

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Applications for Permits pursuant to Articles 17, 19, 24 and 27 of the Environmental Conservation Law (ECL); Parts 201-5, 373, 663, and 750 of Title 6 of the New York Codes, Rules and Regulations of the State of New York (6 NYCRR); Section 401 of the Federal Clean Water Act; and 6 NYCRR 608.9, by

CWM Chemical Services, LLC,
Applicant (RE: Residuals Management Unit – Two [RMU-2])

DEC Permit Application Nos: 9-2934-00022/00225
 9-2934-00022/00231
 9-2934-00022/00233
 9-2934-00022/00232
 9-2934-00022/00249

NEW YORK STATE FACILITY SITING BOARD

In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR 361, by

CWM Chemical Services, LLC,
Applicant (RE: Residuals Management Unit – Two [RMU-2])

**BRIEF SUBMITTED ON BEHALF OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (“Department”) submits this brief in support of its appeal of a section of the December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (Issues Ruling) that proposed certain adjudicable issues relating to CWM Chemical Services, LLC’s (CWM) permit modification applications for the proposed Residual Management Unit-Two (RMU-2) landfill at its Model City facility.¹ The proposed issues raised by Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (the Municipalities) concern the geology and hydrogeology characteristics of the facility, and a related proposed engineering design issue, which are premised upon an unfounded allegation of an underground alluvial valley within the unconsolidated deposits underneath the Model City facility. The Municipalities argue that the presence of this alleged underground valley adversely impacts the monitorability of the existing groundwater contamination at the site and causes the groundwater at the facility to flow in a different direction, and at a different rate, than what CWM and the Department contend is demonstrated by the voluminous investigations performed at the facility over the past forty years. The record demonstrates, however, that the Municipalities failed to proffer sufficient evidence that these proposed issues relating to the permit applications are both substantive and significant to merit adjudication.

In the Issues Ruling, Administrative Law Judge O’Connell further limited the scope of the issues to the following factual issues which he believes are in dispute: (1) the geology of the Model City facility, in general, as well as the geology located within the footprint of the proposed RMU-2 landfill; and (2) the nature and monitorability of the groundwater contamination at the facility. IR at 99-100. Judge O’Connell further delineated the subset of the proposed geology/hydrogeology issues to include the (a) contours of the bedrock; (b) characteristics of the units of unconsolidated deposits that overlie the bedrock; (c) the physical properties of each unit, including the permeability or hydraulic conductivity of the units (in both the vertical and horizontal direction); and (d) the direction, or directions, that groundwater flows at the Model City facility, and the rate of flow. IR at 99-100. The subset of the groundwater contamination proposed issue consists of (a) what type or types of contaminants are present in which units of unconsolidated deposits, and the concentration of any contaminants; and (b) whether the scope of the current corrective action program effectively addresses the groundwater contamination at the Model City facility. IR at 100.

¹ As acknowledged by the Issues Ruling, the geology and hydrogeology issues are relevant to the statutory and/or regulatory criteria for issuance of both the Certificate of Environmental Safety and Public Necessity and the Part 373 Hazardous Waste Management Facilities permit. To clarify, this appeal strictly relates to the applicability of those issues as they relate only to the Part 373 permit requirements and is not intended to, nor is to be interpreted to, affect in any manner the decision making authority of and/or the consideration of those matters by the Siting Board in carrying out its jurisdictional responsibilities in reviewing CWM’s siting certificate application pursuant to 6 NYCRR 361.

Judge O'Connell held that a resolution of the above issues is necessary to determine compliance with the following regulatory requirements:

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

IR at 100.

