traffic-impact

- Starting 2006: Even if RMU-1 were still operating, RMU-2 truck volume would *more than double* the actual ave. RMU-1 volume residents experienced *the past 10 years*. (See trend data in "Volume" of this Appeal section.) A reasonable person would not rely on a 1993 Traffic Study comparing 1993 traffic conditions to the proposed increases.

  No current 20 or 30-year traffic impact projections were offered by CWM.

- Neither the 1993 Bettigole TIS nor 2011 Wendell partial update evaluated peak CWM operating hours as called for by DOT HDM for CWM-related traffic. CWM considered 7:00-8:00 a peak delivery period for the study while the hours posted on its website point to 5:30-7:00a.m. A reasonable peak study should have included these peak CWM delivery hours which are significant, and which do not overlap Modern Landfill delivery hours. Furthermore, CWM chose to omit data it has on the actual truck traffic patterns at its gate.[5]

  Subsequent to the siting of RMU-1, Modern Landfill (adjacent to CWM) became the second largest solid waste landfill in New York in terms of annual volume. While one could argue that the percentage of impact from CWM may be therefore lower, one cannot ignore the sheer volume of *cumulative impacts* of truck traffic from both facilities since 1993, which SEQR *requires* be considered. There is no cumulative impact analysis in CWM applications, including the issue of traffic.

5. **Data Gaps:** *"the data related to the number of truck trips, the levels of service at intersections along the designated transportation route, and any accident reports associated with the current RMU-1 landfill are either referenced or presented in the DEIS and application materials. The data have been collected since operations began in 1993, and represent a substantial historical record that may be relied upon to make the required determinations."(p.45)*

CWM's applications present a large amount of inconsistent, incompatible and incomplete data that the Ruling calls, "a substantial historical record that may be relied upon."

CWM Withheld Relevant Data: Perhaps most frustrating as to data was the Ruling's omission of my Issues Conference statement that CWM *has* actual, comprehensive traffic data[6] it elected to exclude from all of its studies. Then there are the activity averages for RMU-2 diluted or limited to understate the level of activity that would be expected for RMU-2, as noted in my petition.[7] (These concerns were also expressed in my petition and are footnoted elsewhere in this section.)

Accident data gaps are identified in my petition traffic comments, here.[8] (See Volume section, next, for more Data omissions from the Ruling.)

[5] NYSDEC Haz. Waste Manifest System has a field for delivery date, but not time of day. However, CWM has the time of day data from sign-in records at its gate for all vehicles. For haz. waste trucks, CWM has weigh station timestamps.

[6] Issues Conference Day 3, April 30th Transcript.

[7] P.73, Section 2.3.2 Risk of accident, second para

[8] Pages 18, 19, 21, 23, 26-28, 55, 65, 70-75, 103, 108, Appendix K, and Appendix S pgs.30-31, 35, 44, 67

The Ruling also disregarded most of my Issues Conference traffic comments. (Day 3 Trnscrpt p.49-50.)

From CWM's Part 361 Certificate Application (SCA) pgs. 46-51:

Table 1 - Accident data for Transporters Used by CWM 1985-1989:

Excludes (most of SLF 12 and) all RMU-1 operational periods.
Data is not limited to CWM deliveries
Based on "CWM Study"- methods not provided (i.e., # of CWM transporters to CWM total)

A reasonable person would inquire:

- What is the relevance of transporter data 25-35 years ago, prior to RMU-1?
- Why was no comparable data provided for RMU-1? (1-22 years ago)
- Why was the Siting criteria requirement to evaluate truck accident rates replaced with a comparison to motor vehicle accident rates?

Table 1A - Accident data for Top 5 CWM transporters 2004-2012

Data was not limited to CWM deliveries
Based on a "CWM Study"- methods not disclosed

A reasonable person would inquire:

- Why was data provided for only the "Top 5" CWM transporters, representing <5-10% of the number of HW transporters using CWM each year? (per NYSDEC HW Manifest System)
- What were the # of CWM deliveries made by these "Top 5" vs. total # CWM deliveries during the *same period*? (i.e., *comparable* to the accident periods presented)
- Why exclude 1994-2003 RMU-1 accident data when volume during this period was *double* that of the 2004-2012 period used in the application? (And why is the accident trend increasing?)
- Why was the Siting criteria requirement to evaluate truck accident rates replaced with a comparison to motor vehicle accident rates?

Table 2 - Transporter Violations of CWM Transporter Rules and Regulations 2006-2012

A reasonable person would inquire:

- Why exclude the 1994-2003 period RMU-1 accident data when disposal volume was *double* that of the 2004-2012 period CWM presented?
- Why are clay trucks excluded from CWM Transporter Rules?

Table 3 – NYSDOT Accident Data for the Designated route 1983-1991

A reasonable person would inquire:

- What is the relevance of transporter data 25-35 years ago, prior to RMU-1?
- Why was data provided for a road segment that is *not* on the Designated route?

- Why was accident data for the first segment of the Designated Route *excluded*?
- Why was there no accident data disclosed for the Alternate or the Outbound routes?

Table 3A – NYSDOT Accident Data for the Designated route 2003-2011

A reasonable person would inquire:

- Why is accident data *excluded* for the RMU-1 operational period 1994-2002? when disposal volumes were *double* the period presented in the application?
- What is the relevance of accident data provided for an area not on the Designated Route?
- Why was accident data for the first segment of the Designated Route *excluded*?
- Why was there no accident data for the Alternate or the Outbound routes?

Table 4 – 5 Traffic Restrictions

A reasonable person would inquire:

- Why are traffic restrictions omitted for the first segment of the Designated route? Past the Hospital, etc.
- Why is a 1993 Traffic Study sufficient to identify 2013 traffic restrictions? (Petition p.75-76) Siting criteria score could be downgraded due to omissions of current restrictions.

CWM traffic volume projections relied on nearby clay sources no longer available, per DEIS p.40-41.

Porter Center Rd. (from Rte. 104 east of Creek Rd.) is identified by CWM consultants as the primary construction route; no accident data was provided for the route or clay or other construction vendors.

Erroneous new CWM accident rate:

The Ruling may have relied heavily on a footnote in CWM's Responses to petitions that a purported 350,000 "waste" trucks came and went to its facility from 1994-2014 while purportedly only two accidents occurred on the Designated route. This CWM footnote is unreliable:

- First of all, 350,000 hazardous waste trucks did not enter CWM during the operation of RMU-1 according to the manifest data on the DEC Hazardous Waste Manifest System. The CWM figure is off by a minimum of more than 30%.[9] This could be attributable to non-HW waste since it's established that there is excessive overcapacity in HW land disposal capacity.

  There was no indication in CWM's footnote as to where either the # trucks or # accidents figures came from.

[9] The DEC Manifest system can tell us the maximum # of HW trucks to CWM because there must be a minimum of one manifest per truck, per DEC manifest staff. However, one truck could carry more than one manifest of waste. Given CWM has acknowledged most of its receipts are contaminated soils from one-time remedial projects, and, no generator would want to co-mingle its HW contaminated soils with another, the maximum Manifest #'s on the system are likely to resemble actual #'s. Regardless, the figures herein represent HW maximums with certainty.

- Secondly, if CWM included non-hazardous waste trucks in its 350,000 (unverified and unsourced) count, then the accident-per-miles figure it provided is apples and oranges, incorrect for purposes of either Siting criteria scoring or SEQR.

  Furthermore, we've not been given accident data and a for non-HW trucks in or out of CWM, including clay and stone (construction) trucks.

- The CWM footnote compared "waste" truck volume to two *hazardous* waste truck accidents widely reported in the newspapers. There were *no sources* cited by CWM for accidents involving trucks to or from its facility; *none.* We have no confidence all CWM related accidents were reported given the extensive flaws in the applicability of the data presented.

Data quantity does not assure quality or relevance. The Ruling did not identify applicability or reliability.

Finally, with respect to accidents, the Ruling considered one recent fatality from an outbound CWM related truck as insignificant because the accident report indicates the automobile crossed the center road line. However, the Ruling overlooked some significant facts:

- Had RMU-1 not been operating, the outbound truck in question would not have been on that road. As a result, Mr. Henderson's son might still be alive today.
- The accident report included a statement from only one of two purported witnesses
- The statement in the report was from the witness following behind the waste truck

6. **Volume Change:** *"The DEIS and application materials state that the level of operation at the Model City facility would not increase if CWM obtains all approvals for its proposal."*

Leachate Truck Volume Omitted:

My petition (p.73) raised the possibility that CWM would be unable to manage its RMU-2 leachate without trucking significant volumes offsite. Since then, my forecast has been proven correct:

- CWM's Nov. 2015 post-Issues Conference SPDES Anti-Degradation Demonstration application disclosed what would be a *requirement* to truck its leachate offsite in order to obtain approval for RMU-2 conditions under SPDES.
- This additional truck volume was therefore *not* included in CWM's applications.

Land Disposal Truck Volume Would Increase:

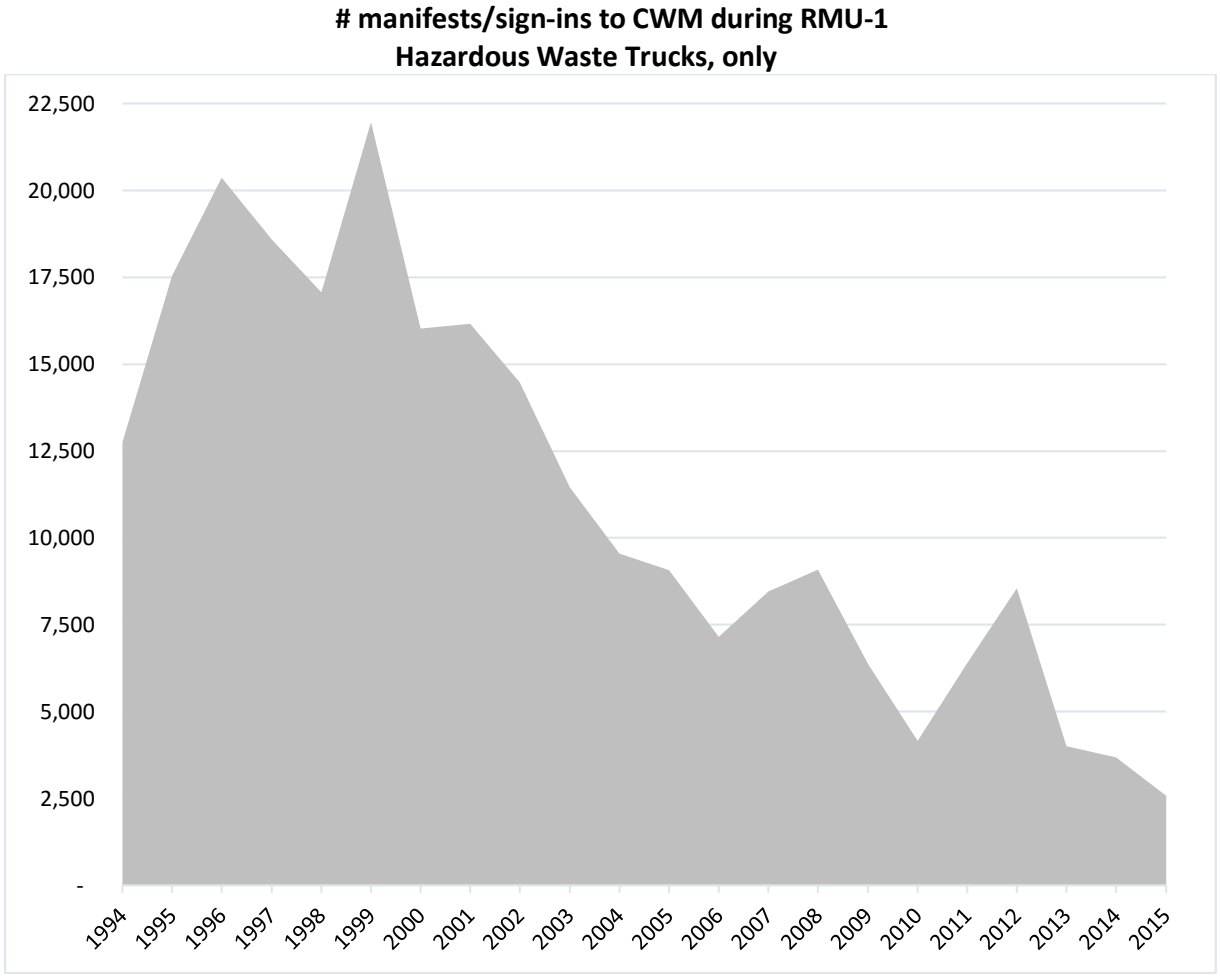
The DEC Manifest System data[10] referred to throughout my petition indicates there would, in fact, be a substantial increase in truck traffic as a result of the RMU-2 proposal, if we are to believe CWM that RMU-2 truck patterns would be similar to RMU-1. Or, when we consider that RMU-1 disposal volume is presently -0-.

[10] Petition pgs. 19, 38, 39, 41, 46

Hazardous Waste # of manifests for trucks "in and out of" CWM during RMU-1:

*1994**	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*
12,758	**17,540**	**20,368**	**18,579**	**17,071**	**21,956**	**16,028**	**16,164**	**14,473**	**11,452**	**9,548**
2005	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*
9,075	**7,148**	**8,454**	**9,080**	**6,367**	**4,152**	**6,394**	**8,551**	**4,011**	**3,680**	**2,579**

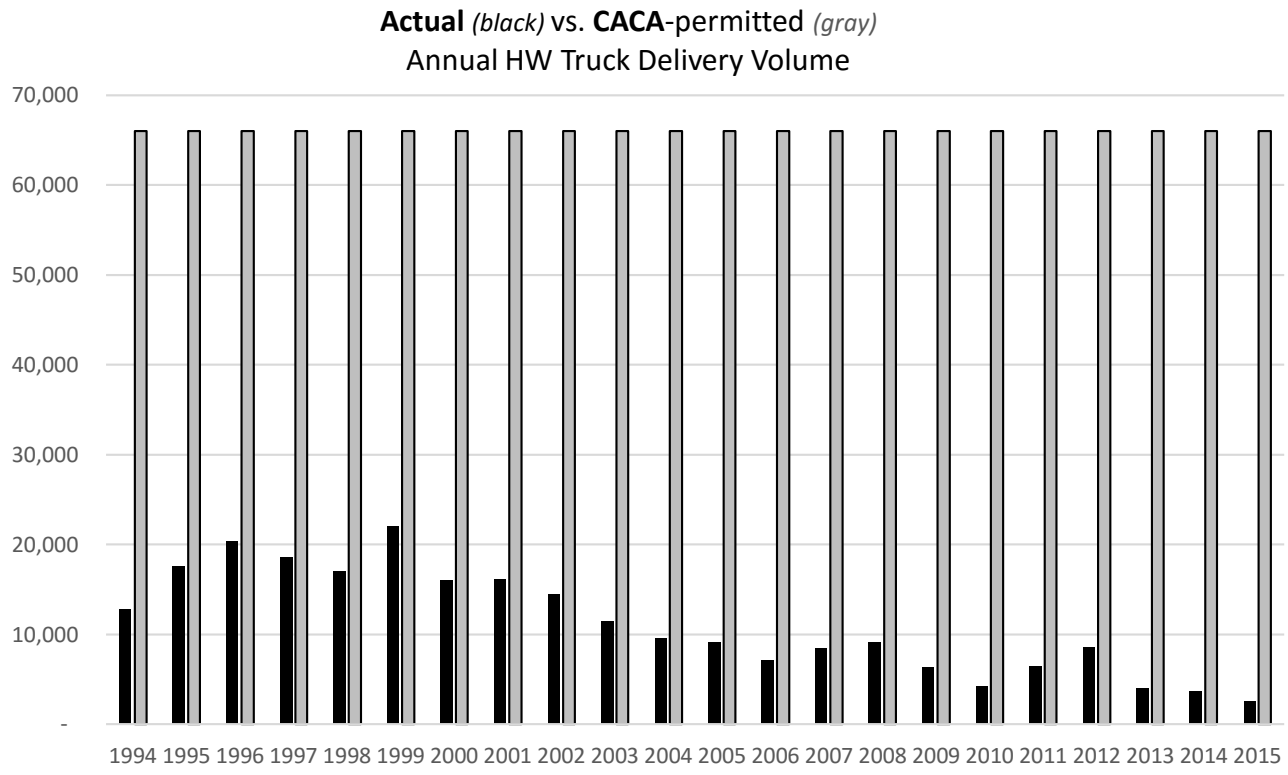
*RMU-1 did not operate a full year in 1994



Ten Year Ave. 1995-2004: 18,400/yr
Ten Year Ave. 2005-2014: 8,000/yr

A CWM Rail Transfer facility would spike volume even more than reflected in the start-up volumes above. As noted in my petition, CWM artificially depressed volumes beginning in 2005 after the DOH Order was found in land records by residents and reaffirmed. (Pet. p.32, "1)".)

Keeping in mind resident complaints during RMU-1 operations, the next chart compares the 220 trucks/day CACA limit to actual volume.



Actual Ten Year Ave. 1995-2004: 18,400/yr
Actual Ten Year Ave. 2005-2014: 8,000/yr
CACA Limit: 68,000/yr

How could a reasonable person view these CACA limits as reasonable mitigation?
CACA limits and conditions do *not* apply to clay and stone (construction) trucks.

The DEIS states during construction, clay trucks will roll 12 hours per day 6 days per week, in construction season when residents might otherwise want to open their windows.

Coincidentally, CWM's 100 clay truck/day figure + 120 trucks from CWM's range of 20-120 truck/day[11] =68,000 trucks/yr. in the chart above. While construction would not occur year round, CWM completely failed to reflect these peak conditions in either study, even on a seasonal basis.

The effect on Contiguous populations from construction cannot be considered insignificant, nor mitigate.[12] Furthermore, when clay trucks are not delivering clay, the CACA provides CWM the flexibility to mirror the clay truck peaks by replacing them with hazardous or industrial waste.

[11] DEIS p.133 last para

[12] CWM (DEIS p.133) daily traffic ranges 20-120 trucks/day for RMU-1 translate into between 6,000 and 36,000 trucks per year. Rather than show the reader the 68,000 CACA limit, the DEIS only states: "However, there is a potential to increase waste truck traffic above current levels, while still abiding by the restrictions in the CAC." Yes, a potential to the whopping 68,000 trucks/year allowed by the CACA.

CWM closed its gate to waste receipts in mid-November of 2015 and it would be unreasonable to expect CWM could both obtain approval and construct more capacity, at a minimum, in 2016. Therefore, the anticipated waste truck traffic in 2016 is -0-. And -0- to 68,000 is significant and substantive.

If RMU-2 would be similar to RMU-1, a reasonable would expect the first year RMU-2 to cause a 20,000 truck/yr increase, notably to include trucks on the Designated route at 5:00a.m. Residents surveys (App. K) report trucks at 4:30a.m. and 5:00a.m. on the Designated route. They refer to trucks coming down the hill, not up the hill at that hour, implying these are CWM and not Modern trucks.

7. **Rail:** *"CWM's proposal does not include a rail transport component. Accordingly, a consideration of rail transport would not be relevant to this proceeding."(p.46)*

As noted earlier, CWM's stated intention[13] is to apply for a RCRA rail transfer station in the region if RMU-2 were sited, impermissibly segmenting applications and deceiving RMU-2 decision-makers in the process. While this would not alter the location of the Designated route, rail would substantially alter CWM Traffic patterns: nighttime and higher concentrations of truck traffic when trains offload. CWM concealed its well-documented plan to seek rail (reported to EPA on the 2011 CWM survey attached to my Feb. 27, 2015 capacity memo.)

The Ruling misapprehended my rail concerns as the failure to evaluate rail impacts, not as deceit and segmentation to conceal a significant change in the traffic patterns (volume concentration and hours) not addressed in the Bettigole or Wendell traffic studies.

- The hours and concentration of rail issues are significant and substantive.
- The deceit and segmentation issues associated with CWM's failure to disclose its true plan in its applications (for rail and leachate) are significant and substantive.[14]

8. **DUST and Leaking Trucks:**

Ruling p.42 "*Appendix K to Ms. Witryol's petition is a set of surveys from these residents, who would testify about their personal experiences. Based on these surveys, the residents generally find that the volume of truck traffic and the associated noise and dust are either 'intrusive' or 'very objectionable to intolerable.' (See Witryol Petition and Comments at 28, Appendix K.)"*

The petition survey reflect dust along the route so significant that many residents cannot keep their windows open when weather would otherwise permit. A reasonable person would consider dust that

[13] Petition p.37 and also at 2/27/2015 Witryol Capacity Assurance Submission, Appendix E ("Notes" at bottom.)

[14] The plan to add rail to increase the geographic footprint of WM hazardous waste landfills was further confirmed by Waste Management's CEO during an analyst earnings call on 2-18-2016. The call transcript is publicly available.

compels people to close their windows as significant and substantive. **This issue requires effective mitigation that CWM applications do not offer to provide.**

Here, I am compelled to respond to DEC project staff's vague comparison of RCRA/TSCA landfill truck studies to unnamed, unknown # of MSW landfill truck studies. As everyone knows, there are no other commercial RCRA/TSCA landfills in the state other than CWM. Most people who drive a car recognize the difference between driving behind a garbage truck (closed) and a dump truck (not closed) with a tarp. The toxicity of cargo for a HW vs. MSW truckload are obviously not the same.

