NEW YORK STATE
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 (State Facility Permits), 373 (Hazardous Waste Management Facilities), 663 (Freshwater Wetlands Permit Requirements), 750 (State Pollutant Discharge Elimination System [SPDES] Permits) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR); Section 401 of the federal Clean Water Act (CWA); and 6 NYCRR 608.9 (Water Quality Certifications), 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
9-2934-00022/00232
9-2934-00022/00233
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 Part 377 (Siting of Industrial Hazardous Waste Facilities),
by

CWM Chemical Services, LLC,

Applicant (Re: Residuals Management Unit - Two [RMU-2]).

SECOND INTERIM DECISION OF THE DEPUTY COMMISSIONER

August 11, 2023

SECOND INTERIM DECISION OF THE DEPUTY COMMISSIONER[1]

This Second Interim Decision addresses appeals from the February 14, 2019 Supplemental Rulings on Proposed Issues for Adjudication (2019 Issues Ruling) of Administrative Law Judge (ALJ) Daniel P. O'Connell in the matter of the applications of CWM Chemical Services LLC (CWM or applicant) to the New York State Department of Environmental Conservation (Department or DEC) and the Facility Siting Board (Siting Board). These applications are for permits to site, construct and operate a hazardous waste and non-hazardous industrial waste landfill, referred to as residuals management unit 2 (proposed RMU-2 landfill or proposed RMU-2 project) at CWM's existing Model City facility which comprises approximately 710 acres and is located at 1550 Balmer Road in the Towns of Porter and Lewiston, Niagara County, New York (site).

The proposed RMU-2 landfill would occupy approximately 43.5 acres at the site. It would have a design capacity of about 3,900,000 cubic yards for hazardous and industrial non-hazardous waste placement and would have a minimum estimated life of approximately 11 years. The site currently consists of several closed secure landburial facilities (SLFs), a now-closed landfill referred to as RMU-1,[2] a leachate collection and management system, an Aqueous Waste Treatment System and several Facultative Ponds (Fac Ponds) (see 2019 Issues Ruling at 9).

CWM is required to obtain various permits and approvals for the proposed RMU-2 landfill from the Department, as well as from federal and local authorities. CWM is also required to obtain a Certificate of Environmental Safety and Public Necessity (Siting Certificate) from the Siting Board pursuant to ECL 27-1105 (1) and 6 NYCRR part 377 (formerly part 361). I issued a First Interim Decision of the Deputy Commissioner on June 23, 2021 (First Interim Decision). That decision addressed appeals from the ALJ's December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (2015 Issues Ruling) and primarily concerned issues raised relevant to CWM's application for a Siting Certificate and CWM's application to modify its DEC-issued hazardous waste management facility permit (see 6 NYCRR part 373).

This Second Interim Decision primarily concerns CWM's applications to the Department seeking (1) to modify its existing SPDES permit (SPDES Permit No. NY0072061); and (2) to modify its existing Air State Facility (ASF) permit (DEC ID 9-2934-00022/00233). The modification applications seek to add the proposed RMU-2 project to CWM's existing SPDES and ASF permits.

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[1] By memorandum dated December 21, 2015, then Acting DEC Commissioner Basil Seggos delegated decision-making authority to Deputy Commissioner Louis A. Alexander with respect to the applications for permits subject to the jurisdiction of the DEC in this matter. This delegation includes, but is not limited to, decision-making authority relating to the consideration of the terms and conditions of permit applications, the application of the State Environmental Quality Review Act, and the preparation and execution of interim and final decisions.

[2] RMU-1 stopped receiving waste in November 2015 and its final cover was completed in September 2016, after the commencement of this proceeding (see CWM Response to Party Status Petitions, dated June 5, 2018 at 10 n 14).

Upon review of the appeals and replies, I affirm the ALJ's 2019 Issues Ruling, as modified by my comments below.

BACKGROUND

With respect to the appeals presently pending before me and the issues raised therein, I offer the following background summary.[3]

The Department's Office of Hearings and Mediation Services (OHMS) received a permit hearing referral with respect to the proposed RMU-2 project in May 2014, and the matter was assigned to ALJ O'Connell. In addition, pursuant to ECL 27-1105(3)(d), then Governor Andrew Cuomo constituted a Siting Board to consider CWM's application for a Siting Certificate, and a joint public hearing was convened (see 2015 Issues Ruling at 9). Pursuant to a Memorandum of Agreement (MOA) entered into between the ALJ (who also serves as the Hearing Officer for the Siting Board), the Chair of the Siting Board, and the Chair-Designee of the Siting Board, effective July 9, 2014, the ALJ shall, in his judgment, "refer certificate-related matters to the Siting Board, permit-related matters to the DEC Commissioner, and matters that are relevant to both the certificate and permit applications to both the DEC Commissioner and the Siting Board" (MOA at 2). The MOA stated that the provisions of 6 NYCRR part 624 are applicable to this joint proceeding, so long as they are not inconsistent with title 11 of ECL article 27 and 6 NYCRR former part 361 (see id. at 1).

A public comment hearing was held on June 6, 2014 and written comments were submitted during the comment period. Petitions for full party status were filed by: (1) Amy Witryol (Ms. Witryol); (2) Niagara County, the Town and Village of Lewiston and the Village of Youngstown (collectively, the Municipalities); and (3) Residents for Responsible Government, Inc., Lewiston-Porter Central School District and the Niagara County Farm Bureau (collectively, RRG petitioners).[4] The ALJ held an issues conference for three days in April 2015.

The ALJ thereafter issued the 2015 Issues Ruling. Among other things, the ALJ granted full party status to the RRG petitioners, the Municipalities and Ms. Witryol (see 2015 Issues Ruling at 151-152) and identified a number of issues for adjudication at the joint hearing, including noise impacts of truck traffic, impacts on property values and property tax receipts, the geology and hydrology of the site and the type, location and concentration of groundwater contamination at the Model City facility (see First Interim Decision at 7-8 [summarizing the issues identified for adjudication]).[5]

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[3] The procedural background with respect to this proceeding is summarized in detail in the 2015 Issues Ruling and the First Interim Decision (see First Interim Decision at 1-4; 2015 Issues Ruling at 5-19).