Judge O'Connell further held that while the Municipalities' offer of proof regarding the adequacy of the engineering design for the proposed RMU-2 landfill does not support an adjudicable issue for further litigation, the final design for the project is "...directly dependent upon the geological characteristics and the hydrogeological qualities of the unconsolidated units..." of the Model City facility. IR at 116. Accordingly, Judge O'Connell identified as a proposed issue whether CWM's engineering design for the RMU-2 landfill complies with the regulatory requirement that the liner be placed on a foundation or base capable of providing adequate support that would resist pressure gradients from above and below the liner to prevent any failure related to settlement, compression or uplift. 6 NYCRR 373-2.14(c)(1)(i)(b)

A description of the Model City facility and summaries of CWM's permit applications submitted for the proposed RMU-2 landfill and the proceedings to date in this matter are set forth in the Issues Ruling and will be incorporated by reference herein, as appropriate, rather than repeated in this brief. Department staff also incorporate by reference the arguments set forth in Department staff's submissions in response to the petitions for party status, provided with a cover letter dated February 27, 2015, which includes a response to the petitions and appendices (referred to in the IR as Staff Response); Department staff's March 20, 2015 response to CWM's November 19, 2014 comments regarding the draft permit and an analysis of CWM's January 28, 2015 Golder Report on the Supplemental Investigation of the West Drum Area; Department staff's sur-reply dated May 22, 2015; Department Staff's May 29, 2015 response to CWM's RMU-2 supplemental information and clarification; and Department staff's December 1, 2015 letter submitted in response to the Municipal Stakeholder's June 12, 2015 and October 2, 2015 submittals (Pre-Issues Ruling Submissions).

ARGUMENT

As discussed in greater detail below, the Municipalities failed to proffer sufficient evidence to meet their burden of persuasion to demonstrate that the proposed issues are both substantive and significant and that further inquiry is needed as to CWM's ability to meet applicable regulatory standards or criteria or that modifications should be made to the current draft Part 373 modified permit. Further, it is well established that when an agreement exists between Department staff and an applicant on the terms and conditions of a proposed permit, the permit application and the draft permit prepared by Department staff "...constitute prima facie evidence that a proposed project will meet all of the relevant statutory and regulatory criteria." See Matter of Jointa Galusha, LLC, Interim Decision of the Commissioner, May 7, 2002, at 2-3, citing Matter of Sithe/Independence Power Partners, LP, Interim Decision of the Commissioner, November 9, 1992.

This administrative permit hearing is unique in two significant respects that negate the need for an adjudicatory hearing of the proposed issues that are the subject of this appeal. First, there already exists a comprehensive record in this matter from which final decisions may be made on the permit applications without the need for further litigation. The parties have exchanged extensive petitions, including detailed reports by the parties' expert witnesses, prior to the Issues Conference. Further submissions were also exchanged subsequent to the conference. A hearing is not necessary to further clarify the parties' positions or to provide the evidence that forms the basis for those positions. To the contrary, the hearing would only amount to an unnecessary academic exercise on topics that have been fully vetted.

Second, the Model City facility has operated as a permitted hazardous waste treatment, storage, disposal and recovery facility for over 20 years. The draft Part 373 permit for the proposed RMU-2 landfill is a modification of the existing sitewide Part 373 permit. The initial Part 373 permit for this CWM facility was issued in 1989 and most recently renewed in 2013. Extensive investigations have been performed throughout this time period to characterize the geology and hydrogeology of the facility as well as to delineate the nature and extent of groundwater contamination. Judge O'Connell acknowledged this fact in his Issues Ruling when he referenced the "numerous geologic investigations" and "numerous hydrogeologic investigations" undertaken at the Model City facility over the several decades the facility has been in operation. Issues Ruling (IR) at 93 and 95. Similarly, there have been extensive Department approved remedial efforts and corrective action programs performed at the Model City facility over the years to address the contamination at the site and prevent off-site migration, both on the surface and underground. Past and current monitoring results demonstrate the success of those efforts.