Leaking Trucks:
We've all noticed the sound of dirt et al hitting our windshields or hoods when driving behind a truck carrying soil with a tarp flopping about in the wind. On the Designated route, the soil carried is usually contaminated. By contrast, the MSW trucks that collect our curbside waste are generally enclosed by metal doors.

As CWM has pointed out, most of its waste volume consists of contaminated soils. And as my petition points out, trucks carrying soil contaminated with hazardous waste arrive leaking at CWM's gate on a regular basis.

This is another transport violation type exemplifying ineffective penalties in CWM (CACA) transporter rules that **requires effective mitigation which does not presently exist.**
A reasonable person might inquire what violations occurred during the entire RMU-1 operational period because CWM disclosed only 5 years during the *lowest* RMU-1 disposal volume period. (See Data section.) A reasonable person would inquire as to whether the chronic nature of trucks leaking through the community would be even more significant for periods of higher disposal volume.

Notwithstanding the 5-year limitation of data discussed above, CWM has disclosed enough information about truck leakage violations at its gate to render its **failure to evaluate cumulative impacts from that leakage for 35 years as significant and substantive**. Staff Response ignored the fact that no other landfill in the state has received truck deliveries in both concentration and volumes of PCB contaminated soil that CWM has received.

"Trucks carrying CWM-bound toxics spill in Town of Niagara lot"

Pictured: Trucks Diapered with tarps re-secured near CWM Gate *after* Leaking through the County (from Buffalo News article referenced in Olsen Petition)

(Petition Appendix U.) Pictured: CWM-bound truck overturned near LewPort Schools.

9. **Wrong Designated Truck Route:**

Even if DEC staff could explain how it arrived at a Level C LOS for a portion of the route that was not in the study:

1) CWM did not disclose the hazardous waste *and* non-hazardous waste accident history for a significant portion of its Designated route as required by Siting criteria and under SEQR (adverse impacts)

2) CWM excluded half of the RMU-1 operational period when volumes were double those figures CWM chose to use in its applications, and

3) Level of Service is certainly not a "C" in the summer peak periods for Modern and CWM, especially during Artpark concerts in July and August.

By evaluating traffic from Interstate-190 Exit 25B instead of Exit 25A, accident histories near residences and the sole area hospital were omitted. This should have been evident from the route tour the ALJ and Siting Board took last year – they traveled the entire route.

DEC staff responses did not take into consideration peak hazardous waste delivery periods to CWM. A reasonable person would not exclude witnesses living on the Designated route, who prefer to sleep at 5:00a.m, from offering its significance. The Ruling excluded them from testifying (as did the unreasonableness of DEC's public participation for CWM applications.)

During CWM (and Modern) peak season periods, thousands of cars back up on the first half of its Designated route from the I-190 down Rte. 265, coming and going for Tuesday and Wednesday night concerts at Artpark. That's not Level of Service "C"; it's not even "D."

Both CWM traffic studies omitted Rte. 265, and, omitted CWM's July and August peak period. A reasonable person could not consider this insignificant and without substance.

10. **Alternate Truck Route Omission: Environmental Justice and Fatal Accident**

CWM provided no traffic or accident data for its alternate truck routes to include outbound routes where the most recent fatality occurred, and, for the primary clay truck routes. CWM studies assumed all clay trucks would use the Designated route[15] claiming that would represent a more conservative assessment of impacts. However, the two mines CWM identified as sources of clay render Rte.104 east of Creek Rd. a major CWM transport route.

This stretch of Rte. 104 east of Creek Rd. omitted from CWM traffic studies excludes:

1) the route where the recent CWM-outbound truck fatality occurred and

2) the route traveling through the Tuscarora Reservation, an Environmental Justice Community.

3) the route CWM consultants identified as the primary construction route

[15] DEIS p.139, last para

11. **Insufficient, Unreliable 2011 Partial Update of Obsolete 1993 Traffic Study**

The Ruling states that, "*According to Department staff, the number of trucks transporting hazardous waste to the Model City facility that travel on Route 265 and NYS Route 104 is relatively small compared to the overall truck traffic on these routes*" and further, that the limited intersections counted in the Wendell 2011 Traffic Study update would be expected to reflect the greatest impact from the proposed RMU-2. However:

On its face, DEC staff comment might appear reasonable, except that it is applicable only for certain hours of the day: *only* when Modern Landfill truck traffic volume is significant, and or *only* when clay is not being delivered to CWM. Only incoming CWM trucks would be expected travel down the Escarpment (Creek Rd. extension) at 4:30-5:30 am. See also Bodewes expert comment, below questioning how staff could reach an LOS determination for a segment excluded from CWM studies.

CWM's prime hazardous waste delivery hours are 5:30am-7:00am according to its website. These hours are consistent with some of the comments from residents living on the Designated route in Appendix K of my petition. Three of these surveys offered (unsolicited) specific reference to traffic around 4:30 or 5:00am. Wendell conducted no truck traffic counts during those hours, and counted on Presidents' Day when schools were closed.

For the Appeal, Ms. Bodewes observed the following:

- 1993 Traffic study cites the Highway Capacity Manual (HCM), 1985 edition. The 2011 study cites the HCM, 2000 edition. The HCM, 2010 edition is the most current and should be used in any new study.

- The Wendel study states, "this TIS utilizes traffic impact study processes and methodologies that are generally accepted by the NYSDOT," as a basis for its validity.

- According to the *GBNRTC TDMS, traffic on NY-18 from NY-104 to Blairville Rd. has decreased since 2000, rendering CWM trucks a higher percentage of traffic:

ALL vs. CWM	1994	1996	AADT 2000	AADT 2006	AADT 2008	AADT 2011
TDMS (Bodewes)	5,400	4,400	5,300	4,300	4,100	3,200
CWM Manifests#[16] (Witryol)	12,800	20,400	16,028	7,100	9,100	6,400

*Greater Buffalo Niagara Regional Transportation Council, Transport Data Management System

- According to the GBNRTC TDMS, traffic on NY-104 from Robert Moses Pkwy to NY-18 has decreased since 2000, making trucks a higher percentage of traffic: (chart next page)

[16] In the charts above, I added a row for truck deliveries from the HW Manifest System beneath figures Ms. Bodewes provides from TDMS

ALL vs. CWM	1997	AADT 2002	AADT 2005	AADT 2008	AADT 2011
TDMS (Bodewes)	6,900	7,400	6,250	6,250	5,700
Manifest# (Witryol)	18,600	14,500	9,075	9,100	6,400

A reasonable person may wish to inquire further as to why RMU-1 actual truck deliveries were insignificant impacts if they were 65% to 360% higher than AADTs (Annual Ave. Daily Traffic.

Potential Clay Sources Appear Depleted (DEIS p.40)

"The list of potential sources is preliminary and should not be considered all inclusive. Because construction will occur over several years, additional sources may be identified in the future as needed.

The locations of the currently identified potential clay sources are indicated in Appendix C. Haul routes used could involve NYS Routes 31, 93, 104, 429 and Balmer Road.

- Bergey Mine Site, Town of Lewiston – through June 4, 2014);
- Mawhiney Trucking Helmich Site, Town of Lewiston –through June 1, 2016).

Potential Stone Sources (DEIS p.41)

Redland Niagara County, Town of Niagara – permitted through June 16, 2012);

Como Park/Cheektowaga, Town of Cheektowaga – permitted through May 9, 2013); and

Redland Lockport Quarry, Town of Lockport – permitted through April 30, 2013)."

The depletion of the sources referenced in the application require this issue be adjudicated under SEQR and Municipal Impacts.

12. **Appeals: Traffic / Clay / Sources of Waste / Noise**

Traffic Study

Based on the information provided in this appeal section, traffic should be considered significant and substantive. A "redo" of the 1993 Traffic Study [emphasis 1993] is warranted.

CWM should also be required to disclose the arrival and departure dates and times for all vehicles during the RMU-1 operational period. CWM has this data and it is important to the significant and substantive question of peak period impacts to contiguous populations as well as CWM's assertion that RMU-2 operations would be just like RMU-1.

Expected Sources of Waste (See same topic in Revenue/Expense Appeal)

Appeal accuracy and reliability of SCA p.6 assertions required by ECL§27-1103.3.c.

See petition comments and NYSDEC Haz. Waste Manifest System data pgs 31-33 and 37-43 and rail references provided above. I dispute the following CWM assertions:

a. Waste sources for RMU-2 would be similar to the six years shown in CWM applications for RMU-1 (manifest delivery charts above)

b. A majority of RMU-2 waste would come from the Niagara County, NY and N.E. U.S. regions (petition sections 1.3 and 1.5)

c. Trucks would be the sole means of delivery for RMU-2, i.e., beyond designated route (see rail references noted in this appeal.)

Significance of Clay:[17] (summary)

1) The mines identified in CWM applications appear to be closed, which will require more clay mine applications during the life of RMU-2, especially if CWM seeks rail access.

2) The Ruling improperly ignored the undue clay mining burden on Lewiston evident in the chart p.103 in my petition. This is an Environmental Justice issue for Public Interest and Municipal Effects, and, is an impact under SEQR: **6 CRR-NY 617.7**:

> **(viii)** a substantial change in the use, **or intensity of use,** of land including **agricultural**, open space or recreational resources, or in its capacity to support existing uses;
>
> **(x) the creation of a material demand for other actions** that would result in one of the above consequences;

3) No RMU-1 clay traffic accident rates

4) Traffic study omission of construction routes identified in DEIS: "Routes: 31, 93, 104, 429"

5) Dust compelling contiguous populations to keep their windows closed in pleasant weather

6) The Absence of clay truck mitigation (as well as other CWM trucks) in CACA conditions.

Cumulative Impacts:

A reasonable person would inquire as to the nature of cumulative environmental impacts on 350,000 trucks (according to CWM) through this community, most of which carry bio-accumulative wastes combined with the dust and noise from the clay traffic, the demand created for more clay and health problems of residents along the truck route. A cumulative impact study as part of the broader issue of traffic should be required.

---

[17] *DEIS 4.6.5.2 Construction-Related Traffic*- [excerpts]
- Approx. 440,000 c.y. of soil materials (clay, gravel) from off-site sources over the life (11 to 25 years) of RMU-2.
- All soil materials would be delivered during the first two months of each construction season;
- Borrow sources would operate 12 hours per day, 6 days per week; and
- Construction activities for RMU-2 may result in an additional 100 trucks per day arriving at the site during an anticipated 12-hour work day (operating hours for borrow source).

With respect to Noise, I concur with the Ruling to require the Noise Study be redone. However, I **appeal STAMINA as the sole item requiring a fix to the 1993 Normandeau Study**. It would be disturbing, substantive and significant if a new study were to:

- place receptors *off* the Designated truck route,
- at the most distant instead of the closet receptor, and
- blind to the extreme variances in terrain

as the CWM Normandeau study did.

I also **appeal the failure to require particulate collection** in addition to the noise receptors. This should be done in connection with my appeal that dust from CWM and clay trucks is significant and substantive and endangers Contiguous populations.

See separate Compliance Appeal regarding overweight vehicles to CWM on the Designated route 25% of the time, per a full year's worth of manifest system data.[18] The manifest system for 2014 suggested there were more than >1,200 overweight trucks, despite much lower disposal volumes than would be expected for RMU-2.

[18] Petition p.19

PUBLIC REVENUE / EXPENSE TRADEOFFS

Table of Contents

1. Introduction:

Overview

The Ruling requires an evaluation of adverse (Growth-Reducing) economic impacts from RMU-2, but does not recognize and include disputes to CWM's RMU-2 economic impact assertions as significant and substantive.

This appeal is to expand the Ruling on adverse economic impacts to include the significant and substantive, numerous disputes of fact and omissions in the economic impacts asserted by CWM for SEQR (DEIS) and Siting Certificate Application (SCA). And, to address the Ruling's criticism of my petition charts on pgs.90-91.

This Appeal seeks:

1) Adjudication of *Municipal Effects: Revenue/Expense Tradeoff* for Part 361 and

2) Expanded adjudication of Economic Impacts (to include Municipal Effects above) required for SEQR (and now SPDES Anti Degradation.) Economic Impact is a broader category than Municipal Effects.

Unless CWM can mitigate every adverse impact without reliance on any economic benefit whatsoever, resolution of disputes of *all relevant* significant economic impact issues would unquestionably alter; 1) the decision to approve or deny the permits or certificate or 2) conditions for approval

The Ruling placed unreasonable reliance on the following CWM statements:

- **CWM's statement that Public revenues would far exceed Public Expense**
  - CWM wholly omitted disclosure and estimates of Public Expense amounts
  - CWM included Public Revenue not attributable to RMU-2
  - CWM included non-Public Revenue, in contravention of the associated Siting criteria
- **CWM's statement that it provides its own security and safety services**
  - CWM provided no estimate, however, a reasonable person would not expect this amount to be significant to total Public Revenue/Expense. Therefore, it was unreasonable to rule on the issue relying on the value of security services (even if the amount was valued, which it wasn't.)
  - CWM did not disclose or estimate the Public Expense for actual calls to or use of law enforcement or fire companies for crimes, security (ex. picnics) and or inspections. (My tables did not charge CWM for the many fires its 19-member fire crew has put out on its site.)
  - CWM included 100% of these expenditures as Public Revenue, even though its security service and employees do not pay 100% of this revenue to Municipalities in taxes or fees.
- **CWM's statement that it provides training for local fire and ambulance districts who may respond to the site in the event of a fire or emergency**: Is not relevant.

- CWM-specific training does not reduce Public Expense. (My charts charged CWM none.)
- CWM provided no estimate of value, however, a reasonable person would not expect this amount to be significant to total Public Revenue/Expense. Therefore, it was unreasonable to rule on the issue relying on the value of security services.

- **CWM states it would assume the costs associated with *establishing* and maintaining a comprehensive regulatory program for its proposal. However,**

  - CWM's Part 373 application fee: $-0- to DEC.* No estimate of DEC staff Expense for the last 14 years spent processing *all* RMU-2 applications was provided. A reasonable person would expect this Public Expense to be significant.

  - CWM Part 361 application fee: $-0- to DEC.* No estimate of Expense for OHMS, the Siting Board and their respective staff advisors, etc. was provided. A reasonable person would expect this Public Expense to be significant.

  - CWM DEIS review fee: $-0- to DEC.[1]

  - CWM has not reimbursed DEC for $500,000 it spent on outside engineering[2] to help review the RMU-1/RMU-2 related applications and Siting. (Ref. petition p.7 and charts p.90-91.) A reasonable person would consider this Public Expense, omitted by CWM, significant.

  - CWM TSCA application fee: $-0- to EPA. CWM did not provide any estimate of EPA's Expense to maintain a TSCA program for RMU-1 (or RMU-2.) A reasonable person would expect this Public Expense to be significant.

  - CWM has not reimbursed EPA for its costs to hire outside consultants[3] to review CWM groundwater conditions associated with the RMU-2 application. A reasonable person would expect this Public Expense to be significant.

  - Program Fees: CWM's Response (p.92) referred to hazardous waste facility fee statutes:
    - CWM acknowledged the fees are based on volume not actual DEC Expense[4]
    - CWM's fee descriptions do not foot to (explain) its DEC Revenue (fee) figures in either its DEIS or SCA charts

    Again, CWM did not estimate DEC $Expense to maintain a program for RMU-1 (or RMU-2.)

  - CWM did not estimate any amount for Public Expense associated with chronic traffic violations of its Transporter Rules or DOT Regulation. From Petition Appendix U:

[1] Refer to my May 19, 2015 letter asking the ALJ assess CWM the DEIS review fee allowed under regulation. Dept. staff assessed $0. (The ALJ did not find authority as staff is Lead Agency.)

[2] Dvirka and Bartilucci – I have copies of the detailed D&B invoices to DEC

[3] Booz Allen report for EPA on groundwater, March 2015

[4] With the exception of on-site monitor reimbursements reflected as a $ wash on both of my petition charts.

8-MILE SPILL
CWM-bound

Pictured: Municipal Public Safety service, not CWM's safety service

[The article for this photo is also among the Olsen Petition newspaper references. This slide was part of my Legislative Hearing presentation and can be viewed at StopCWM.com]

Revenue:

The Ruling relied on CWM's statement that:

> *"3.6.5.4 Taxes and Fees*
> Public revenues associated with permit fees, property and business taxes, employee salary and taxes should far exceed public expenses that are likely to be incurred." (DEIS p.98)

CWM misled readers by stating in its narrative that taxes paid by employees should count toward public revenue, but then, (in its DEIS and SCA charts) included 100% of payroll, not just supposed taxes. CWM took this same misleading approach to Supplier, Hauler, etc. Expenditures. Unless all CWM employees and vendors pay an effective 100% tax rate, and, pay that rate on their gross revenue, CWM's figures are both irrelevant and deceptive. In addition, not all significant CWM Expenditures, such as Corrective Actions and Maintenance were attributable to RMU-1 or would be attributable to RMU-2, but these amounts were included by CWM, anyway.

As for public expense amounts, CWM provided *none*.

Siting Certificate Scoring:

Where disputes are raised, I would offer that any Siting Certificate scoring criteria category is both significant and substantive given how close the scoring result was for the RMU-1 Siting Certificate.[5] CWM barely hurdled the 200 point maximum with a score of 182.4 for RMU-1. (CWM also failed RMU-1 scoring by dissenting Siting Board members.)

Significance:

Finally, the Ruling neglected to include the page 1 petition observation that CWM would expect to spend $27+million in the state over 30 years if RMU-2 were approved, but $100 million were RMU-2 denied. This observation was also discussed at the Issues Conference.

[This concludes the Overview portion of this appeal section.]

[5] http://www.dec.ny.gov/hearings/37955.html

A. Siting Certificate Applicability:

- Whether the Facility is Necessary and in the Public Interest

- Scoring Criteria
  - RMU-2 Public, only, Revenue
  - RMU-2 Public, only, Expense Tradeoffs

- SEQR Growth Reducing Impacts of RMU-2 (Growth Reducing impacts in my Appeals for Traffic and Contiguous Populations are incorporated with this Appeals)

It is obvious when comparing CWM's p. 100 DEIS on Economic Impact with CWM's p.61 SCA Revenue/Expense Tradeoff that they are *identical*. Therefore, it is virtually impossible for the SCA to contain solely Public revenue (whether direct, or indirect) as *required* by Siting Criteria for Municipal Effects.

Municipal Effects in Siting Law are not synonymous with Economic Impact reports. Moreover, Economic Impact reports for industry applications typically do not include economic costs associated with a project. Instead, industry applications typically sum total public and private revenue from expenditures, both direct and indirect, and exclude costs (ex. Hydrofracking.) It is significant that in the case of the WM economic impact report (excerpted by CWM for its applications,) so-called economic impacts were *not* confined to the RMU-2 project.

The Ruling cannot alter the Municipal Effects general consideration for scoring criteria, but had the effect of doing so by allowing non-RMU-2 and non-public Revenue for consideration.

The Ruling incorrectly stated my petition included no explanation for Public Costs in two tables I prepared. This appeal will identify where in my petition explanations were provided.

> Regardless of whether or not the Ruling found substance in my proposed Costs/Expense, there is no dispute that Siting Criteria *requires* an assessment of Public Expense, and that CWM applications contain *no* Expense amounts.

A reasonable person would inquire further as to what RMU-2 Public Costs/Expenses would be anticipated.

NYPA: The Issues Conference and therefore Ruling effectively challenged the amount of Expense used in my table for CWM's NYPA low cost power subsidy, contradicting the Ruling's same claim that I provided no explanation as to how or why Costs/Expenses were included in my two tables.

The ALJ's request CWM provide the current amount of its NYPA subsidies is irrelevant to the actual historical subsidy amounts CWM received from NYPA, and, more importantly, to subsidies expected to be available to CWM by NYPA were RMU-2 sited.

B. SEQR

My petition clearly and substantially disputed CWM's assertion (DEIS p.99-100 and SCA p.61) of RMU-2 direct and indirect "economic impacts." **I appeal the omission of this dispute and ask it be adjudicated for the SEQR requirement to consider Growth Reducing Economic Impacts. CWM identified none.** (This issue could presumably be adjudicated simultaneously with the applicable portion of Public Interest.)

C. SPDES Applicability: SEQR and Anti-Degradation

Although this appeal is not the procedural forum for RMU-2 SPDES comments, I simply want to flag SPDES as an economic impact mitigation issue now in case forthcoming SPDES comments indicate it makes sense down the road to combine it with same for other applications noted above.

Public revenue and expense tradeoffs are necessary to evaluate as Anti-Degradation Policy *requires* review of "the benefits of the proposed activity corrected for any negative economic impacts of the activity"[6] and "Adverse economic impacts" when DEC has determined there would be discharges of bio-accumulative chemicals into the Great Lakes System.[7]

SPDES Anti-Degradation regulation *requires* CWM demonstrate that "lower water quality is *necessary* to accommodate significant economic and social development in the affected [Great Lakes System] area."[8] Here again, CWM inserts into its SPDES application the identical Revenue/(no Expense) projection used in its DEIS and SCA. Failing to adjudicate the applicability, accuracy and reliability of CWM's projection would prejudice not only the SEQR finding and Siting Certificate decision-making, but now also RMU-2 SPDES permit decision-making.