[4] The Honorable Rick Dykstra, a member of the Canadian Parliament, filed a petition for amicus status. In the 2015 Issues Ruling, the ALJ deemed the petition withdrawn (see 2015 Issues Ruling at 151).

[5] The First Interim Decision addressed appeals taken from the 2015 Issues Ruling by Department staff, the Municipalities, the RRG petitioners and Ms. Witryol. The Siting Board also received appeals from the 2015 Issues Ruling and, on August 11, 2016, issued an Interim Decision of the Facility Siting Board addressing those appeals.

As to CWM's pending SPDES and ASF permit modification applications, the ALJ observed in the 2015 Issues Ruling that Department staff was still reviewing CWM's SPDES permit modification application. In addition, the ALJ noted that staff had rescinded a notice of complete application issued with respect to CWM's application to modify its ASF permit and had requested additional information from the applicant (see 2015 Issues Ruling at 141-142, 150). The ALJ "reserve[d] ruling on any proposed issues concerning regulated wastewater discharges from the Model City facility until Department staff issues a tentative determination about CWM's request to modify [its] SPDES permit, and the issues conference participants have had the opportunity to review that tentative determination" (id. at 142). The ALJ also "reserve[d] ruling on any proposed issues related to potential air emission impacts" (id. at 150).

On February 17, 2016, Department staff issued a notice of complete application, Draft Modified SPDES permit (February 2016 Draft SPDES permit) and Industrial SPDES Permit Fact Sheet (February 2016 SPDES Fact Sheet) with respect to CWM's SPDES permit modification application. On March 21, 2016, the U.S. Environmental Protection Agency (EPA) provided comments with respect to the draft permit (see Department Staff Reply Brief, dated June 5, 2018 [Staff Reply to Supplemental Petitions], attachment 1). On December 23, 2016, Department staff issued a revised notice of complete application, along with a (revised) Draft Modified SPDES permit (December 2016 Draft SPDES permit or draft SPDES permit) and an Industrial SPDES Permit Fact Sheet Addendum (December 2016 SPDES Fact Sheet Addendum), with respect to CWM's SPDES permit modification application (see 2019 Issues Ruling at 3; CWM Response to Party Status Petitions, dated June 5, 2018 [CWM Reply to Supplemental Petitions], at 17-18). On August 18, 2017, Department staff issued a notice of complete application, along with a draft permit, with respect to CWM's ASF permit modification application. The December 2016 Draft SPDES permit and draft ASF permit and related documents were thereafter referred to OHMS (see 2019 Issues Ruling at 3).

A notice of deadline for petitions for party status and issues conference with respect to the draft SPDES and ASF permit modifications was published in the Department's Environmental Notice Bulletin (ENB) and in local newspapers. In response, OHMS received: (1) an undated supplemental petition jointly filed by the RRG petitioners, filed April 30, 2018, with supporting documents (RRG Supplemental Petition); (2) a supplemental petition jointly filed by the Municipalities, dated May 4, 2018, with supporting documents (Municipalities Supplemental Petition); and (3) a supplement and amendment to her petition filed by Ms. Witryol, dated May 2, 2018, with supporting documents (Witryol Supplemental Petition). OHMS also received petitions for amicus status from the Tuscarora Nation dated May 2, 2018 and from the Buffalo-Niagara Waterkeeper (Waterkeeper) submitted under cover of a letter dated May 2, 2018. CWM and Department staff filed replies, with supporting documents, responding to petitioners' supplemental submissions as well as the submissions of the Tuscarora Nation and Waterkeeper (see Staff Reply to Supplemental Petitions; CWM Reply to Supplemental Petitions).[6]

The supplemental submissions raised proposed issues for adjudication with respect to the draft SPDES and ASF permits, including issues related to information contained in the Antidegradation Demonstrations (ADDs) submitted by CWM in support of its SPDES permit

[6] During the course of this proceeding, various parties also submitted errata to their submissions.

modification application (see RRG Supplemental Petition at 10-11), issues related to the application of federal Clean Water Act (CWA) regulations pertaining to discharges of bioaccumulative chemicals of concern (BCCs) into the Great Lakes basin (see Municipalities Supplemental Petition at 3-8) and issues related to the adequacy of the air dispersion modeling used for the draft ASF permit and the need for a health risk evaluation (see RRG Supplemental Petition at 14-16; Municipalities Supplemental Petition at 8-9; Witryol Supplemental Petition at 60-62).

The Municipalities also raised issues pertaining to the adequacy of the soil excavation monitoring and management plan (SEMMP) submitted by CWM in support of its Part 373 hazardous waste management facility permit application (see Municipalities Supplemental Petition at 8-14). The RRG petitioners also argued that CWM is currently engaging in operations at the site – including receiving off-site hazardous waste for treatment and storage – which the RRG petitioners contend are not authorized by the existing Siting Certificate issued in 1993 (1993 Siting Certificate) and which should not be permitted (see RRG Supplemental Petition at 17-18). Ms. Witryol raised a host of additional issues in her supplemental petition.

The ALJ reconvened the issues conference on July 10, 2018. Participating in the reconvened issues conference, in addition to Department staff and the applicant, were the RRG petitioners, the Municipalities, Ms. Witryol, Waterkeeper and the Tuscarora Nation. The ALJ thereafter issued the 2019 Issues Ruling.[7] Appeals from the 2019 Issues Ruling were filed by the RRG petitioners, the Municipalities and Ms. Witryol. Waterkeeper also filed an appeal in support of the Municipalities' legal argument "that RMU-2 leachate must, as a matter of law, be managed outside the Great Lakes Basin" (Waterkeeper Appeal at 2).[8] CWM, Department staff and Ms. Witryol filed replies to the appeals.

STANDARD FOR ADJUDICABLE ISSUES

As I stated in the First Interim Decision, the disputed issues in this matter do not arise from any disagreement between Department staff and the applicant over a substantial term or condition of the draft permits, nor has Department staff cited any matter as a basis to deny the draft permits (see 6 NYCRR 624.4 [c][1][i] and [ii]). Rather, the contested issues are proposed by third parties. Such issues are adjudicable if they are "both substantive and significant" (see 6 NYCRR 624.4 [c][1][iii]).