Accordingly, the geologic and hydrogeologic characteristics of the Model City facility are well understood. Based on this extensive data, and the experience of Department staff in regulating hazardous waste facilities and the multi-media statutes and regulations that govern the site, the Model City facility, including the proposed

RMU-2 landfill footprint, is able to be properly monitored through the conditions and terms of the draft Part 373 permit modification. Further, response mechanisms are in place should a release occur at the Model City facility.

I. Standards Applicable to an Appeals of an Issues Ruling

On appeal, the Commissioner's task is to determine whether the Administrative Law Judge adhered to the standard for adjudicable issues as enumerated in 6 NYCRR 624.4(c) as to whether the proposed issues are substantive and significant to merit adjudication. See Matter of Ontario County, Decision of the Acting Commissioner and SEQRA Findings Statement, November 19, 2015.

Pursuant to 6 NYCRR 624.4(c)(4), where Department staff reviews a permit application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the party proposing the issue to demonstrate that it is both substantive and significant. This burden has been upheld by the Third Department in Matter of Citizens for Clean Air v. New York State Dep't of Env't'l Conservation, 135 A.D.2d 256 (3rd Dept. 1988). In upholding the Commissioner's decision to exclude certain issues from adjudication, the court stated that the burden on the intervenors was "...to provide a clear explanation of the issues sought to be adjudicated." *Id.* at 261.

A substantive issue is defined as an item that raises "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR 624.4(c)(2). To be significant, a proposed issue must meet a threshold level of importance. Only those issues that "have the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" are considered significant. 6 NYCRR 624.4(c)(3). Not every substantive issue is automatically deemed a significant issue. Further, an agreement between the Department and an applicant on the terms of a permit is *prima facie* evidence that the proposed project will meet the applicable statutory and regulatory criteria. See Matter of Jointa Galusha, LLC, *id.* at 2-3, citing Matter of Sithe/Independence Power Partners, LP, *id.*

It is well established that the purpose of an administrative adjudicatory hearing is to receive evidence on disputed issues of fact and to hear related argument prior to the Commissioner's final decision. The purpose of adjudication is not to develop or refine information concerning a proposed project but to aid in decision making. See Matter of Sithe/Independence Power Partners, *id.* An adjudicable issue only exists "...where there are sufficient doubts about the applicant's ability to meet all statutory and regulatory criteria such that reasonable minds would inquire further. Requiring ... a lesser showing would over-burden the adjudicatory system with issues of dubious merit." See Matter of Akzo Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996 at 2.

As the DEC Commissioner held in the Matter of Jointa Galusha, *id.* at 3, “[j]udgments about the strength of the offer of proof must be made in the context of the application materials, the analysis by [DEC] Staff, draft permits and the issues conference record.” While an offer of proof at the issues conference need not be so convincing to prevail on the merits, the offer must amount to more than mere assertions or conclusions. See Akzo Nobel Salt Inc., *id.* at 2. Any assertions made must have a factual or scientific basis, and not involve speculation, expressions of concern or conclusory statements to justify moving forward with litigation. See Matter of Ontario County, *id.* at 3 (“[e]ven where an offer of proof is supported by factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions,” citing Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 4-5; Matter of Chemung County Landfill, Decision of the Commissioner, August 4, 2011 at 5-6; and Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 4-9).

II. The Municipalities Failed to Proffer Sufficient Evidence that the Geology and Hydrogeology Issues, Including the Groundwater Contamination, Groundwater Rate and Flow and Engineering Design Concerns, as Outlined in the Issues Ruling, are Both Substantive and Significant to Merit an Adjudicatory Hearing.