[This concludes the Introduction]

[6] http://www.dec.ny.gov/docs/permits_ej_operations_pdf/antideg.pdf

[7] TOGS 139 section 2.3., page 8, http://www.dec.ny.gov/docs/water_pdf/togs139.pdf

[8] Organization and Delegation Memorandum No. 85-40 http://www.dec.ny.gov/chemical/23853.html

2. CWM Public Revenue Figures (DEIS p.100 and SCA p.61)

A. Site Payroll:

In contrast to CWM's DEIS and SCA which imply otherwise, the Bonadio firm stated in its 2009 report for WM (ref. petition p.89) that all payroll and benefit amounts were included in site payroll, not just the associated public revenue from them. As noted earlier, the figures from the Bonadio report were replicated in CWM's DEIS and SCA.

Companies use whatever approach for an "economic impact" report they may choose – that is not a term defined in GAAP.[9] However, Siting defines Municipal Effects very specifically and differently from self-tailored "economic impact" reports or the model selection. A reasonable person would inquire, why CWM did not confine Revenue in the SCA to Municipal Effects and why it included impacts unrelated to RMU-2 applications.

If I've misinterpreted, and the DEC Ruling asserts that virtually all business expenditures represent "Public" "revenue," it is inaccurate and conflicts with the revenue/expense Siting Criteria description specific to MUNICPAL effects.

Payroll figures as presented by CWM are irrelevant and unreliable if intended to reflect what RMU-2 could generate as Revenue for Municipalities:

Non-Public Payroll $'s included: My petition reference to CWM's NYPA applications (p.13, para2,) raises sufficient concern that CWM "site" employees improperly include WM headcount that would remain with or without RMU-2. However, let's assume CWM applications' headcount figures are true for CWM instead of false, only, for purposes of this example:

> If CWM/WM "site" payroll $'s in its application charts are accurate, and CWM intended to include only Municipal revenue, that would mean CWM employees pay an effective Income Tax Rate of 100%.[10]
>
> or
>
> If CWM/WM employees don't pay a 100% effective income tax rate, and, instead, pay, say a 35% effective state and federal tax rate generating $21,700, a CWM/WM employee would have to spend $474,000/year necessary to generate the other 65% or $40,300 per employee from sales tax (8.5%) to arrive at the figures on CWM's chart. The CWM chart figures are therefore, erroneous as to Public Revenue.

[9] The Financial Accounting Standards Board (FASB) is a private, non-profit organization whose primary purpose is to establish and improve **generally accepted accounting principles (GAAP)** within the U.S.in the public's interest. The Securities and Exchange Commission (SEC) designated the FASB as the organization responsible for setting accounting standards for public companies in the U.S.

[10] Site Payroll 2009 line item SCA p.61 for $4,679,482 for CWM+WM 75 "site" employees per 6/26/2009 NYPA application=$62,000/year salary (and benefits according to Bonadio.) Identical line item in DEIS p.100 chart. Also, Site Payroll 2013 line item SCA chart p.61 and CWM SCA employee figure of 66 also translates to $62,000 salary (+benefits.)

Payroll Headcount Inflated: As noted above, CWM improperly included Waste Management employees with responsibilities other than CWM, in CWM's FTE headcount. Determining the number of FTE employees truly associated with RMU-1 and those expected for RMU-2 is significant. (This includes considering permanent RMU-1 headcount reductions arising from WM HQ cost-cutting policy.)

My petitions made specific reference to the original CWM applications to NYPA which later morphed into joint CWM-WM applications for the Model City site (p.13.) NYPA Power for Jobs and successor programs, Transitional Power and ReCharge NY, prohibit transfer in of employees from in-state affiliates since that would serve to camouflage a net reduction in headcount that would, in turn, require a reduction the dollar amount of the power subsidy NYPA would provide.[11] This was referred to by another petitioner at the Issues Conference as, perhaps, gaming the system, however, in reality, it constitutes a violation of NY Law. (Also, a significant Compliance issue.)

My petition referred to the fact that WM applications to NYPA (from 1999-2013) reflect co-mingling of CWM and WM employees, subsequent to the initial application. This evidence raises sufficient doubt about the reliability of CWM's payroll figures in its DEIS and SCA as attributable to the operation of RMU-1 and therefore RMU-2.

It also bears noting CWM applications do not refer to payroll as CWM or RMU-1 payroll. Instead, CWM applications refer to it as "Site" payroll. CWM site headcount has historically included WM sales, service and engineering staff serving other WM locations in WNY, unrelated to RMU-1.

It also bears mentioning that CWM's Response did not dispute my claim of co-mingling CWM and WM employees at the Model City site. One would expect that my indictment of payroll, averaging $4.5 million and significant to the *supposed* $12 million/yr. CWM asserts RMU-2 would generate, would have elicited a Response. CWM chose to dispute my Expense assumptions, instead.

Finally, in contrast to CWM's DEIS and SCA, the Bonadio accounting firm report (ref. petition p.89) states that the economic impact figures were prepared for "Waste Management's Model City site," not for the applicant or its operation of CWM Chemical Services, LLC. This raises even more doubt that "Site Payroll" was, in fact, not limited to RMU-1 and therefore RMU-2.

B. Suppliers, Contractors & Haulers: A reasonable person could not assume these figures represent Public revenue, and, be a result of RMU-1 (i.e. applicable to RMU-2.) I can't tell from the Ruling if that was assumed. It did not occur to me that a reader might assume CWM figured out how much income or sales tax is paid by its suppliers, contractors, haulers, charities and employees, and then, put those figures into its chart.[12] I assumed the reader knew 100% of CWM expenditures were reflected on the chart, not the associated Public revenue. But just in case:

[11] On information and belief, NYPA occasionally audits for total site headcount, but not for compliance with the affiliate transfers prohibition in statue.

[12] Reliability of CWM financial figures issued was shared by an accounting expert at the Legislative Hearing who is also my witness, a business professor at the Legislative Hearing, and the public comment submission by the New York State League of Women Voters.

Applying an 8.5% sales tax rate to this vendor line item in CWM charts, CWM would have theoretically paid suppliers, contractors and haulers in Erie and Niagara County $61 million in a single year (2012 ex.)

The Bonadio report for WM, also provided by CWM to DEC, also referenced in my petition, reported WM's estimate of the entire RMU-2 capital spending in Erie and Niagara would total roughly $28M over 30 years. That casts sufficient doubt on the reliability of $61M in a single year. Vendor expense on CWM's chart does not reflect solely Public Expense.

[Note: The Ruling may have confused the terms Expenditure and Expenses. When CWM mentions Expenditures, it means Public Revenue, even though that's not the case.]

Finally, in contrast to CWM's DEIS and SCA which implies otherwise, the Bonadio accounting firm report (ref. petition p.89) states that all Supplier, Contractor & Hauler expenditures were included, not just their associated Public revenue.

Are Supplier, Contractor & Hauler expenditures applicable, at all?

In addition to disputing the accuracy of the vendor $'s CWM claims are Municipal, I separately dispute the inclusion of this Revenue category as attributable to RMU-2.

EPA and DEC's 20-year hazardous waste capacity assurance should dismiss the CWM category of Suppliers, Contractors and Haulers *entirely*, even if CWM had actually presented only the public revenue portion:

- In order to attribute the Supplier, Contractor & Hauler revenues to the siting of RMU-1 and therefore, RMU-2, CWM would have to demonstrate that without RMU-1, all of the hazardous waste it actually disposed of would not have been generated and therefore, not managed (i.e., creating revenue somewhere.)

- Regardless, as noted above, CWM included Supplier, Contractor & Hauler expenditures 1) above and beyond the taxes they may generate and 2) those unrelated to RMU-1 operations (closed landfill maintenance, leachate, stormwater treatment, Corrective Action sampling, engineering, etc., etc., etc.)

3. Public Expense:

To reiterate, even if my estimates of Public Expense were found unsubstantiated or flawed, a reasonable person would consider them potentially significant and inquire further.

In response to the Ruling's claim I provided no explanations for cost and expenses in my two charts:

- DEC Monitor Cost: P.89 of my petition notes CWM excluded the costs of "Reimbursement" for DEC Monitors. A reasonable would justify this expense based on the word, "Reimbursement."

The Ruling unfairly refers to the above as, "Ms. Witryol did not explain how or why she chose the costs and expenditures presented in the table on pages 90 and 91."

- Gross Receipts tax offset: P. 90 of my petition notes that the ($750,667) Gross Receipts offset was included in Costs because "all unrestricted municipalities benefiting from Gross Receipts taxes oppose the RMU-2 applications. These taxes could, therefore, reasonably be excluded as representing the minimum value placed on preventing RMU-2." Top of my p.91 goes on to explain how and why the offset should be applied to the restricted municipality, Porter.

  Again, the Ruling unfairly refers to the above as, "Ms. Witryol did not explain how or why she chose the costs and expenditures presented in the table on pages 90 and 91."

  Even without detail of the Gross Receipts offset, the absence of a corresponding expenditure should still compel a reasonable person to inquire further, because it is a *Gross Receipts* tax:

  Why was the Gross Receipts Tax for hazardous waste Host communities enacted by the NY State Legislature to begin with? Not because the Legislature wanted to discriminate against an industry by taxing and has gotten away with it for 40 years. As the Ruling observed from my petition, CWM already sued NY and won the removal of the disposal tax at a cost of tens of $millions to NY taxpayers.

  It is self-evident a Gross Receipts tax is in recognition of the well-established adverse environmental and economic impacts arising as a result of these facilities in order to provide some level of mitigation (also well-documented in the relevant legislative memos.) To ignore the obvious "Tradeoff" implied by the existence of a Gross Receipts tax would be unreasonable. Nonetheless, an explanation was, in fact, provided in my petition.

DEC staff cost 6 yr ave. Admittedly, here I forgot to reference my spreadsheet listing some 40 DEC project staff assigned to CWM and an estimate of their annual hours/sal.+ben. However, in contrast to the Ruling, I did, in fact, explain why I included DEC staff expense as a cost at p.89, last para.

Regardless, a reasonable person could not conclude that DEC staff costs to administer almost constant CWM permitting and regulation is insignificant and would inquire further. The extent of satisfaction with the amount of my estimate does not negate the requirement for a reasonable person to inquire further as to CWM's estimate of $nothing. The petition met the burden of questioning $-0-. Noted earlier, CWM's response assumes facility fees are sufficient for oversight of RMU-1 and permitting. I know of no other DEC application with 30,000 pages posted that has been processed for more than 13 years, as is the case for RMU-2. See also Overview bullet #4.

DEC Consultant Exp.: My petition (p.7) notes DEC spent **$500,000**, alone, on an outside engineering consultant 2011-2014 to expedite the CWM renewal and siting application process. I thought the label on my chart called, "DEC consultants/renewal" was an adequate reference to that expense, for which my petition also explained why, again in contradiction to the Ruling. The extent of satisfaction with the amount of my estimate does not negate the requirement for a reasonable person to inquire further as to CWM's $nothing. The petition met the burden of questioning $-0-. See also Overview bullet #4.

US DOT VSL Exp.: The Ruling criticized the petition for not explaining why DOT VSL was used. The petition was clear in citing CWM-related fatalities during RMU-1 occurred on the road where DOT is the regulator, not at the site where DEC/EPA are the regulators. However, at $493,000, the EPA VSL figure is not dramatically different from the DOT figure used in relation to revenue in the chart. And VSL was used in only one of my two charts.

It seems clear from the Discussion and Ruling that the DOT VSL was relied upon as a basis for Ruling out adjudication of Muni Revenue/Expense Trade off. However, Both of my charts reflect a net Municipal loss from RMU-2, with or *without* VSL.

The need for an expert witness may be arguable, however, it is difficult to appeal as there was no explanation provided in the Ruling as to why that would be necessary. I did not anticipate an expert would be required:

1) To opine as to the near certainty that two more people would die* as a result of RMU-2, which is larger than any predecessor facility as noted on p.10 of my petition, or
2) Since a dispute as to the dollar value U.S. DOT experts assigned was not anticipated

*Note: RMU-1 and RMU-2 applications each reflect 2 fatalities

Even if the Ruling found flaw with this item, taken as a whole, it is not reason to disregard the totality of many other CWM flaws which support adjudication of CWM's Public Revenue/"Expense" and proffered economic impacts.

Army Corps of Engineers Expense (Due to RMU-2): CWM did not dispute the "how or why" (as the Ruling did) or the amount of my estimate, it just stated the expense was a public liability not theirs.

First, I just note for the record my petition sections about CWM violations of the DOH Order for decades, and, the fact that CWM has been deemed a *Potentially Responsible Party* by the Army Corps each contradict CWM's Response that legacy contamination is not CWM's liability.

Second, my petition identified factual obstacles to Army Corps remediation (ex. p.3, p.23) caused by CWM operations which has extended Corps time and therefore overhead expense for investigation. My petition (p.4) also explained that CWM further dispersed radiological contamination making ultimate remediation by the Corps (once it gains access) more difficult and more expensive. This is not a matter of dispute either, as CWM has acknowledged using site soils for construction of its landfills and surface impoundments.

In addition, the Muni Stakeholder petition[13] details obstacles to radiological investigation and remediation caused by CWM and predecessors in the opinion of the Atomic Energy Commission (AEC), U.S. Dept. of Energy (DOE) and the Army Corps of Engineers.

Notwithstanding agency concerns noted in the Muni Stakeholder petition, my reference to Army Corps documents (p.5 and footnote 4) stating their intention to investigate if access became available

[13] Stakeholder petition Appendix, p. 17-19, 21-33, 35, 37, 38-39, 41, 45-46 and all footnotes and references

(i.e. if RMU-2 were not sited) represents a sufficient how and why. As to the amount, it was estimated from Army Corps expenses published for reports referenced in my petition (footnotes 3, 4, NFSS.)

Radiological contamination on CWM is a serious public interest issue as recognized in the Ruling, and, should also be ruled a serious SEQR impact requiring mitigation (if possible.) Regardless, the extent of satisfaction with the amount of my estimate does not negate the requirement for a reasonable person to inquire further.

Separately, the Siting Board felt the issue of whether CWM operations created obstacles to Corps investigations was important enough to inquire further of DOH. DOH did not respond. However, the absence of a response does not seem to render the Siting Board inquiry as insignificant. And as noted in the Muni Stakeholder petition references above, other agencies have acknowledge the obstacles and dispersion due to CWM activity.

NYPA Low-cost power subsidy.
In contrast to the Ruling, my petition explained the "why" and the "how" (p.49)[14]

The ALJ's Issues Conference request CWM provide its *current* $ level of NYPA subsidy is irrelevant to the Public Expense that the public incurred from RMU-1 and which would be expected for RMU-2. (CWM twice stated it received no low cost power subsidies prior to correcting itself the third time.)

Asking for the current amount of CWM's power subsidy is akin to asking for CWM's current truck traffic volume now that RMU-1 is closed and then basing an RMU-2 forecast on either.

If CWM obtained a Certificate of *Environmental Necessity* and Public Safety, Model City would likely be returned to full status for low cost power subsidy from NYPA (under a program now known as the ReCharge NY or another similar NYPA reiteration.) My petition figures represents the actual ave. NYPA subsidy amount for RMU-1 since 1999 and should be included in Public Expense at that level.

NYPA/ESD Admin – the petition explains why – to administer its low cost power subsidy, (p.12-13)

NYS Dept. of Health – the petition explains why - to administer the DOH Order on CWM property (p.18, 59, 86-87)

State offices-lobbying – petition explains why – to listen to WM lobby for CWM (p.49.) JCOPE also reports annual WM visits to NYS Exec. re: NY HW Siting Plan 2007-2014.[15]

A reasonable person would not argue that the three items above plus EPA (section 1 bullet #4 of this appeal) involve agency staff time. They can only argue the amounts. Regardless, these Expenses would not alter the calculation of a loss from RMU-2 in either of my two charts.

DEC Siting Cost/30 years. A reasonable person would not question inclusion of RMU-2 siting costs as a Public expense. As the label implies, the cost is very conservatively amortized over the 30-

[14] $4 million divided by CWM's economic report RMU-2 life of 32 years, ave. $125,000/yr obtained from NYPA FOIL
[15] May 22, 2015 submission requested by ALJ O'Connell re; compliance, p. 3 and footnote p.4.

year life CWM anticipates (in its economic impact discussion) for RMU-2 if it were approved. If OHMS believes its time, the Siting Board time, staff advisor time, etc. will not cost taxpayers $3 million by the time we're done, then a reasonable person would wish to inquire further for a more accurate estimate.[16]

(See 1., bullet #4 related comments)

Niagara Cnty Health Dept: The requirement for Niagara County Health Dept. resources is self-evident in 1) the CACA (CAC Agreement) and 2) the fact that NCDOH is copied on all of the (exhaustive) regulatory correspondence CWM and DEC have provided petitioners in this proceeding. CWM used to reimburse NCDOH $10,000/year under the CACA until it expired. My first chart was conservative in using only a $6,000 expense figure.

Est. Porter, Lewiston, Cnty: Newspaper articles about the cost of defending ourselves from a new CWM landfill the past 10+ years OHMS would be collecting, combined with my petition's extreme disappointment (p.7) that $-0- technical assistance was provided by DEC to Muni's in connection with this application, should suffice as to why. Admittedly this labelling was not as effective as many others noted above.

The extent and satisfaction with the amount of my estimate, however, does not negate the requirement for a reasonable person to inquire further as to CWM's estimate of $no expense for its Host communities, particularly with the question of whether the Gross Receipts tax provides adequate mitigation. The petition has met the burden for questioning $nothing.

Muni's Lost $s =1 home/yr @$5,000+1.5%

Admittedly, this label would have benefitted from an explanation. My defense is that one may glean from my model that Municipalities lose one potential homebuyer (or home built) each year due to CWM's image sensitivity. An estimate of $5,000 total in property and sales tax lost, or the "Growth Reducing Impact" (p.14, 107) for the Muni's was used to arrive at the cost. A low inflation rate of 1.5% was then assigned.

Since the Ruling acknowledged that the reduction in real estate values from a facility like CWM may be significant and substantive, I cede to Mr. Olsen's impaired real estate expert as well as my two expert witnesses whose discussion of Tourism and Economic Development would affect the number of people living here.

Regardless, this image-sensitive Expense is not significant enough to warrant dismissal of the larger disputes for the significant Public Expenses issue discussed in this appeal.

Taken as a whole, most of my cost estimates seem reasonably explained or evident. Regardless, my petition's identification that CWM included $nothing for Public Expenses that a reasonable person could rely upon is significant and substantive to scoring the applicable Siting Board criteria, and, evaluating economic impacts required under SEQR (and SPDES Anti Degradation.)

[16] 12 mos. FTE: 8 Siting Board & 4 staff, 4 OHMS, 12 DEC @ ave. salary, $70k+$30k benefits = $3M before expenses.

4. Reliability of Financial Information

Appeal the Exclusion of Financial Accounting and Financial Analysis Expert Witnesses:

My petition incorporated by reference Legislative Hearing testimony by Accounting Professor Agnello. Her testimony explains her reasons for inquiring further as to the reliability of CWM's financial economic impact information (i.e., the DEIS and SCA Rev./Exp.Tradeoffs CWM applications excerpted from WM's Bonadio report.) Ms. Agnello testified about the lack of reliability based on the absence of *independent* accounting opinions and procedures, which my petition incorporated by referenced (p.89 footnote.)

During my career in commercial banking I was required to review each audit or third party opinion or verification for acceptability of reliance in proportion to the loan amount, loan period, and risk being assumed by the bank - for every business loan approval. *The level of detail necessary* for financial disclosures was also reviewed in light of the reliance the proposed transaction would place on the applicant's financial data or statements.

The Ruling did not seem to weight either Ms. Agnello's or my own expertise or concerns about the lack of third party verification and or level of detail/disclosure for the financial figures in CWM's Economic Impact or Revenue discussions to include the Municipal Effects. Laws against false statements in applications mitigate only a fraction of the problem. Without a reasonable level of disclosure, decision-makers really don't know what they're looking at really represents – the numbers may be truthful, but also irrelevant and or lacking the information reasonably necessary to the decision such as:

- whether CWM financial figures ($'s) are really attributable to RMU-2 (i.e. detail or breakdown)
- whether the figures include items that would *not* be considered Public or in Public Interest
- whether taking a company's unaudited and unsworn word is an acceptable level to consider mitigation for a decision of this magnitude and permanance.

The NYS League of Women Voters also expressed similar disclosure and detail concerns during the public comment period (ended Nov. 2014.) Their work for many years has included improving the adequacy of financial disclosure with respect to government.

The facts established in this appeal (1.-4.) wholly discredit or cast significant doubt on the reliability of financial information provided by CWM.

Would DEC accept RMU-2 engineering plans not certified by a licensed engineer? And or which failed to disclose some of the most basic construction designs? Of course not. The same holds true for financial data. DEC may accept uncertified information for smaller projects or where there is sufficient detail. In this case, we have neither with respect to CWM's financial impact claims for RMU-2.

5. Expand Economic Impact Adjudication Ruling:

A. Dispute of CWM-proffered Economic Impacts (SEQR)

My testimony in dispute of CWM Public Interest arguments should be permitted with respect to issues related to interpretation of business financial statements, general industry and competition conditions, or hazardous waste treatment and disposal volumes (ex. capacity assurance or where DEC Hazardous Waste Manifest System data is deemed relevant.) While I am not an economic development professional, 25 years' experience providing credit facilities to private and public companies for a variety of operational or investment purposes combined with my detailed knowledge of the Siting Plan development (manifest data and industry trends) is sufficient to demonstrate relevant experience and expertise.

B. Tourism categories relevant to Lewiston and Porter

First may I clarify that the report in Appendix E of my petition "The Economic Impact of Tourism in New York" was commissioned by and obtained from the I Love New York division of Empire State Development.