Pursuant to the Department's regulations, an issue is substantive "if there is 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]). In determining whether a proposed party has raised a substantive issue, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content

[7] The ALJ made a number of rulings on the record at the issues conference which were memorialized and confirmed in the 2019 Issues Ruling.

[8] Although the Tuscarora Nation did not file an appeal, the Tuscarora Nation, in its petition dated May 2, 2018 (the Tuscarora Nation Petition), set forth its opposition to the draft permits and proposed project (see the Tuscarora Nation Petition at 10-13 [listing particular items of concern]).

of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.). An issue is significant "if it has 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" (6 NYCRR 624.4 [c][3]). Where Department staff "has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant" (6 NYCRR 624.4 [c][4]).

A potential party may meet its burden of persuasion at the issues conference by making an appropriate offer of proof supporting its proposed issues (see Matter of Ontario, Decision of the Acting Commissioner and SEQRA Findings Statement, November 19, 2015 at 3). The offer of proof must specify "the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" (6 NYCRR 624.5 [b][2][ii]). With respect to the offer of proof, any assertions that a potential party makes must have a factual or scientific foundation, and speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue (see Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 26, 2012 at 4; Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 7-8).

Conducting an adjudicatory hearing "where 'offers of proof, at best, raise uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8, quoting Matter of AKZO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]). "If a potential party cannot adequately explain the nature of the evidence that it expects to present and the grounds upon which its assertions are made, an issue is not raised" (Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 8).

In addition, "[e]ven where an offer of proof is supported by a 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" (Matter of Frontier Stone, LLC, Decision of the Commissioner, May 8, 2017 at 2-3). In areas of Department staff expertise, staff's evaluation of the application and supporting documentation is important in determining the adjudicability of an issue, and judgments about the strength of the offer of proof must be made in the context of the analysis of Department staff (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 6-7).

Where an issues ruling is appealed, the Commissioner or his designee will review the ALJ's application of the substantive and significant standard to determine whether the standard has been properly applied (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 10). With respect to legal and policy issues, the Commissioner's (or his designee's) review is de novo, and the appeal provides the opportunity to

offer guidance "'to optimize the permitting process and focus the hearing'" (Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006 at 10-11, quoting Matter of Saratoga County Landfill, Second Interim Decision of the Commissioner, October 3, 1995 at 3). Where, as here, the Siting Board and the Department have overlapping jurisdiction with respect to certain issues, the determinations and recommendations of the Siting Board are an important consideration in the deliberations of the Commissioner or his designee.

2019 ISSUES RULING

In the 2019 Issues Ruling, the ALJ, among other things, granted the petitions of the Tuscarora Nation and Waterkeeper for amicus status, made rulings on issues of law and found that the petitioners had not raised any additional issues for adjudication. The aspects of the 2019 Issues Ruling which are relevant to the matters raised on appeal are summarized below.

With respect to the December 2016 Draft SPDES permit, the ALJ ruled that the proposed RMU-2 landfill did not meet the criteria to be considered a "new source" or a "new discharger" within the meaning of 40 CFR 122 (see 2019 Issues Ruling at 8-10) and characterized CWM's proposal as one for a "*modification* of the existing source" (2019 Issues Ruling at 10 [italics in original]). The ALJ further concluded that the proposed RMU-2 landfill would be an "existing Great Lakes Discharger" and not a "new Great Lakes Discharger" pursuant to 40 CFR 132.2 (see id. at 10-13).

The ALJ also rejected the Municipalities' challenge to the effluent limitations in the draft permit, including those for mercury and polychlorinated biphenyls (PCBs) and other pollutants, as violative of federal requirements (see 2019 Issues Ruling at 13-14). The ALJ found that the Municipalities and Ms. Witryol had not identified a substantive and significant issue for adjudication with respect to CWM's ability to comply with the effluent limitations set forth in the draft permit (see id. at 14-15). The ALJ additionally determined that "any proposed disputes related to the ADDs are not relevant to the Deputy Commissioner's final determination about the SPDES permit application," given the assertion of Department staff that it did not rely upon the ADDs in drafting the SPDES permit conditions set forth in the December 2016 Draft SPDES permit concerning discharges of BCCs (id. at 16).[9]

With respect to the draft ASF permit, the ALJ determined that "the multi-media health risk assessment requested by the intervening parties was not necessary given the analysis required by 6 NYCRR part 212 and Department staff's review of it" and that the proposed issue was not substantive and significant (2019 Issues Ruling at 18). The ALJ also concluded that petitioners had not raised a substantive issue with respect to the source of the meteorological data used by Department staff in conducting its ambient air impact analysis for the draft ASF permit – which data was collected by the National Weather Service at the Niagara Falls International Airport rather than collected at the site -- finding that staff's use of data from the airport was consistent with Department guidance (see id. at 19-20). As such, the ALJ concluded that the

[9] The ALJ noted that the ADDs also address topics that are relevant to the issue of the socioeconomic impact of the proposed project, an issue which had already been joined for adjudication (see 2019 Issues Ruling at 16).

intervening parties had not raised any substantive and significant issues for adjudication concerning the draft ASF permit (see id. at 23).

As to arguments raised with respect to the SEMMP, the ALJ noted that the Siting Board, in its August 2016 Interim Decision, found that the sufficiency of the radiological surveys and the adequacy of the SEMMP were appropriate issues for adjudication with respect to the Siting Certificate application, and that appeals with respect to the adjudicability of those issues with respect to the Part 373 permit were then pending for a decision before the Deputy Commissioner (see 2019 Issues Ruling at 21-22).[10]

The ALJ found that the Municipalities had failed to raise a substantive and significant issue for adjudication with respect to the Fugitive Dust Control Plan which was contained in the Part 373 draft permit and was subsequently revised and referenced in the draft ASF permit as Attachment L (see 2019 Issues Ruling at 22-23). As to the Air & Meteorological Monitoring Plan which was contained in the Part 373 permit and was revised and referenced in the draft ASF permit as Attachment N, the ALJ directed CWM to prepare the required Residuals Management Unit No. 2 (RMU-2) Air Monitoring Plan (RAMP) prior to the commencement of the adjudicatory hearing (see id. at 23). The ALJ further stated that "[i]f the Deputy Commissioner concurs with the Siting Board's August 11, 2016 determination concerning the need to adjudicate the sufficiency of the radiological surveys and the adequacy of the SEMMP," he would recommend addressing the parties' concerns related to the RAMP with any issues relating to the SEMMP (id.).