The proposed issues related to the permit modification applications for the proposed RMU-2 landfill are premised on an unfounded assumption that an underground alluvial valley exists beneath the RMU-2’s footprint at the Model City facility. The Municipalities argue that this alleged valley in itself has not been fully characterized so additional investigations are required to determine its impact on groundwater rate and flow and its ability to act as a pathway for the migration of contaminants. In addition to making this general statement, the Municipalities take it one step further and contend, that despite the lack of data on the valley and its role at the facility, the presence of this valley impacts the hydraulic conductivity of the proposed landfill footprint. Municipalities Petition at 26, De Report at 7, 10-11 and Tr. at 361-365. In addition to not being substantive or significant, the Municipalities have failed to demonstrate how the current draft Part 373 permit modification will not address their concerns. In addition, the parties to this proceeding have exchanged extensive documents and expert reports on this issue, rendering a hearing on these proposed issues merely an academic exercise on technical differences of opinion regarding the information already contained in the record.

- a. The geologic and hydrogeologic characteristics of the Model City facility and footprint of the proposed RMU-2 landfill, including groundwater contamination and groundwater rate and flow, are fully documented in the record.

As noted in Staff’s Response and as recognized by Judge O’Connell in his Issues Ruling, the Model City facility has undergone extensive geologic, hydrogeologic

and contaminant investigation over the past forty years. There have been over 100 separate investigations over the decades, resulting in the completion of more than 600 investigative borings at the facility. Several of those borings were converted to monitoring wells, resulting in the current groundwater monitoring network of more than 300 wells. Staff Response at 1 and A-6 and IR at 93 and 95. The investigations provided adequate data to determine the groundwater flow direction and rates through the unconsolidated deposits that overlie the bedrock at the facility. DEIS at 54. The parties' submissions to date have not provided any new information that has not been raised to and evaluated by Department staff over the decades that the Model City facility has been in operation pursuant to Department issued permits. Further, the record already contains extensive information on the following facts identified by Judge O'Connell as being in dispute: the contours of the bedrock, characteristics of the unconsolidated deposits that overlie the bedrock, the physical properties of each unit (including the hydraulic conductivity of the units), the direction of the groundwater flow and rate and the types of contaminants present in the units of unconsolidated deposits. Accordingly, the geologic and hydrogeologic characteristics of the site are well understood.

As demonstrated by Paragraphs II(a)(1)-(3) below, the parties' positions on the proposed geology and hydrogeology issues have been fully vetted and no new information would be provided should a hearing be held on the proposed issues. As such, the hearing would amount to an academic exercise concerning the technical differences of opinion regarding the known geologic and hydrogeologic characteristics of the facility. See Matter of New York State Thruway Authority, Interim Decision, April 25, 2002, at 6 (“[t]he responsibility of a proposed party at an issues conference is to offer proof that establishes a factual basis for a dispute, not merely that a dispute exists”), citing Matter of Sithe/Independence Power Partners, L.P., *id.* A hearing is not an appropriate forum to argue just how much information is enough to make decisions about the proposed RMU-2 landfill. See Matter of Jointa Galusha, *id.* and Matter of Akzo Nobel Salt, *id.* See also Crossroads Ventures, LLC, Interim Decision of the Commissioner, December 29, 2006 at 9 (Commissioner concurred with the Administrative Law Judge that “...the precise nature of the stratigraphy and cross-connections within the ‘hydrogeologic architecture’ as presented by [the party’s consultant] would be no more than an academic exercise...” not warranting adjudication). A hearing where offers of proof only raise potential uncertainties or where a hearing would dissolve into an academic debate is clearly not the intent of the Department’s hearing process. See Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 20, 2012, at 3 (citing Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999 at 8).

In reversing the Administrative Law Judge’s findings of adjudicable issues, the Commissioner in Akzo Noble Salt held that

[a] hearing on the proposed issues, while accumulating more information on subjects already studied in depth, is not likely to provide data on which to base alternatives to the currently

existing...permit conditions...A hearing on the issues identified would not resolve disputed facts with evidence, but rather would become a debate among geological and mining engineers over the quantity and quality of information appropriate to make judgements leading to [the concerns raised by the parties] and potential contamination of ground and surface waters with brine. Sufficient information already exists on these matters for the purpose of developing both a conservative mine design and permit conditions. Those conditions both regulate and limit the mine design, monitor subsidence and groundwater, to provide ample opportunity for corrective action if necessary.