The Ruling suggests my petition did not demonstrate why any aspect of Tourism other than the purchase of 2nd homes should be adjudicated. I disagree. From my petition:

- It is also economically adverse to site a hazardous waste landfill in an economy steeped in agriculture and tourism (p.56)

- ***Town of Lewiston Code*** *§195-2 Purpose; adoption by reference; filing of copies***.**
  The Town of Lewiston is primarily responsible for promoting the health, safety and general welfare of its residents and the environmental quality of its lands. Vineyards and orchards flourish in the Town of Lewiston. ***Tourism***, recreational facilities, residential developments and light commercial industry abound within the Town borders. (p.85)

- It is also important to evaluate the dates DOT collected its data to determine how DOT's standard extrapolation method for Ave. Daily Traffic count would account for highly seasonal CWM, Modern, Artpark (our Tanglewood) and tourism traffic. (p.26)

- 2.13.1 Proximity to historical or cultural resources. (Rating: 3)

  Niagara River, Four Mile Creek State Park, Joseph Davis Park, Ft. Niagara State Park and Tuscarora Wilson State Parks are all down gradient from CWM's contaminated surface and groundwater discharges. Their use is or would be limited by environmental restrictions which could only be prolonged or increased by the operation of RMU-2. These assets are not only of great economic importance to the United States, but also to the Tuscarora Nation and to Canada. The CWM pipeline runs along the boundary of Joseph Davis State Park.

  . . . As noted elsewhere, the Growth-Reducing effects on population and investments in preserving or leveraging these assets would be diminished by proposed RMU-2

> operations. These assets include but are not limited to family farms and farm markets, and the Niagara Wine Trail. The adverse impacts to population directly impact the availability of volunteers relied on to preserve many of these assets. (p.107)

The Porter Comprehensive Plan (petition Appendix F) has a Policy to promote:

- Small Tourism-Based Businesses growth (Plan p.53)
- Agri-Tourism

The Ruling concluded marketability of farm products is significant, which justifies expert testimony from Professor Rosenwasser as to its Tourism-related component.

Virtually all of the Tourism categories described in the Empire State Development Economic Impact of Tourism (petition Appendix E) are found in Niagara County, and, in Lewiston-Porter and referenced in my petition, with the exception of hotels or B&B's OHMS and Siting Board members stayed in during the Issues Conference meeting.

The expert report by Mr. Acks offered for RRG/Farm Bureau/LewPort Schools by Mr. Olsen concludes that RMU-2 would reduce tourism growth. (p.3) His report did not limit Tourism to the purchase of second homes. Statistics for tourism in its traditional context was mentioned throughout his report.

Small business and agri-tours typically require the owners/investors *live* in that community. Therefore, one cannot separate the vacation real estate market from the rest of the relevant tourism categories to Lewiston-Porter.

As another example, fishing charters here are fundamentally owner-operated. Ref. NYS DEC Public Fishing Rights, (petition Appendix Q) and Niagara County Comprehensive Plan Ch. VI, p.5 for Sportfishing Tourism (ref. Muni and RRG petitions.)

As implied from petition Appendix D., Professor Rosenwasser as former head of the Niagara County tourism agency (and a former Town of Porter resident) knows the applicability of Tourism in Lewiston-Porter well. His long career in the tourism industry makes him qualified to discuss the adverse impact image-sensitive facilities such as CWM have on attracting small (and large) business tourism investors to the area.

Tourism is a subset of Economic Development. Because of its significance in Lewiston-Porter, it justifies distinct testimony from an expert. The importance of Tourism to NY State should also be considered (reflected in the ESD-commissioned report, pet. Appendix E.)

Lewiston and Porter are a major component of the Niagara River Greenway, discussed in County Plan CH.VI, p.7 and in the Riverkeeper comments which were incorporated by reference into my petition and identified at the Issues Conference.[17] The Greenway program created by state legislation funds

[17] Issues Conference: Transcript- Day 2, pgs. 257-264, 299-300, 338 and Transcript-Day 3 pgs.41-47, 58-59

projects solely to promote *all types of* Tourism and Recreational opportunities in the River region, which includes Lewiston and Porter.

C. Applicability to SEQR

All of the Economic Impact or Municipal Effects issues are significant and substantive should any mitigation of an economic financial nature be considered or required. Therefore, any economic or financial issues adjudicated, including social factors such as Environmental Justice, should be adjudicated also as SEQR issues in addition to Public Interest.

COMPLIANCE

1. Inclusion of WM Affiliates
2. On-site Monitors: Presence of and Reporting by
3. OHSA History
4. Fires
5. NYPA Power Subsidy
6. Overweight trucks
7. Property and Facility Description / Permit / Climate Change
8. Pipeline to Niagara River / Expiry of NYPA Easement
9. Deed Restrictions on CWM Property: 1996, 1972, 1974 prohibitions (and Municipal Effects)

1. Appeal the Ruling to limit the adjudication of Compliance to Waste Management entities licensed and engaged in hazardous waste management.

A reasonable person would inquire as to what types of approvals affecting environmental or financial Compliance at CWM require Waste Management (WM) approval and, then, seek the Compliance history of all WM entities.

The Ruling was based on the May 2000 Commissioner's Interim Decision on the Waste Management of NY LLC application to establish a solid waste landfill operation called Towpath Environmental & Recycling. This Towpath Decision was misapplied to CWM for the following reasons:

a) High Managerial Agent: My petition and May 22, 2015 Compliance submission to the ALJ supplied substantial evidence that officers of certain Waste Management affiliates act as a high managerial agent[1] for CWM.

The Al Turi matter relied on by the Towpath Decision Discussion, deemed the owner of Al Turi to be its high managerial agent based on the owner's execution of an Order On Consent on behalf of Al Turi. As a result, DEC determined a Compliance review of all other entities owned would also be adjudicated.

i) My May 22nd Compliance submission to the ALJ evidences the fact that, like the owner of Al Turi, Waste Management, Inc. Area Vice President David Balbierz (for CWM's owner) executed at least two CWM Orders on Consent issued by DEC. He is employed by Waste Management and his office is in Buffalo, not Model City. Mr. Balbierz had responsibility for Waste Management collections and disposal activities for WNY which included supervision of CWM. The Towpath Decision therefore expressly supports the inclusion of, at a minimum, WM-NY.

ii) Appendix A of my May 22, 2015 Compliance submission to the ALJ evidences the influence of Waste Management, Inc.'s Northeastern Group Vice President, John Skoutelas. My submission contained two examples of Mr. Skloutelas' regular interaction on behalf of CWM to the Town of Lewiston and in the Governor's office. The fact that Mr. Skoutelas' Lewiston letter cc's WM employee Mr. Balbierz, again, serves as evidence that CWM's site manager does not have full autonomy and reports to a Waste Management officer for certain approvals. Such evidence and demonstration of influence by corporate affiliates was not addressed in the Towpath Decision.

iii) Further, CWM employee Jonathan Rizzo copied Mr. Skoutelas of Waste Management, Inc.'s Northeastern Group on his 12-23-15 email to Attny. Darragh. (The header was included in Mr. Darragh's forward of the same email to the ALJ and

[1] As interpreted by ECL and NYS Penal Code 20.20 incorporated therein

petitioners.) Such evidence and demonstration of influence by corporate affiliates was not addressed in the Towpath Decision.

The lobbying by Mr. Skoutelas in the Governor's office, specifically for CWM, specifically documented by JCOPE as referenced in my May 22nd submission would also cause a reasonable person to infer Mr. Skoutelas actively participates in CWM decision-making. Such evidence of operational influence by corporate affiliates was not addressed in the Towpath Decision.

Skoutelas is an officer of Waste Management's Northeast Group and therefore Compliance of affiliated entities under his authority would be at issue (Al Turi.)

iv) Co-mingling of employees was not at issue with Towpath, but is for CWM.

- My petition contains a direct reference to CWM applications to NYPA for low-cost power which disclosed the presence of *both* CWM and WM employees at the CWM site. This, too, was disregarded by the Ruling to exclude Compliance for Waste Management affiliates.

- My May 22nd submission documented the co-mingling of specific employees (Sturges and Zayatz) between CWM operations and Waste Management operations in DEC Region 8. Both Mr. Sturges and Ms. Zayatz appeared at the CWM Legislative Hearing and Issues Conference as Mr. D'Amato, the Siting Board Chairman and DEC Region 8 Administrator, can attest to. He's worked with them both in Region 8. These facts were also disregarded by the Ruling to exclude Compliance for Waste Management affiliates.

Note: The Ruling misattributed this statement to me: "Waste Management does not distinguish between solid waste landfills and hazardous waste landfills." I thought the evidence I presented clearly showed that Waste Management's solid waste affiliates *manage and control* their respective hazardous waste operations by geographic region, not by type.

In contrast to Division reporting structures in DEC HQ and DEC Region for example, the management reporting evidence in my submissions reflect that CWM does not have a hazardous Waste management line of business in its chain-of-command. CWM and the 4 other TSCA disposal facilities report directly to their separate, respective collection and solid waste affiliate officers, solely based on geography, as exemplified in the evidence I provided (reiterated above) for CWM Model City's operational decision-making chain-of-command.

b) Direct Financial Interaction: The Al Turi matter among others also concluded that an applicant or high managerial agent's financial misdeeds (deceit, fraud, etc.) were relevant to Compliance even in the absence of environmental misdeeds.

As noted in my petition and discussed at the Issues Conference, Waste Management, Inc. is exclusively relied upon for a $100 million assurance to the State of New York on behalf of

CWM Model City. As I explained at the Issues Conference, that assurance is not "evergreen" as Mr. Darragh asserted. Instead, it is renewed periodically at the discretion of Waste Management's banks.[2] That operational influence on CWM is both significant and substantive, however, the Ruling made no mention of the financial assurance with respect to determining Compliance history requirements.

Further, because it is an LLC, CWM's financial activity is co-mingled with its parent (called a "partner" in this legal context) by financial pass-throughs of profits and cash. As is clear in all three petitions and Legislative hearing comments, Waste Management has a history of serious financial infractions resulting in sanctions and fines from the Securities and Exchange Commission (SEC.) Therefore, a reasonable person would want to inquire further as to the accuracy and honesty of WM's compliance required financial disclosures. (The Ruling incorrectly stated or misapprehended my petition sought to include WM because of its financial condition.)

The Ruling also seemed to ignore my issue that the level of staffing at CWM is not a decision made onsite. The HQ directives for staffing reductions in recent years have been issued by Waste Management, not CWM. [3] This is not to say that CWM staff does not have input, however, the evidence presented indicates CWM staff is not independent of solid waste affiliates' operational *influence, authority or control*.

c) Overlapping Operations: As the Ruling points out [p.4], CWM has applied for both hazardous and non-hazardous industrial waste capacity. Many Waste Management landfills, other than those licensed to accept hazardous waste, accept non-hazardous industrial waste

As evident in the 2010 NYS Haz. Waste Facility Siting Plan capacity analysis and the 2014 EPA Capacity Assurance analysis, hazardous waste landfills accept non-hazardous waste (because there isn't enough recurring hazardous waste to provide sufficient volume to meet corporate profitability goals due to the long-term excess RCRA and TSCA disposal capacity so documented in these proceedings.)

In contrast to Towpath, CWM volume is dictated by solid waste corporate goals, not vice versa. My Feb. 27th memo appendix G excerpting Waste Management's SEC filing for the year ended 12-31-2013 showed that it operated 262 solid waste landfills, dwarfing its mere 5 hazardous waste landfills by comparison. A reasonable person could not conclude from this evidence that WM's 5 hazardous waste landfills operate without significant operational

[2] Please also note the petition resume I submitted outlining my experience and expertise in bank lending to businesses to include the analysis of corporations' financial statements, management, industry and competition.

[3] https://www.wm.com/about/press-room/2012/20120726_2012_Restructure.jsp July 26, 2012:"WM today announced a reorganization. . .

- Removal of the management layer consisting of four geographic Groups (Eastern, Midwest, Southern and Western);
- Consolidation and reduction of the number of Areas managing the core collection, disposal and recycling businesses from 22 to 17;
- Reduction of corporate support staff in order to better align their support with the needs of the operating units, while reducing costs;
- **Elimination of approximately 700 employee positions.** "

influence from the other 262, or those within each hazardous waste landfill's market footprint, which in the case of Model City is typically the eastern half of the U.S.

Such evidence and demonstration of influence if not dominance of CWM by its corporate affiliates was not addressed in the Towpath Decision.

A reasonable person would inquire as to what types of approvals affecting environmental or financial Compliance at CWM require Waste Management approval and then seek the Compliance history of all WM entities subject to that same authority.

d) Finally, Appendix S, p.14 of my petition, DEC Sitewide Renewal Responses to Comments:

> **"Comment No:** 28 – Parent Corporation
>
> **Paraphrased Comment:**
> Why is the Permit issued to "CWM Chemical Services" but the company's advertisements and press releases for the facility state its name as "Waste Management"?
>
> **NYSDEC Response:**
> CWM is of course free to use the name of its parent corporation in its advertisements and press releases..."

...And CWM does so, constantly. A reasonable person might inquire why it's fine for CWM to brand itself as Waste Management's Model City facility for public communication but arbitrarily denies the relationship for Compliance.

The DEC's RMU-2 Fact Sheet directs the public to the applicant's website for additional permit documents.[4] The web link address and the top of that webpage:

http://modelcity.wm.com/

Waste Management Model City

Current Permit Documents

[4] p.11 of 12:
"C. Electronic Copy Availability
Electronic copies of CWM applications listed above and the CWM DEIS are available in their entirety through the following web site: CWM's website http://modelcity.wm.com"

2. Appeal the Ruling's omission that the failure of DEC to substantially staff its on-site Monitor positions as significant and substantive.

The Ruling disregarded evidence in my petition I obtained from a FOIL of DEC payroll hours that DEC, in fact, has *not* had "two full time monitors" on site. For two of the years FOILed, the equivalent on-site presence was one Monitor, and only during one shift. Neither staff nor CWM disputed the absence of two full-time equivalents for one shift, and that there are no monitors on-site, at all, for 2nd and 3rd shifts when applicable.

The Ruling noted staff's inaccurate assertion that there were "two full time monitors" at the site. That was not true for 2 of the 7 years reviewed.

DEC has also failed to disclose what it actually monitors in the monthly reports to towns (pet. p.17 last para) required by ECL§ 27-0920. Reports.2. "a list of any violations *observed.*" This appeal is significant based on the fact that host community Towns required to receive these reports (Lewiston and Porter) would have no idea what DEC monitors actually observed, and based on the DEC's lack compliance with ECL§ 27-0920. Reports.2.

3. Appeal the Ruling to exclude OSHA Compliance history for CWM Model City

The Ruling relied on the Towpath Decision as the basis for excluding CWM's OSHA Compliance records. However, the Towpath Decision made no reference to OSHA Compliance. The Ruling did not provide any rationale for allowing CWM to conceal OSHA problems during the construction and operation of RMU-1 or the applicable Compliance period (i.e., since 1993) with respect to the applicant (or affiliates.)

As noted in my petition, CWM, alone, made the decision to omit its OSHA compliance problems entirely from consideration for compliance with SEQR.[5] A reasonable person would want to inquire as to the nature of the OSHA infractions or problems and how the applicant addressed the problems.

Also, because the Ruling frequently noted CWM's assertion that RMU-2 would be like RMU-1, a reasonable person would want to inquire about what steps the applicant has taken or what conditions no longer exist that would prevent re-occurrence for RMU-2 of the OSHA problems which occurred for RMU-1.

My May 22nd submission to the ALJ on Compliance made specific reference to a 1995 OSHA report of a fatality at CWM Model City involving land disposal operations which CWM's applications concealed and which the Ruling either overlooked or disregarded without comment.

[5] DEIS: "**8.3 Occupational Safety and Health Administration Claims:** CWM …can find no OSHA claims that reflect or concern employees who will be working at RMU-2. . . . have not been included, because historic reports or information do not address "reasonably foreseeable" potential release…or related to RMU-2 if the conditions contributing to the claims no longer exist."

4. **Appeal Ruling to exclude Fires as Significant**[6] to RMU-1 operations and therefore RMU-2, to include gaps in emergency egress routes for RMU-2

   There was no disclosure in the application about the history of fires or supposed air sampling required when this occurs (per DEC Response.)

   The DEC Response indicates the reason for two fires in 2014 was not a regulation failure, but a compliance failure on the part of CWM. A reasonable person would inquire further.

   Siting Criteria recognizes the risk of fires for these types of facilities as so significant, it must be a category of its own in scoring.

   The Orders on Consent submitted by petitioners show that fires occur with some regularity at CWM (to include events with some literary camouflage such as "reaction" or "explosion" instead of a fire.) See also appeal on significance of lack of Air monitoring.

5. **Application for NYPA lower cost power subsidies**

   There is enough evidence by virtue of the headcount co-mingling in NYPA applications (see Revenue/Expense Tradeoff Appeal for detail) to require CWM provide sworn testimony evidencing otherwise. The State of New York may be entitled to a refund. Note: A NYPA audit of CWM headcount would not have had access to information regarding co-mingling of employees during any given year. NYPA subsidies are based on averaging trailing 12-mo. figures as opposed to a particular date.

6. **Overweight Vehicles** (petition p.19)

   As discussed in more detail in the Traffic appeal, overweight vehicles into CWM are a chronic problem, 25% of the time when tested for just one year according to the NYSDEC Haz Waste Manifest System. CWM would be expected in its Response to have dismissed the assertion were it untrue. (All trucks would be expected to get weighed, because that's primarily how CWM gets paid.)

7. **Property and Climate Change**

   Location / Climate Change / Violation of Lewiston Code Disputes:

   The Ruling provides some confusing definitions or statements which I dispute as significant.

   - The "site" upon which RMU-2 would operate is unquestionably in Lewiston and Porter.
   - RMU-2 could not operate without the CWM 100-yr Flood Storage area it constructed in 2000 (DEIS p.13 Wetlands Mitigation)

[6] Petition p.18, 21, 29, 30, 60, 63, 64, 98, 99, 109, 111

This Flood Storage facility was constructed in the Town of Lewiston

The Town of Lewiston has no record of CWM applying for the required construction permit

CWM stormwater has PCBs

CWM's stormwater related permits do not require CWM sample or gate all stormwater prior to discharge. (The Ruling seems to imply they do.)

Consent Orders and draft SPDES permits evidence that CWM is unable to get its hazardous waste out of its stormwater. Therefore, one could additionally argue CWM is managing hazardous waste in the Town of Lewiston

Corps of Engineers investigation reports referenced in my petition reflect detections of contaminated surface water flowing from CWM onto the Niagara Falls Storage site property. The Niagara Falls Storage Site is located in Lewiston. Therefore, one could also argue CWM related waste is being managed in Lewiston, but by the Corps of Engineers.

- The absence of any Climate Change evaluation in CWM applications (in Siting Plan guidance and now required for a TSDF under Sept. 2014 NY law) precludes information on overflows into Lewiston since 2000 and what would we expect under Climate Change 11-30 years from now during RMU-2 operations.

I appeal the cumulative impacts (SEQR) omission in CWM applications for the issues of stormwater and Climate Change (CC) as adjudicable given the direct impact CC has and will have on the intensity and therefore the accumulation of RMU-2 stormwater, and, the importance of Climate Change policy to the Administration.

A reasonable person might also inquire further to ensure the integrity of the compliance record for the construction permit, recognize CWM's improved property in Lewiston is necessary to the RMU-2 application for waste management operations, and attempt to honor the Department's Climate Change policy and law by addressing them during these proceedings.

8. PIPELINE to Niagara River

I appeal the Ruling's exclusion of CWM's 3+ mile private pipeline to the Niagara River as property, and the likelihood the pipeline would function properly for another 50 years. (petition at p.58-60, 68, 82-84.) CWM applications considered no alternatives as required by SEQR. In addition, the Ruling did not address the expiry in 14 years of a 50-yr NYPA easement that would be necessary to use the pipeline during RMU-2 operations if approved. (See Pet. p.83 and March 20, 2015 submission, Response to Nov. 2014 Banaszak/CWM comments, pgs.1 and 4, and Issues Conference Transcript April 29th 87th page)

9. DEED Restrictions on CWM Property[7]

1966: U.S. General Services Administration (GSA) Deed Restriction

Due to the history of federal operations on what is now CWM property combined with the initiation of disposal operations by Modern next door, the 1996 Deed restriction on CWM property may have been the first filed to effectively prevent: 1) contamination from being covered up and 2) being transported by animals. From the Muni Stakeholder petition App. p.10:

> "In 1956 the Navy Interim Pilot Production Plant (IPPP) was constructed along M Street, on what is now the central area of CWM property. The plant was built to produce boron-based high energy fuel and utilized some of the existing TNT production buildings. The parcel of land had been declared excess to current needs by AEC to make way for construction of the Navy Plant and was in the process of being transferred to the Navy. However, the property transfer was never completed. The IPPP operated until 1960, at which point it was still owned by the U.S. General Services Administration. In 1966 the parcel of land was sold to the Fort Conti Corporation.
>
> No information on radioactive waste burials was provided to the Fort Conti real estate group and radioactive contamination present on the former AEC disposal site was overlooked. A covenant was added to the title prohibiting use of the property as a garbage dump and specifying, "No littering or deposition of any refuse or residuals that would tend to breed vermin or cause obnoxious or noxious fumes or odors."