In the 2019 Issues Ruling, the ALJ also addressed additional proposed issues raised by, and new proof and/or arguments offered by, Ms. Witryol in her supplemental petition that did not pertain to the draft SPDES permit or the draft ASF permit, including the potential effects of the proposed RMU-2 landfill on tourism, the adequacy of the application materials relating to the no-action alterative and CWM's record of compliance (see 2019 Issues Ruling at 24-29).

APPEALS

As stated above, appeals from the 2019 Issues Ruling were filed by the RRG petitioners, the Municipalities, Waterkeeper and Ms. Witryol.

In their appeal, the Municipalities challenge the ALJ's determinations that the proposed RMU-2 landfill would not be a "new discharger" pursuant to 40 CFR 122.2 or a "new Great Lakes discharger" pursuant to 40 CFR 132.2, as well as the ALJ's conclusion that the draft SPDES permit satisfies federal discharge requirements (Municipalities Appeal at 2-17). Waterkeeper has submitted an appeal in support of the Municipalities' legal argument (see Waterkeeper Appeal at 2-9), and Ms. Witryol also challenges this aspect of the 2019 Issues Ruling in her appeal (see Witryol Appeal at 5-9).

The Municipalities also argue in their appeal that the ALJ erred by finding that they had failed to raise significant and substantive issues with respect to the adequacy of the draft ASF

[10] In my subsequently issued First Interim Decision, I concurred with the Siting Board that the sufficiency of the radiological surveys and adequacy of the SEMMP were adjudicable issues (see First Interim Decision at 18).

permit's air dispersion modeling and the need for a health risk assessment (see Municipalities Appeal at 17-25). In their appeal, the RRG petitioners and Ms. Witryol raise similar challenges to the ALJ's ruling with respect to the draft ASF permit (see RRG Petitioners' Appeal at 12-13; Witryol Appeal at 14-16).

The RRG petitioners, in their appeal, also request, based upon the ALJ's ruling that proposed issues related to the ADDs submitted by CWM are not relevant to a final determination with respect to the SPDES permit application (see 2019 Issues Ruling at 16), that the ADDs be "removed from the record of these proceedings" (RRG Petitioners' Appeal at 11). In addition, the RRG petitioners repeat their arguments related to CWM's current operations and alleged noncompliance with the 1993 Siting Certificate and argue that the ALJ failed to address this contention (see id. at 14).

In her appeal, Ms. Witryol makes various procedural arguments, including that the ALJ erred by limiting the scope of the reconvened issues conference to issues relevant to the draft SPDES permit and the draft ASF permit and by failing to rule on issues and/or arguments that she raised. She also makes arguments pertaining to: (1) CWM's ability to comply with the conditions of the draft SPDES permit (see Witryol Appeal at 9-11); and (2) the ALJ's ruling with respect to the SEMMP (see id. at 18). Ms. Witryol also offers factual corrections to the 2019 Issues Ruling (see id. at 14) and moves to strike a portion of the transcript of the July 10, 2018 issues conference (Issues Conference Transcript) (see id. at 26).

THIRD INTERIM DECISION OF THE SITING BOARD

These appeals were also presented to the Siting Board, which issued a Ruling and Third Interim Decision of the Facility Siting Board on the appeals on September 10, 2019 (SB Third Interim Decision). The Siting Board dismissed the appeals inasmuch as they concerned the interpretation and application of federal and State laws and regulations pertaining to the draft SPDES permit, finding that the consideration of those arguments is within the Department's, and not the Siting Board's, jurisdiction (see SB Third Interim Decision at 7-8).

As to the arguments made with respect to the air dispersion modeling used to develop the draft ASF permit, the Siting Board noted that it "is concerned that the draft ASF permit is not based on on-site meteorological data" and concluded that "the record needs further development regarding the issue of meteorological data from Niagara Falls International Airport rather than on-site meteorological data" (SB Third Interim Decision at 8-9). The Siting Board observed that, among the facility siting criteria that the Board is required to consider is potential air quality problems and their effect on neighboring communities (see id. at 9). The Siting Board stated: "Although the use of meteorological data from Niagara Falls International Airport in dispersion modeling for the draft ASF permit may satisfy Department guidance and may not raise an issue for adjudication on the draft ASF permit, the data and resulting dispersion modeling do not necessarily assist the Board in evaluating the siting criterion outlined in 6 NYCRR 377.7 (b)(10)" (id. at 9-10). The Siting Board therefore concluded that the issue must be "developed further" and directed staff and CWM to present direct testimony and evidence related to the meteorological data provided in support of the Siting Certificate and in support of the air dispersion modeling for the draft ASF permit (id. at 10).

The Siting Board further concluded that arguments made with respect to (a) the need for a health risk assessment pertaining to the development of the draft ASF permit, and (b) the separate consideration of air issues as to the hazardous waste permit and the draft ASF permit are issues for the Department decisionmaker to address and dismissed the appeals in that regard (SB Third Interim Decision at 11-12).

The Siting Board denied the request of the RRG petitioners that the ADDs be removed from the record of this proceeding, finding that "such a request must first be made to the ALJ and should be made at the time the ADDs or portions thereof are being introduced into the hearing record or during discovery via a motion" (SB Third Interim Decision at 13). For the sake of judicial economy , and to the extent that the request was a motion before the Siting Board, the Siting Board denied the motion (see id.). The Siting Board also dismissed the RRG petitioners' appeal inasmuch as it challenged the ALJ's failure to address their arguments that CWM is operating in violation of its existing permits and Siting Certificate (see id. at 13). In addition, the Siting Board agreed with the ALJ's conclusion that the RRG petitioners' remaining arguments were not substantive and significant (see id. at 13-14).