Akzo Nobel Salt, *id.* at 8.

1. The bedrock contours, characteristics and physical properties of the various units of unconsolidated deposits have been extensively investigated allowing for a final decision to be made without a hearing.

The record already contains considerable information regarding the bedrock contours, specific characteristics of each unit of the unconsolidated deposits and the physical properties of each unit based on the numerous investigations at the Model City facility over the past forty years. IR at 93-94 and Staff Response at 2-3, 6-7, 9-10, 11-12 and 35-38. The unconsolidated deposits consist of the following several units, from the bedrock to the surface: Basal Red Till, Glaciolacustrine Silt/Sand (GSS), Glaciolacustrine Clay (GC), Middle Silt Till and Upper Tills. IR at 94. The GSS unit is the most permeable unit beneath the facility and is considered to exhibit aquifer characteristics at the site.

Despite the voluminous amount of data from these studies, the Municipalities proposed expert witness, Dr. Andrew Michalski, contends that additional studies are required since he believes the older data from a 1977 Wehran report revealed an underground alluvial valley which underlies a majority of the proposed RMU-2 footprint which is not addressed in the investigations performed subsequent to that report. The 1977 Wehran report, however, relied on a limited number of soil borings and only one test pit. Contrary to the Municipalities' witness, Department staff relied on a synergy of data to ascertain the completeness of the information available, in particular the extensive subsurface investigations that occurred after the 1977 report. Staff Response at 6-8. The voluminous data from these investigations do not support the Municipalities' contention that the alleged underground valley exists, let alone that it acts as a pathway for contaminant migration. Staff Response at 6-8 and A-6 through A-10.

For a valley to function as an important hydrogeological feature, it must be filled with a continuous deposit of sand and gravel. The numerous boring data does not support that allegation. The data only identified isolated pockets at the facility of coarse sand and gravel that may produce anomalously high permeability measurements in a few scattered monitoring wells but it does not support a finding of a pathway for groundwater flow or contaminant transport. In addition, the subsurface conditions are

not consistent with the high energy fluvial environment that would be necessary to deposit a sand and gravel aquifer in the area of the Municipalities alleged valley. The high conductivity deposits identified by Dr. Michalski, which ranged from 1×10^{-3} to 1×10^{-4} centimeters per second, do not support his theory. Rather hydraulic conductivity values ranging between 1.0 and 1×10^{-2} centimeters per second are typically associated with a sorted sand or sand and gravel. Staff Response at 6 and 37. Further, the boring logs yield a consistent description of the GSS as a fine sand and silt unit with trace medium to coarse sand and trace gravel. Staff Response at 12.

2. The voluminous data regarding the groundwater flow and rate at the Model City facility will not be supplemented by a hearing on this topic.

The Municipalities contend that the alleged underground alluvial valley directs groundwater flow in a west-southwest direction contrary to the findings of the comprehensive data and that the rate of groundwater flow (also referred to as hydraulic conductivity) is faster than what was calculated by CWM. Municipalities Petition at 25-26 and Tr. at 41-42. Based on that position, the Municipalities argue that CWM cannot properly monitor groundwater in compliance with 6 NYCRR 373-2.6, necessitating a revision to CWM's groundwater monitoring plan, and that CWM cannot comply with the Part 373 standard for hydraulic conductivity, which is a required site characteristic criterion set forth in 6 NYCRR 373-2.14(b). Municipalities Petition at 28-30 and Tr. at 46-49.