While there may be an understandable reluctance by the Commissioner or the Siting Board to get involved in interpreting a property restriction on the part of GSA (on behalf of the U.S. Departments of Defense and of Energy,) both Compliance and Siting Criteria scoring for Municipal Effects *require* an evaluation of whether CWM applications conform to local laws, etc., of which Deed Restrictions are significant and substantive component.

Therefore, this is an appeal to the Ruling's exclusion of the 1996 Deed restriction for Compliance and or for Municipal Effects.

1972 and 1974: DOH Order and Amendment Deed Restriction

My petition at p. 87 reiterated in my July 3, 2015 questions for DOH asked whether a landfill is a "structure" prohibited by the Order as Amended. DOH did not respond and may not likely wish to be embroiled in a dispute over whether the Order has been violated with the siting of several *new* landfills constructed at or by CWM since 1974. The application and decision information

[7] GSA: Petition Appendix B.-bottom p.1, and Muni Stakeholder petition Appendix p.10 and its footnotes 34, 35 reference item p.54, fourth
DOH: Petition p.86 and p.110 footnote 69, pgs.18, 59, 87 and Appendix S pgs. 4, 7, 8-9.
- Muni petition Appendix p.14 and footnote, p. 18-20, 44-46 and footnotes and reference p.51 third item, p.52 seventh and eight items, p.54 second item

Mr. Darragh has provided indicate that the Siting boards for SLF 12 and RMU-1 were unaware of the Orders' existence (and recording in the land records.)

This raises an interesting question for the RMU-2 Siting Board as to whether it believes in 1972 DOH envisioned land disposal to increase from:

2 facilities @100,000+ tons, to
9 facilities @ 8.8 million tons,
a 10th @ another 6 million tons.

Or, if DOH believed a landfill is not a "structure" in contravention to EPA, DEC and real estate industry references (pet. p.87) to simply allow for the then operating landfill to deplete and close.

Again, while there may be an understandable reluctance of one agency to get involved in interpreting a property restriction on the part of another, both Compliance and Siting Criteria scoring for Municipal Effects *require* evaluation of whether CWM applications conform to local laws, etc., of which Deed Restrictions are significant and substantive component.

A reasonable person would not conclude that in 1972, DOH would have envisioned massive landfill operations that disperse contamination, making investigation and remediation of radiological contamination more difficult.

In addition, in denying radiation as adjudicable, the Ruling misapprehended DOH's assertion[8] in the Pfeifer letter (with all of its flaws noted in my separate appeal and in the Muni. Stakeholder petition) was somehow identical to: 1) an opinion on the need for the Army Corps and CWM as a Responsible Party to identify and remediate dangerous contamination on CWM property, or 2) a DOH opinion as to the likelihood excavation could impact groundwater flow or the NFSS. **The Oct. 5th Pfeifer letter to the Siting Board offered neither.**

While there may be an understandable reluctance by the Commissioner or the Siting Board to get involved in interpreting a property restriction on the part of DOH, both Compliance and Siting Criteria scoring for Municipal Effects *require* an evaluation of whether CWM applications conform to local laws, etc., of which Deed Restrictions are a significant and substantive component.

Therefore, this is an appeal to the Ruling's exclusion of the 1972 and 1974 Orders as amended, and filed in the land records, for Compliance and or for Municipal Effects.

Finally, for all deed restrictions, DEC Staff's Sitewide renewal, Response to Comment 28 states: [9]

> "NYSDEC obtained copies of the Deeds for the parcels which make up the facility property from Niagara County and confirmed that 'CWM Chemical Services, L.L.C.' is the current property owner."

A reasonable person might want to inquire as to the time period reflected in the deed search, and what the results of that search included, in addition to the name of the property owner.

[8] In letter dated Oct. 5, 2015 from Justin Pfeiffer, Acting Director, DOH Bureau of House Counsel, to Judge O'Connell
[9] Petition App.S p.14)

Public Participation

Public Participation

ECL 70-0103.4 states: "It is the intent of the legislature to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities."

1) DEC's public information for its May 2014 Completeness determination referenced some 30,000 pages of documents.

2) Significant public interest in CWM matters was acknowledged by DEC.

3) Despite a 12-page long Fact Sheet, DEC did not conduct a Public Availability Session to take questions from the public about the massive application documents or the process. Two DEC engineers in the lobby with a map and the Fact Sheet *during* the Legislative Hearing, without notice, does not constitute an Availability Session.

4) Despite a 12-page long Fact Sheet, DEC provided no guidance to the public on what Party Status is or how to apply if not a lawyer. Residents along the waste truck routes and clay truck routes would have been interested. I note that in addition to having been barred from applying, the Ruling denies them an opportunity to testify under my petition not only as to Noise, but also to Dust and Hours of transportation operation.

5) Despite a 12-page long Fact Sheet, DEC provided no guidance to the public regarding the standard of proof.

6) Despite a 12-page long Fact Sheet, DEC provided no guidance to the public regarding the level of references required for either evidence or proof or dispute.

7) As noted in the Ruling, DEC never extended the public comment period by more than 30 days at a time. This precluded petitioners the opportunity to plan and implement more comprehensive responses to a greater number of issues. The short, lurching extensions also precluded reasonable time for the more informed members of the public to even superficially digest the 30,000 pages of documents, then call their own meeting for the broader interested public to explain the process in place of DEC's failure to provide same in proportion to the complexity and length of CWM applications.

8) There were additional RMU-2 related applications and documents published, post-public comment period. All documents incorporated by reference were not provided. While the process remains open for petitioners, it no longer remains open for the public.

A reasonable person would not consider the above to have "*promoted public understanding*" and therefore "*participation.*"

The 1984 enactment of Siting law was specifically intended to provide for "robust public participation." Notwithstanding my appeal, above that the RMU-2 process has, to date, not promoted

public participation and understanding, and that failure is both significant and substantive to the applications. Incorporated by reference into this Appeal:

- All DEC webpages and links created for public comment on all DEC RMU-2 applications.
- All Office of Hearings and Mediation (OHMS) replies to my FOIL requests since May 1, 2014.
- All communication between OHMS and parties or prospective parties since May 1, 2014.
- Petition pages 7-8.
- Petition Appendix U.
- Legislative Hearing: Afternoon session Transcript p.124-160, Evening session Transcript p.93
- Issues Conference Transcripts April 28-30, 2015

Residential Areas and Contiguous Populations - Health

1. Causal effects

2. Conclusions: Misapprehension or omission of significant data

Separate appeals on Traffic, Clay, Noise, Surface/storm water and Air are incorporated into this appeal as applicable to Contiguous Populations (and SEQR)

I appeal the Ruling to expand its proposed adjudication of Public Health risk for Public Interest to additionally include SEQR and the Siting Certificate. I also appeal the Ruling's exclusion of RRG expert witnesses. All three RRG witnesses should be included as each reviewed the 2008 DOH Cancer Study, and, as their resumes reflect, each of them has unique expertise to evaluate the significance of that DOH study. The Ruling was based on:

1. **Failure of petitioners to demonstrate a "causal" effect between CWM operations and cancer incidence and failure to predict the increased number of illnesses due to a proposed RMU-2.**

   None of the petitioners nor DOH asserted that the study would evaluate causal effects. To the contrary, we and DOH asserted the study did not evaluate causal effects. The Ruling misapprehended the issues raised in this regard. However, this does not disqualify the data in the DOH study as being relevant and significant to CWM applications for purposes of SEQR.

   - From the DOH study, p. 2: ". . . study areas were chosen on the basis of the possibility of exposures to any site-related contaminants by different pathways, independently of any knowledge of the presence of any actual contamination or contamination-related exposures. [DOH Study p.2] The DOH study did not take LOOW[1] site conditions into consideration, however, RRG's expert submission from Dr. Carpenter, did. Therefore, the Ruling to exclude Dr. Carpenter's testimony should be reversed.

   A "causal" effect is *not* required under SEQR for an agency to consider an issue as significant and substantive. To the contrary, uncertainty was a critical part of the foundation of the DOH evaluation and the DEC decision to take no action on permitting hydrofracking across the state:

   - From the DOH Dec. 17, 2014 Commissioner's letter and Public Health Review for DEC's Hydrofracking Findings:

     "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 attained."

   - In denying the activity of hydrofracking in NY, the June 2015 DEC Findings Statement (p.25-26) goes on to state:

     "Any assessment of health risks from a given chemical is highly dependent on understanding the route (ingestion, inhalation, or skin contact), degree, extent, and timing of human exposure (if any) to that chemical. In the absence of data from a specific exposure incident, the NYSDOH stated that this assessment would entail making many assumptions and extrapolations regarding the exposure conditions under which risks are estimated."

[1] The Lake Ontario Ordnance Works Site, on which CWM is located.

- And from the DEC's Final SGEIS 2015, Executive Summary (p.1,2):

  "These studies and expert comments evidence that significant *uncertainty* remains regarding the level of risk to public health and the environment that would result from permitting high-volume hydraulic fracturing in New York, and regarding the degree of effectiveness of proposed mitigation measures."

  "The Department concurs with NYSDOH, as the *uncertainty* revolving around potential public health impacts stems from many of the significant adverse environmental risks identified in the SGEIS for which the Department proposed and consider extensive mitigation measures."

- CWM has offered no evaluation of public health impacts from the 22-year operation of RMU-1 or the proposed RMU-2 in its applications and,

- The Negative Declaration for CWM applications, similar to hydrofracking, concludes there would be significant adverse environmental impacts from RMU-2.

  However, CWM applications contain no cumulative impact analysis for the following exposures reported in, among other things, CWM Orders on Consent:

  - Discharges of PCBs, etc. into creeks through residential and farm property
  - Fires
  - Leaking trucks
  - Spills
  - Unbridled excavation at CWM from 1987-2004 in contravention to the NYS Dept. of Health Order due to radiological contamination at CWM

  The above refutes Mr. Darragh's assertion that no exposure pathways have been identified. Also, adjudication that the Ruling proposed for groundwater is likely to affirm it moves quickly offsite, and for RMU-2, west toward all our public schools:

  - The Erie/Niagara Regional Planning Authority 1977 finding that Boron[2] traveled to River Rd., 3-4 miles west of CWM
  - Municipal Stakeholder expert comments on groundwater

  Adverse RMU-2 exposure pathways are also evident in the recent DEC Water Division requirement for an Anti-Degradation demonstration for the RMU-2 SPDES application (due to discharges of bio-accumulative constituents that would lower area water quality.)

Attorney Olsen for RRG/FarmBureau/LewPort Schools expressly incorporated by reference into his remarks the exposure conditions offered by the Municipalities' petition and submissions. His approach in this regard is entirely consistent with if not identical to DEC

[2] From Dept. of Defense operations in the 1950-60's on CWM property. See Petition Appendix U, p. 14 and also Muni Stakeholders petition Appendix (History) at pgs. 6 and 10.

and DOH's approach in presenting and concluding that uncertainty was, in fact, significant and substantive with respect to hydrofracking in their key Findings and Public Health Review documents, respectively.

2. **"Results and Conclusions" from the 2008 NYS DOH Study.** The "conclusions" from the DOH study on which the Ruling was based were not specified. However, the study did not contain a "conclusion" section.

   As discussed below the Ruling improperly created its own "conclusions" from the study based on conjecture and dangerously beyond DOH's Results and Interpretation.

   The *Results* and *Interpretation* sections of the DOH study were limited to certain questions that are not necessarily relevant to the issues raised in the petitions. However, the DOH study *data* is relevant to CWM applications and was reviewed by all of the health experts for RRG-Farm Bureau-LewPort School District.

   The Discussion in the Ruling seemed to disregard statistically significant or elevated *group* cancers in the study, mitigating them with the observation that most *individual* cancers were not statistically elevated. **The DOH study did not offer that as a conclusion. The Ruling substituted its judgment for DOH, and at conflict with DOH cancer findings in general:**

   DOH did not conclude individual cancer statistics mitigate group statistics or vice versa. For DOH to conclude that individual variances mitigate group variances, it would have to assert that there is only one kind of cancer associated with an environmental hazard. I would offer that ordinary people, even DEC staff, would acknowledge that in many cases, a single type of environmental hazard is suspected by agencies to cause multiple types of cancers.[3]

   The Ruling also arbitrarily dismissed statistically significant cancer rates for Study area 1, the LewPort School District, based on the absence of same for Study areas 2 and 3. This, too, was outrageous. **The DOH study did not offer that as a conclusion. The Ruling substitutes its judgment for DOH** and prejudiced petitioners by ignoring possible exposures of:

   - adult staff while at School (air and ground-to-surface water from CWM)
   - adults or children exposed to CWM cumulative impacts along the Designated Truck route
   - adults or children exposed west, east and south during seasonal wind variations.

   The **Statistically Significant Childhood Cancer rate, 88% above expected**, cannot be ignored.

[3] Examples from my April 24, 2015 email submission to Judge O'Connell: ATSDR attachment, Plutonium: "The types of cancers you would most likely develop are cancers of the lung, bones, and liver." Radium-226: [any kind of] "cancer (especially bone cancer.)"

- The Ruling also arbitrarily *ruled out* a potential environmental hazard (i.e., "not likely due to chance") if statistics were not considered "significant" (i.e., represent a cancer cluster.)
- The Ruling similarly if not arbitrarily *ruled in* chance as the reason for any elevated cancer rate that was not statistically significant, i.e. a defined cluster.

The DOH study did not offer either of the above as a conclusion. In other words, the study did not opine that when a cancer rate is elevated but not "significant," that means an environmental hazard did not cause that cancer.

The DOH study offered no conclusions on cause, but statistics that based on exposures and pathways identified by the Municipalities could establish a significant degree of uncertainty. The experts should be allowed to argue this for the Siting Board to make its own judgment as to the level of uncertainty acceptable or not for Endangering Contiguous populations required for a Certificate, and the Commissioner as to SEQR.

As noted above, basic statistical practice considers potential risk based on the number of variances, not just the degree of a particular variance. Facts from the DOH Study data appear on the following page.[4]

[4] Petition at p.24-26, DOH Study and DOH spreadsheets, pet. Appendix C. Note: DOH Study includes Census Tract maps.

LewPort School District (Table 1)

18 of 32 cancer rates or 56% DOH reported were elevated above the rate expected to occur.

Ransomville and Youngstown (Table 2)

9 of 15 cancer rates or 60% DOH reported were elevated above the rate expected to occur.

Ransomville (Table 3)

6 of 12 cancer rates or 50% DOH reported were elevated above the rate expected to occur.

Village of Youngstown (Census Tract 245.01)

7 of 9 cancer rates or 78% DOH reported were elevated above the rate expected to occur.

Town of Porter (Census Tract 245.02 similar to Ransomville):

7 of 9 cancer rates or 78% DOH reported were elevated above the rate expected to occur.

Designated Truck Route Segment (Census Tract 244.04, Rt.265 end-Rt.18 enter)

6 of 9 cancer rates or 67% DOH reported were elevated above the rate expected to occur.

1 of 9 cancer rates DOH considered *Statistically Significant*

Designated Truck Route Segment (Census Tract 244.01, Creek Rd. Ext)

6 of 9 cancer rates or 67% DOH reported were elevated above the rate expected to occur.

3 of 9 cancer rates DOH considered *Statistically Significant*

CWM Southern Border (Census Tract 244.05)

3 of 9 cancer rates or 33% DOH reported were elevated above the rate expected to occur.

1 of 9 cancer rates DOH considered *Statistically Significant*

A reasonable person would inquire as to whether the above, taken as a whole, is a, “coincidence.”

From DOH email w/ spreadsheet to Witryol: (Petition Appendix C)

"To protect confidentiality, I am only giving total numbers of cancers by sex for each census tract, and numbers of those cancers that were 6 or greater in all of the five tracts, to prevent people from figuring out what the small numbers were by subtraction. This comes down to [disclosable] colorectal and lung cancers in males and females, prostate and bladder cancers in males, and breast cancer in females."

Other Cancers identified in the DOH study that may, in fact, represent elevated incidence, but which were not reported due to confidentiality policy not to report <6 cases. This is most likely in the more rural areas in the Town of Porter, particularly for rarer forms of cancer as the DOH Study described:

LewPort Male: "Fewer than six cases were observed for cancers of the liver/intrahepatic bile duct, thyroid and for multiple myeloma. (To protect patient confidentiality, for cancers with fewer than six observed cases, the specific numbers of observed cases have not been indicated."

LewPort Female: "Fewer than six cases were observed for cancers of the esophagus, liver/intrahepatic bile duct, and larynx:

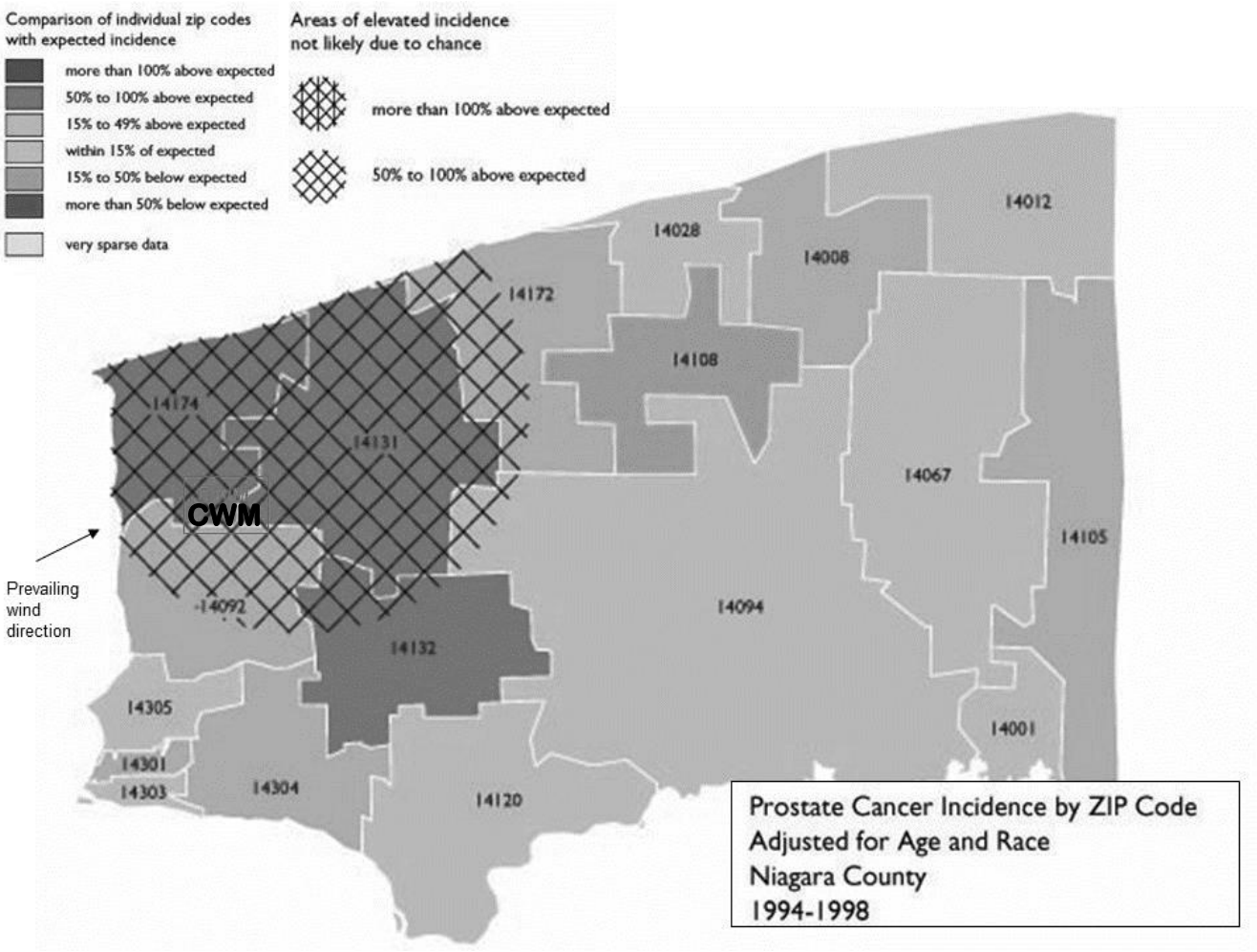
Yngtwn/Rns. Male: "Fewer than six cases were observed for several types of cancer including cancers of the stomach, liver/intrahepatic bile duct, pancreas, larynx, kidney and renal pelvis, brain and other parts of the nervous system, thyroid, and for multiple myeloma."

Yngtwn/Rns. Female: "Fewer than six cases were observed for several other types of cancer, including cancers of the oral cavity and pharynx, esophagus, stomach, liver/intrahepatic bile duct, larynx, cervix uteri, kidney and renal pelvis, brain and other parts of the nervous system, and for multiple myeloma."

Ransomville Male: "Fewer than six cases were observed for several types of cancer, including cancers of the oral cavity and pharynx, esophagus, stomach, liver/intrahepatic bile duct, pancreas, testis, kidney and renal pelvis, brain and other parts of the nervous system, thyroid, lymphomas, and for leukemia."

Ransomville Female: "Fewer than six cases were observed for several other types of cancer, including cancers of the oral cavity and pharynx, esophagus, liver/intrahepatic bile duct, pancreas, larynx, cervix uteri, ovary, urinary bladder, brain and other parts of the nervous system, and thyroid, and for lymphomas, multiple myeloma and leukemias."