As to Ms. Witryol's remaining arguments on appeal which were within the Siting Board's jurisdiction, the Siting Board agreed with the ALJ that the issues were not substantive and significant (see SB Third Interim Decision at 14). The Siting Board also found that Ms. Witryol's request to have "dialogue" stricken from the record should first be made to the ALJ. For the sake of judicial economy, however, and to the extent that Ms. Witryol's request was a motion made to the Siting Board, the Siting Board denied that motion (see id. at 15). Finally, the Siting Board modified the 2019 Issues Ruling to allow Ms. Witryol to use two additional witnesses in support of issues joined for adjudication (see id. at 15).

DISCUSSION

I. SPDES Permit Modification

CWM operates an Aqueous Waste Treatment System at the site for the treatment of on-site landfill leachates, other site-generated wastewaters and liquid waste received from off site (see February 2016 SPDES Fact Sheet at I [Background]).[11] As currently configured, the Aqueous Waste Treatment System discharges through Outfall 01A to Fac Ponds 1, 2 and 3, where the treated effluent accumulates, equalizes and mixes with atmospheric precipitation; the treated effluent is not subject to any additional treatment in the Fac Ponds except for further reductions in Biochemical Oxygen Demand (BOD) (see id.). The treated wastewater in the final Fac Pond (Fac Pond 3) is discharged through Outfall 001, typically once per year over a period of several days, to the Niagara River after being tested for compliance with discharge limits (see id.). Except for BOD, Outfall 001 discharge quality is a long term average of Outfall 01A discharges plus precipitation (see id.). Stormwater runoff is discharged through Outfalls 002 and 003 (which discharge to an unnamed tributary of Four Mile Creek) and Outfall 004 (which discharges to Twelve Mile Creek) (see id.; December 2016 Draft SPDES Permit at 2).

[11] Background information was also contained in the December 2016 SPDES Fact Sheet Addendum.

The Niagara River is a Class A Special Waterbody (see 6 NYCRR 837.4, Table I; see also 6 NYCRR 701.4) and is included on the most recent (2018) Section 303(d) List of Impaired Waters due to the presence of dioxin, mirex and PCBs (see 2018 Section 303[d] List of Impaired Waters [www.dec.ny.gov/docs/water_pdf/section303d2018.pdf]). Because the Model City facility discharges to the Niagara River, which flows into Lake Ontario, the facility is subject to 40 CFR part 132, entitled "Water Quality Guidance for the Great Lakes System."

The Department issued a SPDES permit for the Model City facility in 1974 (see 2015 Issues Ruling at 138). On April 22, 2015, the Department issued to CWM a modified and renewed SPDES permit, effective June 1, 2015, for the Model City facility (see id. at 139). On April 23, 2015, CWM requested a permit modification to authorize discharges related to the construction and operation of the proposed RMU-2 landfill (see February 2016 SPDES Fact Sheet, at I). The proposed RMU-2 landfill is located within the footprint of Fac Pond 3. CWM has proposed to construct a Fac Pond (Fac Pond 5) which would have a 24.7 million gallon capacity, "substantially smaller" than Fac Pond 3 (51.4 million gallon capacity) (id.; see 2015 Issues Ruling at 103, 138).

Department staff initially determined that "construction and operation of the proposed RMU-2 has the potential to result in a new or increased discharge of BCCs from the CWM site to the Great Lakes Basin" (February 2016 SPDES Fact Sheet, at III [Antidegradation Analysis]). Staff also determined that the proposed project is subject to two DEC antidegradation policies: (1) Organization and Delegation Memorandum #85-40, entitled "Water Quality Antidegradation Policy;" and (2) Division of Water Technical and Operational Guidance Series (TOGS) 1.3.9, entitled "Implementation of the NYSDEC Antidegradation Policy – Great Lakes Basin" (see id.).

Pursuant to TOGS 1.3.9, staff required CWM to submit an antidegradation demonstration (ADD), and CWM submitted ADDs dated August 2015 and November 2015 (see 2019 Issues Ruling at 15). Based upon its review of the ADDs, Department staff made a tentative determination to permit the new or increased discharge of BCCs and advised in the February 2016 SPDES Fact Sheet that it would grant the permit "if the new or increased discharge is necessary and supports important social or economic development in the area, or will result in a net environmental benefit" (February 2016 SPDES Fact Sheet, at III [Antidegradation Bioaccumulative Chemicals of Concern]; see also TOGS 1.3.9 [3]).

By letter dated March 21, 2016, the EPA provided comments on the SPDES permit application and the February 16, 2016 draft SPDES permit to the Department. The EPA stated that its comments "must be satisfactorily addressed in order to eliminate the potential for permit objection" by the EPA (Staff Reply to Supplemental Petitions, attachment 1, at 1). Specifically, the EPA advised that CWM "is a discharger to the Great Lakes System" and is subject to the 1995 final Water Quality Guidance for the Great Lakes System, also known as the Great Lakes Initiative (GLI), and specifically the GLI Antidegradation Implementation Procedures set forth in 40 CFR part 132, Appendix E (id. at 2). The EPA stated:

> "Even if CWM provides a demonstration of economic need for this expansion, the requirements of 132 Appendix E Paragraph B mandate that no lowering of water quality shall be allowed, under any circumstance. The Niagara River is also on the 303(d) list for

impairments due to PCBs and dioxin in contaminated sediments, and there is a fish consumption advisory. The Niagara River is not achieving its best use. . . . NYSDEC is obligated as the SPDES permitting authority to ensure, through permit effluent limitations and requirements that there is **no additional loading of BCCs** from this Great Lakes discharger to a 303(b) listed waterbody, regardless of the completeness of the antidegradation demonstration, demonstration of economic need, availability of variances or detection limits above water quality standards. NYSDEC should be requiring the offsite treatment of leachate, or an alternative solution that decreases the discharge of BCCs. NYSDEC cannot allow additional loading of BCCs to the Great Lakes System" (id. at 2-3 [emphasis in original]).