In addition to being premised on the speculative existence of the underground valley, the analysis of the potentiometric data for the GSS unit over the past twenty-five years has shown a consistent flow direction to the north/northwest in the proposed RMU-2 footprint. Further, the one area of westerly groundwater flow in the southwest portion of the site has been known since the current groundwater monitoring system was designed in 1985 and is confined to this area. Staff Response at 2-4 and 13-14. In 2014, CWM conducted a further investigation to evaluate the western portion of the facility referred to as the West Drum Area. Three deep groundwater wells were installed in locations identified by the Municipalities in order to assess their claims that the deep groundwater in the vicinity of the West Drum Area is contaminated and flows in a westerly direction. The data indicated that the contamination in this area's upper deposits has not migrated through the GC into the underlying GSS and that the groundwater flow was consistent with the historical known flow directions to the north/northwest. See CWM's January 28, 2015 Supplemental Investigation Well Installation Report – West Drum Area. In addition, field oversight observations during the well installation did not indicate the presence of sand or gravel layers, providing further technical data as to the non-existence of the Municipalities' alleged underground alluvial valley. Staff Response at 12.

The Municipalities also contend that hydraulic conductivity values greater than the regulatory standard have been measured along the northern border of the area where the proposed RMU-2 landfill will be sited. Based on these measurements, the Municipalities contend that the landfill cannot be located in this area without violating the

regulatory siting criteria in 6 NYCRR 373-2.4(b)(1). Municipalities Response at 28-30. In reaching this position, however, the Municipalities' expert chose to only include certain data for the calculations, rather than evaluating the comprehensive set of data, as Department staff did in its determination. See Staff Response at 20-21 and 25. Based on its comprehensive analysis, and expertise in determining the applicability of the regulatory siting criteria for landfills, Department staff opine that the data supports that the footprint for the proposed RMU-2 landfill will meet the Part 373 standard for hydraulic conductivity. Staff Response at 9-10, 12, 20-21, 25 and 36-37.

3. The nature and extent of the groundwater contamination has been fully investigated and the corrective actions performed by CWM adequately address the contamination at the Model City facility.

The Municipalities contend that the groundwater contamination in the central area of the Model City facility, where the alleged underground alluvial valley has not been mapped, requires CWM to develop a supplemental monitoring program pursuant to 6 NYCRR 373-2.6. In addition, the Municipalities argue that CWM needs to develop a corrective action plan to address the contamination in the site's lower groundwater bearing zone with dense non-aqueous phase liquids (DNAPL) and confirm the ability to monitor any releases from the proposed landfill. Municipalities Petition at 36-39.

Over the past thirty years, the Model City facility has been the subject of corrective actions and investigations to address the known contamination, which included contaminant transport modeling. There is no disagreement that groundwater contamination, including DNAPL, is present in the upper tills above the GC unit and that contaminated soil and groundwater are present below the GC in a few areas below the Process Area. This contamination originated from releases that occurred years ago prior to the enactment of the Resource Conservation and Recovery Act (RCRA). Staff Response at 3, 27, and 29-34.

In response to the groundwater contamination, the Department required CWM to perform extensive groundwater monitoring pursuant to an approved groundwater monitoring plan that complies with regulatory standards. Under the plan, groundwater monitoring data is collected from a network of 357 permanent monitoring wells, 111 of which monitor the GSS unit. Those wells that currently monitor the GSS consistently show results that are non-detect for site contaminants of concern.

Further, due to the presence of high levels of contamination in the Northern portion of the Process Area at the site, the Department required CWM to install the Phase I remedial system. This includes a collection trench that is keyed into the GC unit. Three collection sumps were installed at approximately 150 foot intervals and four DNAPL sumps were installed at low points in the trench and opposite locations of potential DNAPL infiltration. Only trace DNAPL has been detected in any of the sumps. The data indicates that a pathway of vertical migration does not exist in this area and performance monitoring indicates that the remedial system is operating as designed. Staff Response at 29-30 and 33-34. Further, as noted above, the analytical data from

the recent sampling of the West Drum Area were non-detect for the contaminants of concern. Staff Response at 12.

Department staff relied on the monitoring data, which has not detected significant groundwater contamination from the longstanding sources in approximately three decades of monitoring the underlying GSS unit, to support its position that significant contaminant transport is not occurring on a sitewide basis. Staff Response at 3, 27, and 29-34.