The Ruling quoted the Study statement that statistically significant Prostate Cancer incidence in Lewiston and Porter reflects a problem in northwestern Niagara County (instead of the study area.) However, *the study areas is*, *in fact*, *northwestern Niagara County*. Below is a DOH cancer map from my petition Appendix B:



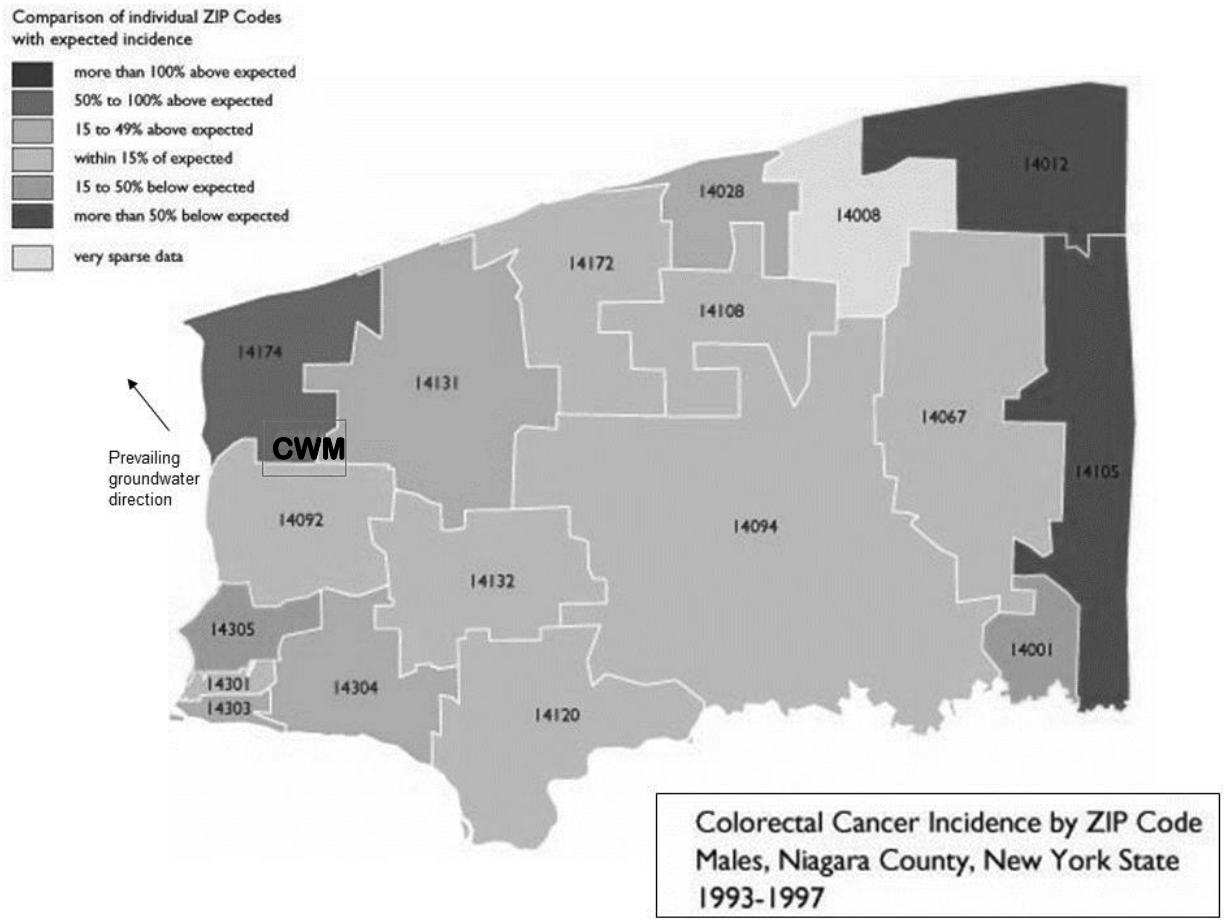
I added only CWM's location for reference to the DOH map, above. Note at top, "Areas of elevated incidence not likely due to chance." The 3 plaid-covered northwest zip codes are Lewiston-Porter.[5]

Siting a facility in a rural area precludes the disclosure of all health statistics (<6 cases,) and therefore, all potential problems. Nevertheless, this map suggests the further away you are from CWM, the lower the risk of Prostate Cancer. **A reasonable person would want to inquire further as to what problems NYSDOH could not disclose due to the smaller population in rural study areas, like those near CWM.**

The most troubling approach in the Discussion was to exclude the elevated cancers based solely on the possibility, not DOH certainty they were due chance.

A case in point, again from the Scoping appendix in my petition and my Legislative Hearing July 2014 slides, below is a map prepared by DOH (except for notation of CWM location and upper groundwater zone direction):

[5] The Twelve-Mile Creek part of the Town of Wilson, zip code 14172, is also part of this plaid-defined cancer cluster.



Also Map from Appendix B.[6] Due to the black-and-white[7] document requirement imposed by ALJ since the submission of petitions, please note that the towns at Eastern end of County are green, denoting rates >50% *below* expected, while Youngstown is violet, denoting *50%-100% above* expected cancer rates. Said another way, it appears the further away you are from CWM the lower the risk of Colorectal Cancer.

Nowhere in the DOH study does it state that the 14174 Ransomville zip code incidence of 50%-100% pictured above "must" be due to chance. This is but one example of how the Ruling added to or altered DOH's interpretation. I disagree with the Ruling's premise that a reasonable person could review this DOH map and not wish to inquire further because there's no accompanying report of statistical significance.

RMU-2 related applications fail to include a cumulative impacts analysis, required by SEQR.

[6] Prevailing ground water direction arrow refers to the *upper* aquifer. This DOH pilot used a 5-yr period not comparable to the DOH Study period 10 year period. However, the geographical area covered is the same.

[7] Color copies of my petition were subsequently electronically distributed to the Siting Board – see Appendix B.

Also as noted in my petition, DEC has refused to require CWM to conduct offsite sampling despite its failure to prevent discharges of PCBs and VOCs into area creeks. (petition p. 8) In the case of CWM, there is not merely a lack of evidence, there is a preponderance of evidence of elevated adverse health effects in its Host communities of Lewiston and Porter during its operation of RMU-1. Moreover, CWM has stated "RMU-2 will be like RMU-1."

3. **Inclusion of Witnesses**:

The Ruling excluded Dr. Moysich, an epidemiologist, on the basis that there was no dispute as to the types of cancers CWM's Toxic Release Inventory may cause. However, Dr. Olsen's petition did not expressly limit her testimony to the Hierarchy:

> Dr. Kristen B. Moysich [*Exhibit 12*] will be called as an expert witness and will testify that many of the chemicals contained in the Toxic Release Inventory of CWM "could pose a significant threat to human health." However, the extent of risk is dependent on the type, amount and duration of exposure and the exposure pathway which are beyond the scope of our review. Some of the cancers which are suspected or associated with inhalation, ingestion, or skin contact with chemicals included in the inventory include but are not limited to leukemia, urinary cancer, bladder cancer, lung cancer, renal cancer, brain cancer, nasal cavity cancer, laryngeal cancer, lymphatic cancers, ovarian cancer, stomach cancer, prostate cancer, mesothelioma, melanoma and other skin cancers."

Dr. Moysich is an epidemiologist and did, in fact, review the 2008 DOH Study and spreadsheet data discussed in this appeal, and met with LewPort School officials and staff several years ago to discuss them. Dr. Olsen is willing to join her testimony and my petition issue as to the significance of the uncertainty raised by the DOH Study. This determination would have a bearing on whether to approve or deny CWM applications, similarly to the determination as to whether or not to allow hydrofracking.

Dr. Carpenter is an expert in environmental health whose credentials, including his former position of Director of a NYSDOH science Center, are well known to DEC and its researchers who have called on him for consultation in the past. The Ruling improperly substituted its judgment for Dr. Carpenter's, in addition to DOH:

There were no inconsistencies between the data Dr. Carpenter cited from the DOH Study figures as presented. Only his additional task, beyond the DOH Study, to render an opinion as to whether the DOH data taken as a whole suggests the likelihood of environmental exposures considering actual hazardous constituents at CWM and the NFSS. DOH did not consider the types of hazardous contaminants, and, looked for clusters without regard to site operations. By contrast, Dr. Carpenter has visited the Lewiston-Porter School campus and reviewed the chemical and radiological contaminants of concern.

Dr. Olsen is willing to join Dr. Carpenter's testimony and my petition issue as to the significance of the uncertainty raised by the DOH Study. This determination would have a bearing on whether to

approve or deny CWM applications, similar to the DEC determination as to whether or not to allow hydrofracking.

Dr. Hughes, as a member of the County Board of Health and as a physician who has practiced medicine here, is uniquely qualified to offer an opinion on whether, for example, unusually aggressive Prostate Cancer screening in the rural Town of Porter is more likely to account for the cancer cluster DOH identified than from environmental hazards. Here, the Ruling relied on generic and non-site-specific comments from DOH, absent any local medical practice familiarity Dr. Hughes would be expected to have. (DOH comments in this regard were, therefore, conjecture.) This is not duplicative to Dr. Carpenter's distinct research career in environmental health.

Finally, to reiterate, due to the significance of uncertainty of DOH Study data and its potential relationship to CWM operations, which no one has opined to except:

1) the ALJ and

2) health professionals for RRG

the significance of the DOH Study data to CWM's application should be adjudicated not only for Public Interest, but for SEQR purposes and for the Siting Certificate (Endangering Contiguous Populations.) And, all three RRG witnesses should be permitted to testify.

Finally, the Ruling was based in part on DEC's consultation with DOH for its Response. There were no DOH quotes or email provided. DOH second-hand comments were related to cause-and-effect, which was not included in the purpose its Study. By contrast, consideration of the Study data and CWM operations are at issue and based on this appeal, a reasonable person would wish to inquire further.

NFSS / CONTINGENCY / EXCAVATION

NFSS

Worst Case Scenario and Contingency

Plutonium and CWM Excavation

Note: It is important to view the NFSS/RMU-2 photo on petition p.4 in color. Black-and-white copies were distributed to OHMS and Siting Board members without my knowledge and later supplemented with a color copy only electronically, not by hard copy.

NFSS

Appeal the ruling that the risks associated with the adjacent Niagara Falls Storage Site ("NFSS") are not significant and substantive to SEQR and to the Siting Criteria, both of which were referenced in my petition and at the Issues Conference.[1]

The Ruling (p.133) excluded the NFSS for two reasons:

1. "DEC staff's statement that groundwater pumping at CWM does not affect groundwater flow on the NFSS."

   DEC staff's Response referred to historical groundwater (GW) pumping activity at CWM in the *upper* GW zone, while my comment refers to pumping in the *lower* GW zone (p.55, 97.) So, I am hopeful DEC will reconsider its comment in Reply.

   RMU-2 would require pumping very near the NFSS in the lower zone. Further, Mr. Darragh's assertion at the Issues Conference that GW pumping for RMU-2 construction would be "short-term," is contradicted by CWM applications calling for sequential construction of cells over a period of many years. Regardless, whether the GW pumping would translate to 5 years or 30 years, its potential to camouflage or confuse Army Corps of Engineers monitoring of the NFSS would require mitigation to conform with SEQR, if that's even possible. This is particularly important given the high probability the containment cell is already leaking (pet. App.U, p.13)

   The Ruling's assertion above is also incorrect according to the National Academies of Science (pet. p.5) The Ruling to adjudicate groundwater (GW) issues raised by the Muni' Stakeholders, which includes the affected GW pumping radius, would cause a reasonable person to consider adjudicating this aspect of GW together with or following the outcome of GW disputes.

   CWM applications do not include recognition or mitigation of GW pumping impacts to surrounding properties (p.14, 29) or any growth-reducing impacts referred to in my petition.

   As a somewhat bewildering aside, the DEC Response also quoted 30-year old (c.1980's) DOE surveys claiming that NFSS Vicinity Properties located on WM property (VPs) have been cleaned up to a level of unrestricted use. However, the NYS Dept. of Health Radiation Bureau has stated it would lift the Order on CWM property if it (VP's) met standards for "unrestricted use," and it has no evidence to support that DEC/CWM contention.

   Also as my petition notes, DOH found that not all certified VPs had even met the then DOE standards (ex. PCB warehouse) the Corps wishes to reinvestigate them.[2]

---

[1] Pgs. 1-6, 14 (Federal Remedial Action), 16 para2, 29, 55 para3&6, 81, 97, 110-111 and all footnotes/photos. Issues Conference 4-28-15 Transcript pgs.191-198, and I/C 4-29-15 Transcript p.394, and I/C 4-30-15 Transcript p.46-47, p.59

[2] At the Issues Conference, Mr. Darragh acknowledged Corps recommendations to re-investigate CWM VPs, but dismissed the issue based on his speculation that the Corps would not be funded to do so during the proposed RMU-2 operational period, which CWM estimates at 30 yrs.

2. "CWM does not own property where the NFSS is located and does not control its activities." (Ruling p.133)

   Siting Criteria *requires* consideration of compatibility of adjacent properties (pet. p.21, 98.)

   CWM is supposed to control its own activities but as referenced in my petition, Army Corps of Engineers investigation reports concluded **surface water** flows onto CWM from the NFSS, and *contaminated* surface water flows onto the NFSS *from* CWM. This issue has never been addressed by a DEC or CWM in a stormwater plan.

   Some relevant, key NAS conclusions noted in my petition appear below, followed by some excerpts from the Army Corps reports referenced in my petition.

National Academies of Sciences: [3]

(CWM and DEC project staff are very familiar with the 1994 NAS report.)

- "The high-level residues pose a potential long-term risk to the public, given the existing environmental conditions and **future unpredictability**, if they are left permanently at the NFSS.

- The present and potential future **interactions between the NFSS and disposal sites adjacent to the NFSS**, where non-radioactive **toxic chemical** and landfill wastes are currently disposed, have not been addressed adequately, either in the NFSS final environmental impact statement (FEIS) or in subsequent studies and documentation.

- Current site monitoring activities are inadequate for the determination of long-term site integrity and potential future risks to the public and the environment from the **movement off-site** of radioactive and non-radioactive wastes in the NFSS containment structure, **as well as the possible influx of waste materials from the disposal sites adjacent to the NFSS**."

If DEC RCRA geology staff in Albany dismisses the NFSS as a concern in his Reply as anticipated, the fact his assessment is contradicted by a National Academies of Science report combined with GW disputes from an experienced, credentialed expert for the Muni' Stakeholders, would cause a reasonable person to inquire further.

[3] NAS report – Conclusions, Executive Summary, http://www.nap.edu/read/9161/chapter/2
http://www.nap.edu/catalog/9161/safety-of-the-high-level-uranium-ore-residues-at-the-niagara-falls-storage-site-lewiston-new-york
(Safety of the High-Level Uranium Ore Residues at the Niagara Falls Storage Site, Lewiston, NY
Committee on Remediation of Buried and Tank Wastes
Board on Radioactive Wastes Management
Commission on Geosciences, Environment, and Resources
National Research Council
WASHINGTON, DC 1995)

Army Corps of Engineers: examples of cross-contamination

NFSS Remedial Investigation Report-2007:
(CWM and DEC project staff are very familiar with this report.)

"5.3.1.1 Soils
…Soil was also investigated along the northern NFSS boundary in EU 4 where run-off is received from the CWM property.
… **PCBs were detected** in surface soil at five locations in EU 6. Three of the samples were located either near the northern property boundary with CWM **or in a** [surface] **drainageway flowing onto the NFSS from CWM**.

NFSS Remedial Investigation Report Addendum-2011:
(CWM and DEC project staff are very familiar with this report.)

10.4.3 Pipeline Waste Water/Surface Water SRCs
Radiological SRCs were identified in pipeline waste water at five locations on CWM property. These waste water samples were collected from the sanitary line that leaves the NFSS north of EU 2 and from the acid waste lines that leave the NFSS north of EU 3. Radiological SRCs identified in waste water include uranium-234, uranium-235 and uranium-238.

10.5 OFFSITE TRANSPORT OF RADIOLOGICAL CONTAMINATION VIA PIPELINES
Transport of radiological contaminants from the NFSS via pipelines is limited by the fact that few lines cross the NFSS boundary. **Lines extending off the NFSS** include four sanitary lines (**one on the north** side...

14.2.2 Acidification Area in EU 4
Plumes with elevated concentrations of dissolved total uranium, boron, and chlorinated solvents (e.g., PCE and degradation products) were found in the [upper GW zone] Acidification Area during previous phases of the RI. Data from the RI indicated the **possible contribution of VOCs to groundwater from DNAPL at this location**...

The **boron plume** identified within the UWBZ [upper GW zone] in the central portion of EU 4 was further evaluated for the RIR Addendum . . . Additionally, off-site exposure to this plume is unlikely because the groundwater is not used as a source of drinking water and **CWM Chemical Services** is located downgradient of this plume where public access is restricted. Available site operational information and environmental investigative data indicate that groundwater contamination in this area is the result of historic site operations and past **waste storage practices**."

The Issues Conference discussion includes reference to surface water pathways shared by CWM and the NFSS.[4]

[4] p. 193 I/C Transcript of 4-28-15.

As noted in my petition (p.5), the NFSS containment cell has now passed its 25-year minimum useful life. (There is no useful life assigned to the un-engineered earth beneath the c.1942 cement basement that constitutes the floor of the NFSS containment structure.)

Mr. Darragh's Issues Conference claim that the RMU-1 siting board did not find issue with the NFSS in 1993, when the NFSS cap was 9 years old, is irrelevant. The cap is now 32 years old and has an expected life of only 25-50 years; meaning the minimum 25-yr. threshold has been crossed and the maximum 50-yr. threshold will be crossed in 18 years vs. CWM's financial forecast of 32 years of operation for its RMU-2 proposal.

As noted in my petition, the NFSS has a Homeland Security designation (p.3.) A reasonable person would inquire further as to whether it is appropriate to permit a hazardous waste disposal operation next to a Homeland Security site.

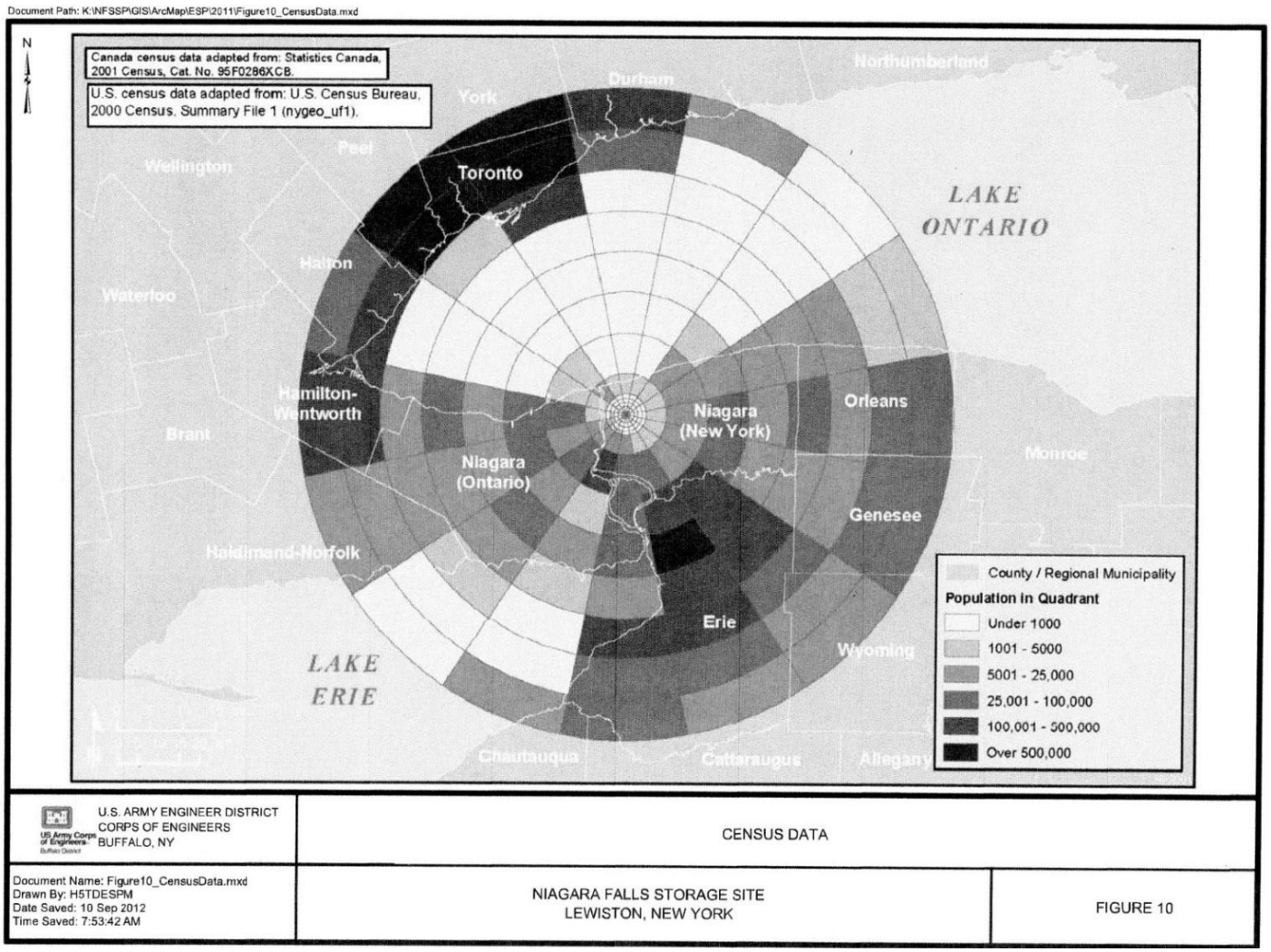
Siting Criteria *requires* scoring of compatibility with adjacent properties (should the applicant first, a) demonstrate its facility is necessary or in the public interest, then, b) that its facility is equitably distributed, and then c) that its applications are consistent with the Siting Plan, to begin scoring.)