Department staff withdrew the February 2016 Draft SPDES permit and issued a revised draft permit in December 2016 (see 2019 Issues Ruling at 7; see also December 2016 SPDES Fact Sheet Addendum, at I [Background Information]). Based upon, among other things, comments from the EPA and others on the first draft permit, Department staff added additional permit requirements to ensure that the permit "will not allow a net increase in BCC loading and other pollutants to the Niagara River" (December 2016 SPDES Fact Sheet Addendum, at III [Antidegradation Analysis]). Department staff, therefore, concluded that antidegradation requirements were satisfied for BCCs and other pollutants. Proposed changes made in the December 2016 Draft SPDES permit include but are not limited to: (1) modification of the schedules for interim PCB Aroclor limits at various stormwater outfalls; (2) the addition of PCB Aroclor limits to Outfall 01A to minimize the discharge of PCBs through Outfall 001; (3) the addition of a special condition prohibiting discharge of SLF 1-7 landfill leachate and requiring that all SLF 1-7 leachate be disposed of off-site; and (4) the addition of a special condition prohibiting an increased loading of BCCs to the environment due to the operation of RMU-2 (see December 2016 SPDES Fact Sheet Addendum, at II [Summary of Proposed Permit Changes]). By letter dated January 17, 2017, the EPA advised that it had reviewed the December 2016 Draft SPDES permit for the CWM facility and determined that DEC "has made appropriate revisions in response to our comments" (Staff Reply to Supplemental Petitions, attachment 2).

As outlined above, the ALJ rejected the intervening parties' legal arguments with respect to the December 2016 Draft SPDES permit and found that they had raised no issues for adjudication with respect to CWM's ability to comply with the effluent limitations set forth in the December 2016 Draft SPDES permit.

Arguments on Appeal

In their appeal, the Municipalities argue that CWM's proposed RMU-2 landfill would be a "new discharger" pursuant to 40 CFR part 122 and a "new Great Lakes discharger" pursuant to 40 CFR part 132 and, as such, it may not, as a matter of law, discharge any leachate or contaminated stormwater to the Niagara River and must be required to transport all effluent off-site for discharge outside the Great Lakes Basin (Municipalities Appeal at 2-17).[12] Specifically,

[12] The Municipalities state that the proposed RMU-2 landfill would not be a "new source" pursuant to 40 CFR part 122 (see Municipalities Appeal at 4, 7-8). This is in accord with the ALJ's determination on this point (see 2019 Issues Ruling at 8-10).

the Municipalities assert that, pursuant to 40 CFR 122.4 (i), no discharge permit can be issued to CWM for RMU-2 -- a "new discharger" -- because the discharge from RMU-2's construction and operation would cause or contribute to the violation of water quality standards; the Municipalities aver that the loadings calculated by CWM for mercury and for PCBs "in all scenarios involving RMU-2 substantially exceed water quality standards" and that, because CWM "would not meet the water quality standard for discharges to the Niagara River," it must discharge to a non-impaired waterbody in order to qualify for a SPDES permit (id. at 8). The Municipalities argue that the criteria listed in 40 CFR 122.29, relied upon by the ALJ, pertain to a "new source" and are not relevant to the question of whether RMU-2 is a "new discharger" (see id. at 5, 7-8).

The Municipalities further contend that the ALJ erred by adopting the position of CWM and Department staff that CWM can comply with federal regulations by avoiding a "new increase" or a "net increase" in BCCs discharged to the Niagara River, noting that those terms are not found in the applicable regulations (see Municipalities Appeal at 13-16). The Municipalities urge that "[r]estricting RMU-2 related discharges to no net increase in BCC loading would not be a revision to the permit appropriate to EPA's comment [that the permit must ensure that there is no additional loading of BCCs] because some additional loading would continue to occur" (id. at 14). The Municipalities read the EPA's March 21, 2016 letter as requiring offsite treatment of all RMU-2 leachate if, as here, discharges from RMU-2 cannot comply with water quality standards (see id. at 15-16).

In its appeal in support of the Municipalities' contentions on this point, Waterkeeper argues that RMU-2 is a "new Great Lakes discharger" and that CWM's contention that RMU-2 is not a new discharger because there will be a net decrease in the discharge of BCCs is contrary to the plain language of 40 CFR part 132, which requires no additional loadings of BCCs (Waterkeeper Appeal at 2-3, 9). Waterkeeper asserts that, as such, RMU-2 should not be allowed to discharge any BCCs into the Niagara River.

In her appeal, Ms. Witryol argues, among other things, that RMU-2 should be considered a new discharger to the Niagara River, rather than a modification of an existing source, taking the position that "[o]nly an open landfill, not [a] closed landfill could cause discharge to the Niagara River" (Witryol Appeal at 7 [emphasis omitted]; see id. at 5-9). Ms. Witryol contends that, because RMU-1 is closed and there are no open landfills at the site, RMU-2 must be considered a new discharger. She also asserts that she has raised a substantive and significant issue for adjudication as to whether CWM will be able to comply with the effluent limitations set forth in the draft permit (see id. at 9-12).

In their appeal, the RRG petitioners request that the ADDs be removed from the record of this proceeding (see RRG Petitioners' Appeal at 11-12).

New Discharger (40 CFR part 122)

I turn first to the Municipalities' argument that the proposed RMU-2 landfill is a "new discharger" within the meaning of 40 CFR 122.2 and therefore, pursuant to 40 CFR 122.4 (i), no

permit may be issued for RMU-2 because "the discharge from its construction or operation will cause or contribute to the violation of water quality standards" (40 CFR 122.4 [i]).

SPDES permits regulating the discharge of pollutants into the waters of the State must conform to and meet all applicable requirements of the federal CWA and the "rules, regulations, guidelines, criteria, standards and limitations adopted pursuant thereto relating to effluent limitations, water quality related effluent limitations, new source performance standards [and] toxic and pretreatment effluent limitations" (ECL 17-0801; see ECL 17-0811). Under the federal regulations, with one exception which is not relevant here, no permit may be issued "[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards" (40 CFR 122.4 [i]). The term "new discharger" is defined in 40 CFR part 122 as:

> "any building, structure, facility, or installation (a) [f]rom which there is or may be a 'discharge of pollutants;' (b) [t]hat did not commence the 'discharge of pollutants' at a particular 'site' prior to August 13, 1979; (c) [w]hich is not a 'new source;' and (d) [w]hich has never received a finally effective NPDES permit for discharges at that 'site' (40 CFR 122.2).