The comprehensive groundwater monitoring network also ensures that any possible releases from the proposed RMU-2 landfill, should they occur, will be quickly detected. This provides definitive evidence to counter not only the Municipalities' speculative claim that the site is not fully characterized but also supports Department staff's determination that the site's contamination has been properly delineated and the site can be properly monitored in accordance with applicable regulatory requirements. Staff Response at 3, 27, 29 and 35.

- b. The proposed engineering design issue outlined in the Issues Ruling is adequately addressed by the conditions in the draft Part 373 permit modification for the proposed RMU-2 landfill.

Judge O'Connell held that the Municipalities failed to raise a substantive and significant issue regarding the adequacy of the engineering design for the proposed RMU-2 landfill. IR at 116. Department staff are in agreement with that finding. However, Judge O'Connell states that the submissions on that topic support his position for the need to adjudicate the geology and hydrogeology of the site, since these natural characteristics can influence the proposed RMU-2 landfill's ability to comply with the regulatory requirement that the liner be placed on a foundation or base capable of providing adequate support that would resist pressure gradients from above and below the liner to prevent any failure related to settlement, compression or uplift. 6 NYCRR 373-2.14(c)(1)(i)(b). IR, *id.* In support of that position, Judge O'Connell noted that the construction of the proposed RMU-2 landfill depends on the characteristics of the geologic units and how those units interact, including an understanding of the hydraulic conductivity values for those units. IR, *id.* Judge O'Connell further noted that CWM may need to revise the design of the proposed RMU-2 landfill depending on the outcome of the adjudication of the geological and hydrogeological issue. IR, *id.*

Department staff maintains its position on this topic as set forth at length in its Pre-Issues Ruling Submissions and the arguments raised above with respect to the geologic and hydrogeologic characteristics of the facility. The draft Part 373 permit modification requires the collection of additional geological data at the time of each cell's construction and provides sufficient discretion to the Department through a review and approval process to ensure adequate protection against hydrostatic uplift damaging the liner at each cell of the landfill. Specifically, the draft permit modification provides Department staff with discretionary authority in the field to ensure the adequate hydrostatic uplift factors of safety values are obtained prior to allowing sump

excavation/construction based on real time data collected immediately prior to each sump's scheduled excavation. See also Department staff's December 1, 2015 letter submitted in response to the Municipal Stakeholder's June 12, 2015 and October 2, 2015 submittals. Accordingly, the Department views this concern not as a question of data inadequacy but more as a matter of the timing of the collection of the additional data – immediately prior to excavation or some earlier time. While data on the depths and thickness of deposited geologic layers can be collected at any time, it is more appropriate to collect data on potentiometric groundwater elevations immediately prior to each sump excavation as these levels fluctuate seasonally and yearly. Obtaining such data immediately prior to a planned sump excavation provides for real-time and more accurate factor of safety calculation against hydrostatic uplift upon which Department staff can make their discretionary determination on whether or not to allow excavation at that time.

As this issue has also been the subject of extensive submissions to date, a hearing on this topic will similarly amount to a technical debate among the witnesses with nothing further of substance provided. As noted above, a technical difference of opinion highlighting that a dispute exists does not constitute a substantive and significant issue meriting further adjudication. See Matter of Akzo Nobel Salt Inc.; Matter of Seneca Meadows, Inc., *id.* at 3 (“[c]onducting an adjudicatory hearing ‘where offers of proof, at best, raise potential uncertainties’ or where such a hearing ‘would dissolve into an academic debate’ is not the intent of the Department’s hearing process;” Matter of Sithe/Independence Power Partners, *id.*; and Matter of New York State Thruway Authority, Interim Decision, April 25, 2002, at 6 (“[t]he responsibility of a proposed party at an issues conference is to offer proof that establishes a factual basis for a dispute, not merely that a dispute exists”) and Crossroads Ventures, LLC, *id.* The purpose of an adjudicatory hearing is to hear disputes of material facts, not to test theories and hypotheses of witnesses.