In addition to the GW and surface water concerns noted above, my petition identifies the risk of fires at CWM (See Compliance appeal.) Given the generic risk of fires at landfills reinforced by its specific Siting Criteria category (pet. p.111,) a reasonable person would want to inquire as to the significance and frequency of fires and what a fire at CWM impacting the NFSS would mean.

Clearly there is a need to include the NFSS in a cumulative impacts evaluation which is not addressed in CWM applications.

A reasonable person would want to inquire further as to the CWM risks to and from the Niagara Falls Storage Site and what, if anything could be done to mitigate those risks.

The NFSS is at the epicenter of the Army Corps of Engineers map in its annual Environmental Surveillance Technical Memorandums for the NFSS. The map includes Toronto and Buffalo and was shown at the July 2014 Legislative Hearing but inadvertently lost in transferring hearing slides to petition Appendix U, "Slides From July Hearing" as the transcript demonstrates.[5]



[5] Legislative Hearing Transcript July 16, 2014, 1:00pm, from Witryol remarks at p.133:

but we're standing just one mile from the Epicenter of this chart **from the annual, technical memorandum** from **the U.S. Army Corps of Engineers from Niagara Falls Storage Site** which is adjacent to CWM's property. That is our temporary radioactive storage site from the 1940s. You can see there's a little chart for population density. **You have Toronto in the upper left-hand** *[right hand]* **corner, you can see Erie, in the dark spot there is Buffalo...**

Worst Case Scenario and Contingency

Please see petition pgs. 28-30 criticism of CWM's poor Worst Case scenario. Given the hazards at and around CWM and inadequate emergency egress combined with CWM's assertion that RMU-2 would be like RMU-1. This means more fires, explosions and reactions in proximity to all public schools and the trailer park. This issue is significant and substantive and appealed for these reasons.

Please also see petition Appendix N., CWM map of residences, which *excludes* the nearby trailer park.

Again, it is important this map be viewed in color via the electronic copy provided by OHMS on March 23, 2015, four months after petitions were submitted. (We were not advised to submit petitions in black-and-white.)

Plutonium and Excavation

(Ruling p.137)

Plutonium:

Appeal the Ruling that Plutonium on CWM property would be co-located with Cs-137. [6]
My comments on the SEMMP[7] of 10-2-15 and my comments of 12-1-15 on the DOH response, both to Judge O'Connell are incorporated here, in full.

In its Oct. 5, 2015 letter to the Siting Board, DOH wrote (last page):

"With respect to plutonium, records indicate that this material was co-mingled with cesium-137, which can also be detected through gamma emissions. Records also indicate that during the 1960s, this material was removed and shipped to another location."

Both of the above statements are false. Sufficient evidence to that effect was provided in my petition and submissions.

1. Only *some* of the waste contaminated with plutonium handled, spilled or burned (on what is now CWM property) was "mixed." My 12/1/15 submission included Atomic Energy Commission (AEC) documents, the first of which is a sample rail shipment document for wastes to Oak Ridge National Laboratory (ORNL) from the LOOW. In my Exhibit A, p.1 of 2, under "Materials":

   "Pu – Composed of all materials contaminated with Plutonium or Thorium.
   This type of waste is packaged into 1 gallon paint cans, and placed into carbon steel drums."[8]

   This Jan. 1958 shipment document shows that pallets for four other types of waste were shipped off-site, but not waste contaminated only with plutonium; only

   "Slurry,
   Oils,
   Solid Waste and
   Misc. Scrap"

   types of waste were in this shipment, not the waste contaminated only with plutonium. This is just one example.

   On the following page, Exhibit A, p.2 of 2, a March 1958 AEC memo states,

   "Since we have been warned that some of these crates contain plutonium and we are to avoid these because of the potential fall-out, we now find it impossible to do so by observing external markings.[9]

[6] See Petition pgs.2, 4, 17, footnote #3 p.5, and Appendix S pgs. 4, 7, 9-11, 17-18, and Dec. 1, 2015 letter from Witryol to O'Connell, DOH Order
[7] CWM Soil Excavation Monitoring Plan
[8] Waste contaminated only with Plutonium in paint cans repackaged from badly damaged drums stored onsite.
[9] i.e., AEC personnel couldn't read the drum labels because they had deteriorated to the point of being illegible.

Our current plan is to remove all the crates of KAPL Wastes from building 444 where they are tipple decked, difficult to observe and in a dangerously decomposed building. We will line these crates up along one of the inactive outside roads and merely remove their lids without attempting to burn."

There is much more documentation evidencing that "KAPL" waste sent to the LOOW[10] from the Knolls Atomic Power Laboratory, a Naval reactor in Schenectady, included waste contaminated only with plutonium. My petition (p.5 ftnte 3) and submissions referenced the Army Corps reports page which includes the Remedial Investigation Addendum (RIA) quoted for GW discussed earlier in this appeal. The Corps' RIA Appendix 12-A "Knolls Atomic Power Laboratory (KAPL) Waste Research[11]" contains much of that documentation (evidence for dispute, not proof which was sufficiently referenced and offered in my petition and submissions.)

This Appendix at pdf pg. 428 includes a letter from KAPL to DOH Radiation Bureau Chief, Stephen Gavitt, who prepared the attachment to the Oct. 5, 2015 DOH letter from Mr. Pfeiffer. It is important to recognize that this KAPL memo addressed only one type of wasted shipped to the LOOW; slurry. This is the same USDOE memo the DEC staff Response cited, again, for only one of 5 KAPL waste types shipped to LOOW/CWM.

As noted above, shipments known to contain waste contaminated only with plutonium were excluded from evaluation by DOE letter to DOH. This KAPL memo was relied upon by DOH in arriving at its incorrect assertion that KAPL waste shipped to the LOOW was exclusively mixed (i.e., slurried.)

Interestingly, during a recent phone conversation with me, DOH Radiation Bureau chief, Mr. Gavitt declined to affirm that his "co-location" assertion in the Pfeiffer letter is applicable to *all* plutonium at the site.[12] Instead, he raised what he considers mitigating factors: 1) that wastes were mixed [dismissed above] and 2) that the Corps had found plutonium at CWM only inside an animal bone. The latter, (2), is also erroneous as evidenced by the soil data in the VP G investigation report by the Corps.[13] The plutonium was found in soil at CWM near the surface, absent Cs-137 as noted in my submissions. Quoting from the report of footnote 6 of my Dec. 1, 2015 submission (and elsewhere):

"*Based upon the findings of Strotium-90 and Plutonium-239/240 in debris and subsurface soils and K-65-like radium-226 concentrations in subsurface soils, further characterization of Vicinity Property G is warranted. Note: A portion of VPG is inaccessible due to the presence of a water treatment pond"*

[i.e., Fac Ponds 1&2 sitting atop the Castle Garden dump]. No Cs-137 noted.

[10] Lake Ontario Ordnance Works, which includes CWM and the Niagara Falls Storage Site properties

[11] http://www.lrb.usace.army.mil/Portals/45/docs/FUSRAP/NFSS/EI/nfss-riaddendum-appendices3a-12a-2011-04.pdf at pdf pgs.396-500. Municipal Stakeholder petition Appendix (History) also references CWM plutonium sources at pgs.3-4)

[12] 6 CRR-NY 624.9(a)(1) "All evidence submitted must be relevant and all rules of privilege will be observed. However, other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if a reasonable degree of reliability is shown."

[13] Witryol 10-2-15 SEMMP memo p.4 footnote #2

DOH may also be confused by USDOE and DEC staff as to the mixed radioactively contaminated wastes vs. wastes with only Plutonium contamination. Gamma detections from rail cars which contained *both* non-gamma emitting drummed cans (plutonium) *and* gamma emitting drums (mixed wastes) for example does not constitute evidence that all wastes were mixed. To the contrary.

Furthermore slurry would be expected to contain a small fraction of the plutonium wastes shipped to the LOOW/CWM site. As noted in Corps reports, the KAPL SPRU (separation unit) sought to separate uranium and plutonium from spent nuclear fuel. The fission product fractions were removed as waste at various stages and contained only traces of plutonium, leaving plutonium and uranium behind. An explanation of the *documented* plutonium wastes sent to the LOOW/CWM site (other than mixed slurry) was not provided by KAPL or DOE reports DEC and DOH seem to rely on.

Then there is the DEC staff conjecture in the sitewide Response[14] (pet. App. S) that because plutonium was valuable, wastes contaminated only with plutonium would not have been shipped to the LOOW for storage. The same could be said of Ra-226, shipped to the LOOW in large quantities, which remains at the NFSS today - more than 2,000 curies of activity.

I do not believe DOH would provide sworn testimony that all plutonium remaining at CWM would be co-located with Cs-137. It's already been disproven. The issue of how much plutonium was shipped offsite would not mitigate extensive documentation showing plutonium was both burned and leaking while onsite. A reasonable person would want to inquire further.

I anticipate DOH would be more than willing to appear at a hearing on SEMMP protocol to include the debate over whether plutonium detection with field equipment is possible, given the hard evidence to the contrary.

Discussing the evidence provided in my petition at the Issues Conference[15] and in my Dec. 1, 2014 submission, the fact that Cs-137 has a short half-life of 30 years, so 75%+ of it is gone by now, was noted. The half-life of Cs-137 is not a matter of dispute, but adds to the evidence above that finding all the KAPL plutonium using gamma detection would be impossible. (My SEMMP comments also discuss flaws in gamma detection methods also discussed in the Municipal Stakeholder petition and submissions.)

As evidenced in my petition Appendix S pgs.18-19, the adjacent LOOW Wastewater Treatment Plant (WWTP,) also known as VP X, for many years serviced wastewater discharges from what is now CWM property. Plutonium detections there, absent Cs-137 were clearly noted in Army Corps reports - DEC staff common to CWM and the NFSS received this report[16] but disturbingly denied this fact in its responses on prior permit actions. From petition Appendix S, p.18:

> **Fact:** The Army Corps provided DEC its March 8, 2012 "COMPLETION REPORT For Mitigation of Safety Hazards at the Lake Ontario Ordnance Works (LOOW) Office of Economic Adjustment

[14] Petition Appendix S, p.11 DEC "One has to remember that Plutonium was and still is a valuable commodity and every effort to recover the isotope to the greatest extent possible would likely have been taken."
[15] Issues Conference Transcript: 4-30-15, pgs. 135-142
[16] http://www.lrb.usace.army.mil/Portals/45/docs/FUSRAP/NFSS/SoW/nfss-idwlegacydisposal-wmtdp-2010-08.pdf at p.

> (OEA) Wastewater Treatment Plant (WWTP) Lewiston, NY" report showing plutonium found inside a pipeline used to discharge wastewater from CWM and NFSS properties.
>
> The following page from this report shows the plutonium detection, which was also pointed out to DEC by the public, well in advance of the Responsiveness."

The DEC Response was careful to say the Corps had "evaluated" the presence of Plutonium at the site, as opposed to "investigated" for it. Without public input as to its usefulness, the Corps took some samples off the shelf, at random, from prior unrelated investigation and re-analyzed them for Pu. That's what DEC refers to as an "evaluation." There has been no Corps investigation for Plutonium, to date.

Based on the all of above, a reasonable person would consider DEC staff Response (W-145) on the Plutonium matter to be as far-fetched as its 30-year old quote from DOE that radiological conditions at CWM are sufficient for unrestricted use (ex. suitable for residential home building banned by the DOH Order.)

Like the Radium-226 and other radiological contaminants now of concern at CWM, (due to intervention by agencies other than DEC,) plutonium mitigation is necessary for worker and public safety. Of all the radiological contaminants, it is among the most dangerous to inhale, and in the smallest of amounts.

Finally on the detection question, DEC staff common to NFSS oversight and CWM oversight would be expected to know that the Corps does not use Cs-137 as a marker for Plutonium in its investigations. In this regard, staff's Response was extremely disturbing.

As to the second sentence in the DOH letter, "*Records also indicate that during the 1960s, this material as removed and shipped to another location."*

DOH acknowledged to me it erred – it believes shipments ended in the 1950's, not the 1960's and attributed that error to a typo. However, the statement is still false, DOH is apparently not aware of the documents reporting KAPL drums were subsequently identified in a 1960 site inspection report[17] which raises more than reasonable doubt all KAPL waste was shipped offsite. Furthermore, we do not have complete documentation for what came to the LOOW and therefore what left.

[17] Witryol 10-5-15 SEMMP memo top of p.4

Excavation:

The Ruling in part relies on a second-hand report by DEC at the April Issues Conference that DOH had approved the SEMMP. However, that turned out to be false. DOH had asked for revisions and the revised SEMMP was not provided until August 10th, well after the April Issues Conference meetings. Note: The Ruling refers to the final SEMMP document we were provided August 10th only as the "May" 2015 SEMMP.

The final SEMMP was not available in time to discuss at the Issues Conference, and while comments from petitioners were accepted post-meeting, there was no opportunity to discuss with the Siting Board present, flaws, such as worker exposure when excavating whether material is moved off site or not. And petitioners were further prejudiced by having no accounting for what information DOH had been provided by DEC or CWM. For example, we had no opportunity to determine whether DOH was informed by DEC of the extent of the radioactive contamination that would become forever obscured by a new CWM obstacle, or structure, such as a landfill. The record suggests, not.

The Oct. 5, 2015 DOH letter from Mr. Pfeiffer refers solely to compliance with excavation protocol under the Order, not to compliance with any other applicable regulation or agency jurisdiction over radiological contamination at the CWM site. In this regard, the Ruling seems to misapprehend DOH's letter as assuring compliance with all applicable regulation relevant to remediation, permitting or public safety. The Order is not that broad. It relies on other agencies to determine cumulative impacts. The Ruling improperly relied on DOH's concurrence with the SEMMP to justify site safety. And for reasons noted above, DOH does not appear to be fully informed.

THE DOH ORDER DOES NOT PREVENT CWM FROM COVERING UP DANGEROUS LEVELS OF CONTAMINATION. NOWHERE IN THE OCT. 5, 2015 LETTER DID DOH DIRECTLY OR INDIRECTLY IMPLY THAT IT WOULD. INSTEAD, DOH SIMPLY DECLINED TO ANSWER SITING BOARD QUESTIONS REGARDING REMEDIATION.

The Excavation plan is yet another aspect of the exposures on CWM noted in my petition which deserve a cumulative impact analysis in combination with other site exposures and the accumulated discharges of the past 35 years under WM ownership.

Time constraints on my petition and for the Appeals precludes addressing in detail the poor results from 35 years of corrective actions[18] by Waste Management, which in my opinion is likely to have made more money off a contaminated site without cleaning it up than any company in NY history. However, I'd like to offer two items for Appeal.

A myriad of Corrective Actions[19] with a remedy of "natural attenuation" at the site is troubling and also warrants a cumulative impacts evaluation for mitigation. My petition noted that DEC declined to require CWM take samples offsite[20] in Creeks it has contaminated, which run past homes, farms and parks, or to sample it themselves. I support any dispute Muni Stakeholders have raised to

[18] Petition Appendix S pgs. 6-8, 16, 20, 23-27, 57-60, 64-5 (rad.)
[19] Petition Appendix S, pages 6-8
[20] Petition p.96, para 1

challenge: 1) CWM assertions that all of its problems and contamination occurred more than 35 years ago and are exclusively attributable to ancient predecessors and that 2) its Corrective Actions have been effective as opposed to evasive.[21]

Secondly, an observation related to the inadequate Soil Excavation Plan combined with no action whatsoever required by DEC for CWM to characterize and clean up radiological problems unless it happens to be in the way of a CWM landfill or fac pond, etc. This deferral of action by CWM as a Responsible Party is significant and substantive. DEC allowed CWM to combined NFSS VP's on CWM as a "solid waste management unit" (SWMU) with the Sitewide renewal in 2013 – as history shows on the chemical side, that allows CWM to defer and severely diminish cleanup standards. (I believe I made reference at the Legislative Hearing to the article by CWM counsel instructive as to how to reduce Corrective Action costs at RCRA facilities.)

Source of Contamination:

Finally, I object to the Ruling's reference to radiological (or chemical) contamination as "Legacy." CWM is a Responsible Party on both counts under regulation. Decades of unbridled excavation in contravention to the DOH Orders combined with the myriad of spills fires and leaks since WM took over the property are not insignificant as evidenced the Orders on Consent and DOH's reaffirmation of its Orders in 2005.

[21] EPA Guidance for natural attenuation (OSWER Directive 9200.4-17P)

- Whether the contaminants can be effectively remediated by natural attenuation processes; [destroyed or decompose]
- Whether or not the contaminant plume is stable and the potential for the environmental conditions that influence plume stability to change over time;
- Whether human health, drinking water supplies, other groundwaters, surface waters, ecosystems, sediments, air, or other environmental resources could be adversely impacted as a consequence of selecting MNA as the remediation option;
- Current and projected demand for the affected resource over the time period that the remedy will remain in effect;
- Whether the contamination, either by itself or as an accumulation with other nearby sources (on-site or off-site), will exert a long-term detrimental impact on available water supplies or other environmental resources;
- Whether the estimated timeframe of remediation is reasonable (see section on "Reasonable Timeframe for Remediation") compared to timeframes required for other more active methods (including the anticipated

SURFACE / STORMWATER / AIR / ENDANGERED SPECIES

1. Surface and Storm Water

2. Air Impacts / Correction: SLF-1 commencement date, Ruling Finding of Fact

3. Endangered Species and Habit

1. Surface and Storm Water

The Ruling (p.27-29) dismissed the significant surface water issues raised in my petition by misinterpreting them as solely applicable to the "completeness" of the DEIS. However, I made specific reference in my petition to the "insufficiency" of environmental impacts and mitigation in CWM applications to comply with SEQR, which is adjudicable.

Wetlands - Mr. Olsen noted at the Issues Conference that his witness (Mr. Freck) would testify as to flooding on this property caused by CWM RMU-1 mitigation of Twelve Mile Creek.
The absence of any Climate Change discussion in CWM applications is noted in my petition (p.20, 96.) The discharge of PCBs and VOCs into Twelve Mile and Four Mile Creeks (per Orders on Consent) are emphasized.

The absence of a cumulative impacts analysis to address mitigation that would be required under SEQR is reiterated here.

The Ruling dismissed the "severe" impact from a DEC Biological Assessment in Four Mile Creek solely due to staff's vague comment that other parties have purportedly contaminated Four Mile Creek. However, we know of no other party subject to any Order on Consent for contaminating that Creek in the last 20 years. Further, the sample location is near the intersection of a Four Mile branch originating *solely* from CWM's site from the east. Other parties would feed the creek south of that intersection. [Note: This assessment was conducted by a DEC Division uninvolved with DEC project staff for CWM.]

Here again, DEC's failure to address CAC requests that the Creek be sampled is significant and substantive.

A reasonable person would inquire further as to CWM's contribution to the contamination severely impacting the ecological community in that creek evidence by the DEC biological assessment rating. And, would inquire as to the cumulative impacts, if DEC can show that another party is presently or in the past contaminating Four Mile. Depending on how far back the past contamination goes is significant to whether it could have impacted the current biological assessment.

Finally, Staff's Response did not deny that CWM is in some part, responsible for the severe, adverse impacts identified by the biological assessment for Four Mile Creek.

In light of the severity, a reasonable person would wish to inquire further as to CWM's contribution to the problem.

2. **Air Impacts** (petition p.12, 29, 33, 62-63, 64, 68, 72, 81, Section 2.10 p.100-01, p.111)

The Ruling dismissed Air as a Part 373 or SEQR adjudicable issue based on the air monitoring which took place at CWM through 1996.

First, I would refer to the site history on petition p.10 reflecting the fact that:

a) RMU-1 began operating in 1995 and

b) RMU-1 was roughly 50% larger than *all 10 prior landfills, combined*.

Second, the air sampling conducted in 1995 did *not* include analysis of particulate matter from site perimeter air grabs for the *major contaminants* disposed in SLF 12 at the time.

Here again, there is no cumulative impacts assessment required by SEQR, no data offered from fires at the facility and no data collected for contaminants in the particulates at perimeter air grab locations. Further, the air grab locations are not located in areas that would receive significant dust from landfill operations, especially when considering terrain conditions, vegetation, etc. and the locations for RMU-2 remain unclear (pet. pgs.62-63, 100-101.)

A reasonable person viewing CWM's Toxic Release Inventory in combination with the absence of meaningful air sampling would wish to inquire further as to why there has been no monitoring as to what is in particulates during more than 20 years of RMU-1 operations.

Important Ruling Correction: SLF 1 Commencement date

The Ruling should be corrected to reflect an error on the operational period of SLF's 1-6. Documents indicate SLF 1 operations commenced in 1972 and *after* the 1972 DOH Order was issued, not 1971 (Ruling finding of fact.) This was clarified in my Dec. 1, 2015 submission on the DOH Orders and is further detailed in Muni Stakeholders petition, "*Chem-Trol Site Development*" at the Appendix pgs. 18-19.

3. Endangered Species and Habit

Please see Ruling p.55.

My petition incorporated Buffalo Niagara Riverkeeper's submission during the 2014 Public Comment Period (p.106.) That submission (starting at "2.") disputes the facts in DEC's Response which the Ruling relied upon as to endangered species, and areas impacted from RMU-2 operations. There are, in fact, endangered species, and the Riverkeeper letter identifies impacted areas where CWM discharges are known to occur.