In addition, 40 CFR 122.29, entitled "New sources and new dischargers," provides, in relevant part:

> "[c]onstruction on a site[13] at which an existing source is located results in a modification subject to [40 CFR] 122.62 rather than a new source (or a new discharger) if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment" (40 CFR 122.29 [b][3]).

The criteria set forth in 40 CFR 122.29 (b)(1)(ii) and (iii), respectively, are:

> (ii) the new building, structure, facility, or installation "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source" and
>
> (iii) the processes of the new building, structure, facility, or installation "are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source" (40 CFR 122.29 [b][1][ii] and [iii]).

Upon due consideration, I find that the proposed RMU-2 project would constitute a modification of an existing source pursuant to 40 CFR 122.29 (b)(3). It is undisputed that an existing source is located at the Model City facility; indeed, the Department first issued a SPDES

[13] The term "site" is defined as "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity" (40 CFR 122.2).

permit regulating discharges of treated wastewater for the Model City facility in 1974 (see Draft Environmental Impact Statement, Residuals Management Unit 2, dated April 2003, at § 1.5.3.2). The facility is currently discharging treated wastewater pursuant to a SPDES permit issued by the Department to CWM (id.; see 40 CFR 122.29 [a][2], [3]; CWM Reply to Supplemental Petitions at 10-11).

The record before me also demonstrates that the proposed construction will not create a new building, structure, facility, or installation meeting the two criteria set forth above but will, rather, "otherwise alter[], replace[], or add[] to existing process or production equipment" (40 CFR 122.29 [b][3]). The criterion in 40 CFR 122.29 (b)(1)(ii) is not applicable, as the modification proposed by CWM would not totally replace the process or production equipment that causes the discharge of pollutants. Instead, the modification contemplates a partial reconfiguration of the current leachate collection system to accommodate the RMU-2 landfill, which will utilize the Aqueous Waste Treatment System which is already in place in treating and discharging its wastewater (see Issues Ruling at 9; CWM Reply to Supplemental Petitions at 13). In addition, the existing Aqueous Waste Treatment System will continue to treat wastewater and leachate that is not generated by the proposed RMU-2 landfill (see 2019 Issues Ruling at 9; CWM Reply to Supplemental Petitions at 13). The criterion in 40 CFR 122.29 (b)(1)(iii) is also inapplicable because the processes of the proposed RMU-2 landfill would not be "substantially independent of an existing source at the same site" (40 CFR 122.29 [b][1][iii]). CWM's proposed project contemplates, for example, that "the RMU-2 leachate collection and transfer system will be entirely integrated with two other landfills on-site and treated in the existing [Aqueous Waste Treatment System]" (CWM's Reply to Supplemental Petitions at 13; see 2019 Issues Ruling at 10).

None of the intervening parties have pointed to any aspect of the proposed RMU-2 project which, in my judgment, would raise a question as to whether the proposed project would meet the criteria set forth in 40 CFR 122.29 (b)(1)(ii) or (iii). Inasmuch as the Municipalities argue in their appeal that the criteria set forth in 40 CFR 122.29 are not relevant to the question of whether the proposed RMU-2 landfill would be a "new discharger" (Municipalities Appeal at 5, 7-8), I reject that contention, as it finds no support in 40 CFR part 122. Section 122.29 of 40 CFR specifically cross-references the definitions of new source and new discharger set forth in 40 CFR 122.2 and, by its terms, applies to the question presented here: whether the proposed RMU-2 project constitutes a modification of an existing source or if it is a new source or new discharger within the meaning of 40 CFR part 122.

Based upon the foregoing, I concur with the ALJ's determination that the proposed RMU-2 landfill and related modifications to the facility would constitute a modification of the existing source pursuant to 40 CFR 122.29 and that the proposed RMU-2 landfill would not be a "new source" or a "new discharger" as those terms are used in 40 CFR part 122 (see 2019 Issues Ruling at 10). Accordingly, the discharge from the proposed RMU-2 landfill is not subject to the prohibitions set forth in 40 CFR 122.4 (i) and I reject the Municipalities' argument on this point. It is important to note that the EPA did not raise any objection to the December 2016 Draft SPDES permit pursuant to 40 CFR 122.4 (see Staff Reply to Supplemental Petitions, attachment 2 [EPA letter dated January 17, 2017]).

Great Lakes Initiative (40 CFR part 132)

The CWA provides that "the Great Lakes are a valuable national resource, continuously serving the people of the United States and other nations as an important source of food, fresh water, recreation, beauty, and enjoyment" (33 USC 1268 [a][1]). The CWA directs the EPA to promulgate proposed water quality guidance for the Great Lakes System (33 USC 1268[c][2][A]), and directs the Great Lakes states, including New York, to "adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with" EPA guidance (33 USC 1268 [c][2] [C]; see also 33 USC 1268 [a][3][G]). The federal regulations, entitled "Water Quality Guidance for the Great Lakes System" and also known as the GLI, established stringent water-quality-based requirements, especially for BCCs, including mercury, PCBs and dioxin (see 40 CFR 132, Table 6).

-- New Great Lakes Discharger

Under the federal regulations, a "new Great Lakes discharger" is defined as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants' (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997" (40 CFR 132.2). An "existing Great Lakes discharger" is defined as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants' (as defined in 40 CFR 122.2) to the Great Lakes System, that is not a new Great Lakes discharger" (40 CFR 132.2). In turn, 40 CFR 122.2 defines "discharge of a pollutant" as:

> "(a) Any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source,' or
>
> (b) Any addition of any pollutant or combination of pollutants to the waters of the 'contiguous zone' or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation."

Pursuant to the CWA, the term "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged" (33 USC 1362 [14]).[14] It has been held that the CWA's definition of point source "connotes the terminal end of an artificial system for moving water, waste, or other materials" (Froebel v Meyer, 217 F3d 928, 937 [7th Cir 2000], cert denied 531 US 1075 [2001]).