- c. The Municipalities failed to demonstrate that CWM cannot meet the draft Part 373 permit modification conditions and applicable regulations governing the proposed RMU-2 landfill.

Article 27, Title 9 of the New York Environmental Conservation Law (ECL) and Part 373 of 6 NYCRR, set forth the regulatory requirements for the issuance of a permit for the storage, treatment and disposal of hazardous waste and related hazardous waste management activities. Department staff are authorized to issue hazardous waste treatment, disposal and storage permits in accordance with the above statutory and regulatory criteria. Department staff use their unique multi-disciplinary experience to review permit proposals to ensure that an applicant reasonably fulfills the applicable statutory and/or regulatory criteria and to develop case-specific permit conditions as appropriate to address any individual features.

Since the initial permit application was received by Department staff in 2003, the application went through extensive revisions based on comments from the public as well as Department staff. The revised Part 373 permit modification application was

deemed complete in January 2014. The length of time of Department staff's review of the proposal, the several application revisions and the voluminous nature of the draft Part 373 permit with Department staff's conditions, demonstrates the comprehensive analysis performed by Department staff of the proposed project. Further, based on the draft permit conditions prepared by Department staff, the proposed landfill will be constructed and operated in a manner that is consistent with the environmental protections set forth in ECL Article 27, Title 9 and 6 NYCRR 373, including, but not limited to, 6 NYCRR 373-1.5(a)(3); 6 NYCRR 373-2.6; and 6 NYCRR 373-2.14(b)(1). It is well established that when an agreement exists between Department staff and an applicant on the terms and conditions of a proposed permit, the permit application and the draft permit prepared by Department staff "... constitute prima facie evidence that a proposed project will meet all of the relevant statutory and regulatory criteria." See Matter of Jointa Galusha, LLC, *id.*, at 2-3, citing Matter of Sithe/Independence Power Partners, LP, *id.*

Further, in areas of Department staff expertise, "...its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue." See Seneca Meadows, Inc., Interim Decision, October 26, 2012, at 3, citing Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6; NYC Department of Sanitation (Southwest Brooklyn Marine Transfer Station), Decision of the Commissioner, May 21, 2012 at 6; and Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, 1990 WL 154836 at 2).

CONCLUSION

An adjudicatory hearing is not needed to develop a factual record on the proposed issues enumerated in the IR relating to the permit applications for the proposed RMU-2 landfill. The comprehensive record in this matter is sufficient to support the permit conditions established by Department staff in the modified Part 373 permit as well as for the parties to argue the weight that should be associated with each siting criteria for the proposed RMU-2 landfill. The data supports Department staff's position that the proposed RMU-2 landfill will be able to be appropriately monitored, as the sitewide Model City facility has for decades, and the draft permit modification allows for the proposed landfill to be operated in accordance with applicable statutory and regulatory requirements. A hearing would only amount to an academic exercise to reiterate the technical differences of opinion on the information already enumerated in the extensive petitions, expert reports and subsequent documents exchanged prior to the issuance of the IR.

Department staff took a hard look at the potential adverse environmental impacts of the proposed RMU-2 landfill and the material mitigation measures are enumerated in the draft Part 373 permit modification. The parties have failed to proffer sufficient evidence to meet their burden that the proposed issues relating to the permit modification applications are substantive and significant.

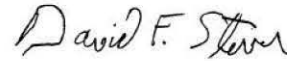
For the reasons expressed above, Department staff respectfully requests a decision granting Department staff's appeal to dismiss the geology and hydrogeology (including the groundwater contamination and engineering design concerns) as proposed issues for adjudication in this matter.

Respectfully submitted,
On behalf of the New York State
Department of Environmental
Conservation



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