As to the Escarpment, I only clarify that for CWM's Designated truck route:

- The intersection of Rte 265 and Rte 108 is where the Designated truck route begins descending down the Escarpment.
- The intersection of Creek Rd. Extension and Rte. 104 is at the bottom of the Escarpment (petition p.105).

Siting Board members may recall coming down a rather large hill during their tour of the Designated truck route. That is the Escarpment. For the reader's convenience, Riverkeeper comments, referenced in my petition, are on the follow pages.

CWM's DEIS p.75 claims,

> "The SEC Donohue report included a survey of the truck route and region and is entitled *Ecological Communities Evaluation of the Proposed RMU-1 Expansion and Truck Route*. Each of these reports is on file with CWM, in Model City, New York."

As noted in my Public Participation Appeal, many documents incorporated by reference were not posted by DEC or available in libraries during the public comment period. This is just one example.

The exclusion of the CWM ***Ecological Communities Evaluation*****,** from public review, alone, renders Endangered Species and Habitat as significant and substantive, and, should reserve my right to reintroduce flora and fauna impacts should this report ever become available for public evaluation. This significant issue is *required* for SEQR and *required* for scoring in Siting Criteria.

I also note that CWM site Manager Michael Mahar has required in the past that I visit the CWM site (under a DOH Order) to obtain answers to any questions. Further, it is unreasonable for an agency to require the public visit a hazardous waste site of any kind to inspect documents.

Note: CWM's requirement I visit its site for any response is documented in an email to me from Mr. Mahar. Also, my post Completeness request to DEC project staff, Mr. Cruden, to post application documents incorporated by reference and his requirement that I, instead, FOIL them for review is also evidenced in the form of an email. None of the comment period extensions granted would have provided time to receive a FOIL (DEC allowed 30 days to respond) and review the documents, notwithstanding the other 30,000 pages posted requiring review.

BUFFALO NIAGARA **RIVERKEEPER®**

November 18, 2014

James T. McClymonds
Chief Administration Law Judge
NYSDEC Office of Hearings and Mediation Services
625 Broadway, 1st Floor
Albany, NY 12233-1550

Judge McClymonds:

Thank you for providing this opportunity to submit comments concerning Chemical Waste Management's (CWM) proposed RMU-2 expansion to its existing landfill in Niagara County. Buffalo Niagara Riverkeeper (Riverkeeper) is one of Western New York's leading non-profit organizations regarding the protection and stewardship of the region's fresh water resources. As such, our interest in this permit application and the larger subject of waste management practices is to ensure that the policy, process, science and community-based analyses used to evaluate the request are given careful and thoughtful attention in order to ensure that no adverse impact will occur to the community or environment now or in the future, as a result of the proposed activity. The existing facility and proposed expansion locations are located in the Niagara River watershed, approximately two miles from the Niagara River and three miles from Lake Ontario. The Niagara River is currently being addressed by the New York State Department of Environmental Conservation, the International Joint Commission, and US Environmental Protection Agency based on its designation as an "Area of Concern" which is due, in part, to contaminated bottom sediments. Lake Ontario provides drinking water to approximately 8 million people throughout the United States and Canada.

The following comments mainly address the findings of three basic permit documents that will inform the Siting Board's decision on CWM's proposal for RMU-2. These documents include: the *New York State Hazardous Waste Facility Siting Plan* (Plan, 2010), the CWM Draft Environmental Impact Statement (DEIS), and the Facility Siting Criteria and CWM scoring anticipated for RMU-2. Based on our review of these documents and our knowledge of the project area, **Riverkeeper concludes that the proposed RMU-2 facility is <u>not consistent</u> with the State Hazardous Waste Facility Siting Plan and therefore a permit should not be issued for its construction.** We provide the following:

721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

1. NYS Hazardous Waste Facility Siting Plan

The NYS Hazardous Waste Facility Siting Plan (Plan) states two basic criteria for deciding whether of not to site a new hazardous waste facility in New York State:

Criteria 1 - Is a proposed facility consistent with the Plan? See Sections 2 and 3 below for an itemization of inconsistencies with the Plan's criteria.

Criteria 2 - Is a proposed facility otherwise necessary or in the public interest? The Plan itself provides a clear "No" to this question in regard to proposed RMU-2, as follows:

- Clear need not demonstrated. The Siting Plan begins and ends with a clear statement that current "capacity exists for the foreseeable future", and since its publication, capacity was added in Wayne County MI—adding 44 years to NE PCB landfill capacity at current disposal rates as of 2014. In addition, the following statement appears within the plan: **"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."** Periodically USEPA revisits the issue of national capacity and need through analysis of available data and regulators at both a state and federal level and will have years of lead time to address potential capacity shortfalls. Thus there appears to be no current or near term need for increased capacity for hazardous waste management in New York State. 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." (Plan, 6-9)
- Phase-out goal. Creating more landfill capacity contradicts and undermines the Plan's phase-out goal. The Siting Plan states that its goal is "to phase out land disposal of hazardous wastes, other than treated residuals posing no significant threat to public health or to the environment." It ranks landfilling as the least desirable alternative in the hazardous waste management hierarchy of alternative treatments, due to:
  - "the long-term containment uncertainties associated with land burial,
  - the characteristics of the hazardous waste which degrade containment mechanisms used in authorized hazardous waste land burial facilities, and
  - the persistence, toxicity, mobility and propensity to bio-accumulate of such hazardous wastes and their toxic constituents." (Plan, 4-5)
- Environmental Justice. The Plan states that "the Siting board should evaluate the location of a proposed facility, including past and present activities at the property and in the surrounding area including transportation issues, the facility's compliance history, and environmental justice considerations." It quotes the DEC environmental justice policy including "fostering green and healthy communities…redevelopment of contaminated land, air and water quality,…[and] quality of life and public health." (Plan, 9-6,7)

  The burden on residents of existing hazardous waste makes this location least favorable for adding more. Past activities at the CWM/Model City site include landfilling of over 9 million tons of hazardous waste and a long history of permit violations and corrective actions. The RMU-2 facility would add an estimated 4 million cubic yards or 6 million tons to the waste burden. (Draft permit)

WATERKEEPER® ALLIANCE MEMBER
721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

Additionally CWM is located adjacent to and over other major hazardous waste sites including the Niagara Falls Storage Site and the 7,500-acre Lake Ontario Ordinance Works (LOOW) where the waste mix includes radioactive waste. As CWM notes in the DEIS scoping document for RMU-2, "previous use by the US government as part of LOOW, or other reasons could explain any contamination of off-site fish or surface ditches. Without more information it is not possible to evaluate any such off-site contamination and related causes or sources." (p.10) By the same token, adding RMU-2 to this landfill complex will further complicate efforts to characterize and delineate the volume, location and migration of existing contaminants and will further postpone remediation of the LOOW site.

The surrounding area includes rates of Colorectal, Prostate and childhood cancer at 50-100 times expected rates. (NYS DOH Cancer Incidence by zip code, Niagara County). Also, depressed property values are a direct result of the general perception that the groundwater and soils are not safe.

2. Draft Environmental Impact Statement (DEIS)

Potentially impacted ecological communities. The DEIS looks at ecological communities potentially affected by the RMU-2 "project region," which is defined as the area north of Route 104 to Lake Ontario between the Niagara River and Ransomville Road. This definition is flawed insofar as it excludes the lower Niagara River itself and the western basin of Lake Ontario, both downstream of and potentially affected by CWM discharges of persistent toxic contaminants to groundwater, surface water and sediments via outfalls to the Niagara River, Four Mile Creek and Twelve Mile Creek. Reference is made to issues raised by the Niagara County Municipal Stakeholders' petition on this matter regarding discharge limits for PCBs. We ask DEC to fully evaluate this issue as we consider it to be significant and substantive.

As a connecting channel between Lake Erie and Ontario, the Niagara River is a globally significant corridor for migratory fish and birds, but also a significant source of contaminants like PCBs, causing fish and wildlife consumption advisories in the lower river and across Lake Ontario. Aquatic species potentially impacted by CWM outfalls should not be ignored.

The DEIS states that "there have been no recent observations of rare or state-listed animals and plants, significant communities and other significant habitats located within the proposed project site." (DEIS 3.5.5.) **Riverkeeper disagrees with this assessment. Here are some of the New York State-listed wildlife species/communities that potentially are impacted by the CWM facility expansion:**

- Lake Sturgeon (NYS threatened): The lower river, including "Peggy's Eddy" which is in the area of CWM outfall 001, is a known Lake Sturgeon area (US FWS; Lowie, 1999). Populations of Lake Sturgeon are considered to be at about 1% of historic abundance (Carlson, 1995; Hay-Chmielewski and Whelan, 1997; COSEWIC, 2006). As a long-lived, bottom-feeding species, Lake Sturgeon may be especially vulnerable to contaminants like PCBs accumulated in river sediments and benthic biota.
- Indigenous State-listed fish-eating birds and wildlife. The lower river also plays an important role in the life cycle of many of the bird species that make the Niagara River a globally significant Important Bird Area. PCBs and other persistent toxic contaminants in the water and sediments threaten the biotic integrity of aquatic communities, including

WATERKEEPER ALLIANCE MEMBER
721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

benthic organisms, fish, and the animals that eat them. Buffalo Audubon records include many piscivorous, NYS-listed RTE and species of concern in Joseph Davis State Park, which is within the DEIS-defined project region. These species include Pied-billed Grebe, Bald Eagle, Common Tern, Osprey, Common Merganser and a variety of listed gulls. The DEIS itself lists several other NYS-listed species of concern in the project region including Blue-winged Teal, Great Blue Heron, and a Pocketbook mussel species *Lampsilis ventricosa*. (DEIS, Table 3-6)

- State-listed upland birds that likely breed in the project region include Savannah Sparrow, Bobolink, Eastern Bluebird, Eastern Meadowlark, Horned lark, Whip-poor-will, Northern Harrier, Sharp-shinned Hawk, Cooper's Hawk and Common Nighthawk (Audubon).

3. Siting Criteria

A site scoring above 200 points is deemed inconsistent with the State's siting considerations and criteria (NYS ECL 361.7). CWM scores the proposed RMU-2 facility at 152 points based on 14 criteria. Based on Riverkeeper's review of those siting considerations within our area of expertise, the overall score for RMU-2 should substantially exceed 200 points as per the discussion below.

- 1a: Population density in the vicinity of the proposed site. "Vicinity of the proposed site" is defined as "residential and nonresidential population within 0.5 miles of the site boundary." This definition not only contradicts the project region as defined in the DEIS; it also excludes potential project impact areas such as the wastewater pipelines and air emissions that move contaminants off-site. It excludes a major vulnerable population—school-age children in the Towns of Lewiston and Porter. The campus of the largest of these schools, LewPort (2,100 children), is situated over hydraulic connections between the CWM site and the Niagara River. Due to these potential exposures this criterion should reflect a vicinity of 3 miles and receive a Least Favorable ranking of 3.
- 4b: Proximity to incompatible structures. All of the public schools in the Towns of Lewiston and Porter are located along the transportation route or within the potential impact area of air and water discharges off site. This should also be scored a Least Favorable ranking of 3.
- 6. Municipal effects. Can "consistency with the intent of master land use plans" and with local laws be ranked a "2" when all Niagara County local governments, agencies, and school districts are on record opposed to the proposed CWM expansion and when the2007 Niagara River Greenway Plan has invested tens of millions of dollars into ecological and recreational improvement of the Niagara Greenway? The siting of the proposed facility has major inconsistencies with the specific intent and overall approach of the Greenway Plan and with every municipal waterfront master plan within the Greenway. Given what these local officials have said about declining public revenues and increased public awareness of the negative quality-of-life effects, such as health issues and depressed real estate values, associated with living near a major toxic landfill, all three categories here should be ranked 3, Least Favorable.
- 7. Contamination of ground and surface waters: Annual discharges ranging from between 10 and 30 million gallons of treated wastewater from CWM facultative ponds

WATERKEEPER® ALLIANCE MEMBER
721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

add to PCBs in the Niagara River each year. (Abraham, 2005) Over a dozen permit violations associated with these discharges were cited in a DEC 2008 Consent Order with CWM. However, the permit application does not evaluate the condition or useful life of this discharge pipeline which is over 35 years old, potentially subject to leaking and/or infiltration and runs generally west from the facility, under the LewPort School campus to the Niagara River. Increasingly severe and flashy storms will potentially generate more runoff and more groundwater overflow as when the snowmelt from the "Blizzard of '77" caused Love Canal to overflow the following spring.

Discharges of CWM wastewater into tributaries of Four Mile and Twelve Mile Creeks have exceeded permitted concentrations of PCBs. As a result, the DEC proposed additional internal outfalls for CWM to identify the source(s) in 2008. However, to date the SPDES permit for these discharges has not been modified. A 2010 NYSDEC Biological Assessment Profile at Four Mile Creek shows in-stream habitat to be severely impacted for aquatic life. The 1.89 BAP score at this site may be the lowest on record for streams in Western New York. Riverkeeper is waiting for a response from DEC as to the location of CWM's outfalls in relation to this stream segment.

These histories and uncertainties regarding underground migration recall the reasons listed in the Siting Plan for phasing out hazardous waste landfilling in New York State (see 1.2. a-c above). All three items in this category should be scored Least Favorable.

- 10. Air quality. The proposed expansion includes open air hazardous waste lagoons (66 million gallon capacity) that depend on the air to absorb volatile pollutants (PCBs) with residuals discharged to the Niagara River—called by critics "an uncapped landfill." Given this exposure of volatiles to air, air quality should be scored a 3 as it was for RMU-1.
- 12. Preservation of RTE species. "Sites are least acceptable where the development and operation of proposed facilities is likely to jeopardize the continued existence of endangered, threatened or indigenous species by destruction of their habitat." See DEIS comments above concerning the need to protect NYS-listed indigenous species in the project region. Lake Sturgeon and Bald Eagle are just two of the threatened species with critical habitat in the project region. This should be scored at least a 2.
- 13. Conservation of historic and cultural resources. The Niagara River itself; Joseph Davis, Four Mile Creek and Fort Niagara State Parks; the Niagara Greenway; the historic Village of Lewiston; and the pre-Iroquoian and Haudenosaunee "customary use" sites along the river are all part of the Niagara region's cultural heritage. Their importance increases as the region's economy shifts away from heavy industry and as funding is more available for habitat restoration, place-based recreation and tourism. Conservation of this natural and cultural capital is likely to be adversely affected by expansion of the landfill. This should be scored a 3.
- 14. Open space, recreational and visual impacts. Development and operation of the RMU-2 facility is likely to adversely affect all the open space, recreational, scenic and tourism resources that are now becoming more robust, visible and treasured in the project region thanks to new interest and funding for the Niagara River Greenway, Niagara Escarpment protection, and NYS Open Space priorities. All three items under #14 should be ranked 3, Least Favorable, given this resurgence of the Niagara region and the advancement of open space, recreation and scenic vistas that is occurring.

WATERKEEPER ALLIANCE MEMBER
721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

Much has changed in the project region since RMU-1 was approved. The Niagara River Remedial Action Plan has invested millions of dollars in cleaning up landfills and waste discharges to the river. The Niagara Greenway Plan has helped promulgate and build a vision of connected open space, resilient habitat, cultural celebration and ecotourism in the region. Both plans have fostered research that is increasing our knowledge of the natural and cultural resources of the region including:

- **Lower Niagara Lake Sturgeon and benthic organisms research**: Researchers form the Great Lakes Center, SUNY Buffalo State and U.S. Fish and Wildlife Service
- **Niagara Greenway Habitat Strategy**: Buffalo Niagara Riverkeeper
- **Joseph Davis State Park Bird Habitat Restoration:** Buffalo Audubon
- **Niagara Escarpment Conservation Plan**: the WNY Land Conservancy
- **Stella Niagara conservation and kayak access plan:** the WNY Land Conservancy

All of these efforts are bringing more people and wildlife to the project region and reducing the prospect of an additional hazardous waste facility to the least acceptable use of the land. Within the Western New York region, the cumulative impacts associated with hazardous waste disposal activities have far exceeded the carrying capacity of our human and natural resource systems. For this and all the reasons stated with this letter, Buffalo Niagara Riverkeeper is opposed to requested permit for expansion.

Thank you again for the opportunity to provide comments on this request. If you have any questions regarding our comments, please do not hesitate to contact me at 716-852-7483 x21 or jedlicka@bnriverkeeper.org.

Sincerely,

Jill Jedlicka

Jill Jedlicka,
Executive Director

MW:KW:jsj

Cc: Margaret Wooster
Katherine Winkler
Kerrie Gallo
Abby Snyder
Don Zelazny

WATERKEEPER® ALLIANCE MEMBER
721 Main Street | Buffalo, NY 14203 | tel: 716.852.7483 | fax: 716.885.0765 | e-mail: info@BNRiverkeeper.org

CONSISTENCY WITH SITING PLAN

Land Disposal and Remedial Activity

Preferred Management Practices Hierarchy

Equitable Geographic Distribution

1. **Land Disposal and Remedial Activity** (Ruling p.57)

Reference is made to Sections 1.3, 1.5, 1.6, 1.12, Appendix B, Appendix I, Appendix T and Traffic discussions in my petition, and the Siting Plan Chapters 2-7 and appendices.

While the Ruling quotes CWM's position on its relationship to remedial activity, it did not make mention of extensive information in my petition and in the Siting Plan which reflect factual data which disputes CWM's claim that:

- Land Disposal of Hazardous Waste is rarely used[1] and never "required" for remediating[2] a site.
- CWM's Land Disposal method *competes* with other facilities' Treatment methods. Disposal in direct competition with Treatment is in contravention to the Preferred Practices Hierarchy.[3]

2. **Preferred Management Practices Hierarchy** (Ruling p.77-81)

Reference is made to petition Section 1.6.2.2 and to p.47

LDRs:
The Ruling misapprehended my issue as challenging Land Disposal Restrictions (LDRs.) The petition did not seek adjudication of the level of protection LDRs provide.[4]

To clarify the issue raised in my petition: Nowhere in "§ 27-0105 Preferred statewide hazardous waste management practices hierarchy" is there a reference to LDRs (which were created after.) The Ruling is therefore flawed in referring to LDR's as synonymous with "treated residuals posing no risk to human health or the environment." Moreover:

- The statue refers to the risk of [partially[5]] treated waste *before* it is placed in a landfill, not its state once inside a landfill.
- By contrast, LDRs refer to the condition of waste, *after* it is placed in a landfill.[6]

Therefore, LDRs are not appropriate to interpretation of § 27-0105.

---

[1] Siting Plan p.3-19: "While the number of Brownfield sites entering the Brownfield Cleanup Program may increase in the coming years, consistent with the information presented above, these sites may generate significant quantities of **non**-hazardous waste with only a small number of these sites involving large volumes of hazardous waste generation. It is anticipated that the other trends will continue, with a small number of the sites generating the bulk of the hazardous waste requiring off-site management, and the vast majority of the remedial sites generating relatively small amounts of waste and having only a modest impact on the total volume of remedial hazardous waste managed off-site."

[2] Pet. Appendix B-Exhibit 4, Siting Plan Table 3-2. Also, footnote 3, below:

[3] Pet. P. 37 and Footnote #18 for DEC DER (RFP) bids solicited for Treatment *or* Disposal of the *same* material. p.43

[4] Even though a reasonable person would inquire as to how LDRs could be protective if EPA concludes all landfills will eventually leak, as CWM landfills already have, as noted in my petition.

[5] By definition, hazardous waste is never fully treated. If it were fully treated it would no longer be classified as "hazardous waste under regulation."

[6] LDRs were created subsequent to the enactment of § 27-0105.

The Ruling did not include my petition's quote (p.44) of EPA acknowledgment that LDRs are based on practicability, and therefore, are not a measurement of environmental and public health threat.

Regardless, § 27-0105.d. requires phasing out of:

> **"treated residuals posing no significant threat to the public health or to the environment"**

1) There is no legal basis for concluding LDRs remove the threat of wastes *prior* to land disposal.

2) There is no legal basis for concluding § 27-0105.d means that land disposal removes a "significant threat to public health or the environment." If that were true, land disposal would be at the top of the hierarchy, not at the very bottom.

The above does not necessarily dismiss LDRs and CWM variances requested to certain LDRs over the years as worthy of discussion on some other question; just the question of compliance with § 27-0105.

Consistency:
Finally, the Ruling contradicts the Siting Plan's requirement (vs. the Ruling's encouragement) for consistency of the Hierarchy with the Siting Plan. From Siting Plan p.9-5:

"*Facilities which will promote moving up the hierarchy for management of hazardous waste are consistent with the Plan*."

A reasonable person would therefore conclude that facilities at the bottom of the hierarchy are defined as "inconsistent" with the Plan, unless Need has been demonstrated. And in this case no Need has been demonstrated.

3. **Equitable Geographic Distribution** (EGD) Ruling p.25

Reference is made to ECL 27-1102[2][f].

The *requirement* for EGD under this statute is mandatory for the Siting Plan. It is not simply one issue to weigh in determining an application's consistency with the Plan. Therefore, this issue is significant and substantive, and must be adjudicated if the applicant were to, first, demonstrate its proposed facility "is otherwise necessary and in the public interest," prior to a Siting Board's determination of consistency of the application with the Siting Plan. Failure to demonstrate EGD for the application, alone, is sufficient to deny a Siting Certificate. This was not clear from the Ruling.