Upon due consideration, I find that the proposed RMU-2 landfill and its related modifications would not be a "new Great Lakes discharger" within the meaning of 40 CFR 132.2. The record before me reflects that, pursuant to an existing SPDES permit duly issued by

[14] 40 CFR part 132 provides "[t]erms not defined in this section have the meaning given by the Clean Water Act and EPA implementing regulations" (40 CFR 132.2).

the Department, the Model City facility currently discharges treated effluent from the facility into the Niagara River through Outfall 001. Pursuant to the existing SPDES permit, the facility also discharges stormwater runoff to Four Mile Creek and Twelve Mile Creek via Outfalls 002, 003 and 004. CWM does not propose, as part of its RMU-2 applications, any modification to the physical structures that constitute the point sources for the Model City facility, that is, the discrete conveyances from which pollutants are or may be discharged (see 33 USC 1362 [14]). As discussed above, the proposed RMU-2 landfill will be incorporated into existing facility operations, and any resulting wastewater will be treated in existing infrastructure and discharged through existing point sources. Therefore, I find that staff and the ALJ appropriately concluded that the Model City facility will not be a "new Great Lakes discharger" upon implementation of the modifications proposed by CWM. This conclusion is in accord with the EPA's statements in its March 21, 2016 letter, in which the EPA referred to the Model City facility as a Great Lakes discharger but did not make any finding or representation that the proposed RMU-2 landfill would be a new Great Lakes discharger (see Staff Reply to Supplemental Petitions, attachment 1).

As the ALJ found (see 2019 Issues Ruling at 11), the question of whether the proposed project would be an existing Great Lakes discharger or a new Great Lakes discharger is only relevant in this particular matter with respect to staff's application of the Compliance Schedules set forth in 40 CFR 132, Appendix F, Procedure 9 (see Staff Reply to Appeals at 10). Specifically, if the proposed RMU-2 landfill and the related modifications were considered a new Great Lakes discharger, CWM would be required to comply with the Water Quality Based Effluent Limitations (WQBELs) set forth in the permit upon commencement of the discharge. On the other hand, if the proposed RMU-2 landfill and the related modifications to the Model City facility were considered an existing Great Lakes discharger, the permit would allow a reasonable period for CWM to comply with new or more restrictive WQBELs (see 40 CFR 132, Appendix F, Procedure 9 at A and B [1]). Importantly, the EPA, in its March 2016 letter and follow-up letter dated January 17, 2017 concerning the December 2016 Draft SPDES permit, did not raise any objection to the schedule provided for compliance with the WQBELs set forth in the draft permit.[15]

-- Antidegradation Requirements

> GLI antidegradation implementation procedures state:
>
> "For all waters, the Director shall ensure that the level of water quality necessary to protect existing uses is maintained. In order to achieve this requirement, and consistent with 40 CFR 131.10, water quality standards use designations must include all existing uses. Controls shall be established as necessary on point and nonpoint sources of pollutants to ensure that the criteria applicable to the designated use are achieved in the water and that any designated use of a downstream water is protected. Where water

[15] The conclusion that the proposed RMU-2 landfill would not be a new Great Lakes discharger and therefore may be afforded a reasonable period for compliance with the new effluent limitations in the December 2016 Draft SPDES permit is also supported by EPA guidance on the subject (see Water Quality Guidance for the Great Lakes System: Supplementary Information Document [SID] § VIII.I [2][a], dated March 1995, available at www.epa.gov/sites/default/files/2018-10/documents/water-quality-great-lakes-sid.pdf).

quality does not support the designated uses of a waterbody or ambient pollutant concentrations exceed water quality criteria applicable to that waterbody, the Director shall not allow a lowering of water quality for the pollutant or pollutants preventing the attainment of such uses or exceeding such criteria" (40 CFR part 132, Appendix E [II][B] [emphasis added]).

Similarly, TOGS 1.3.9 provides: "Where the water quality necessary to maintain the current use is not being attained because of a specific BCC, no additional loading of the pollutant of concern should be allowed that are not consistent with TOGS 1.3.1" (TOGS 1.3.9 [1][d]).

Here, the record reflects that, in developing the draft SPDES permit with respect to CWM's proposed RMU-2 landfill, staff noted that the Niagara River and Lake Ontario are listed on the New York State section 303(d) list of impaired waters due to dioxin, mirex and PCBs, and determined that the construction and operation of the proposed RMU-2 landfill have the potential to result in an increased discharge of BCCs from the facility to the Great Lakes Basin (see December 2016 SPDES Fact Sheet Addendum, at III). Accordingly, staff included permit conditions, in accordance with TOGS 1.3.9 and Appendix E of the GLI, which will prevent a net increase in the loading of BCCs and other pollutants into the Niagara River (see id.). Among other conditions, the December 2016 Draft SPDES permit includes a special condition which states: "No additional discharge loading of Bioaccumulative Chemicals of Concern [BCCs] resulting from operation of RMU-2 is permitted at any final outfall" and also includes a special condition requiring the off-site disposal of all leachate from SLF 1-7 (see December 2016 Draft SPDES Permit at 19 [Restrictions on Treating and Discharging Certain Wastes (Special Conditions 3 and 4)]). In addition, the December 2016 Draft SPDES permit includes a Mercury Minimization Program, designed to "reduce mercury effluent levels in pursuit of the WQBEL" (id. at 23), and a PCB Minimization Program, designed to reduce PCB effluent levels in pursuit of the WQBEL, which includes monitoring and reporting requirements and requires the implementation of a control strategy (see id. at 24-25).

The Municipalities and Waterkeeper take the position in their appeals that, under the GLI, the proposed RMU-2 landfill is prohibited from discharging any BCCs into the Niagara River and that the SPDES permit must require CWM to transport all effluent from RMU-2 off-site for discharge outside the Great Lakes Basin. However, the language of the GLI mandates that no "lowering of water quality" shall occur (40 CFR part 132, Appendix E [II][B]), and the language of TOGS 1.3.9 mandates that "no additional loading" is allowed (TOGS 1.3.9 [1][d]). I find Department staff's development of a draft permit that will "maintain the level of water quality to protect existing uses and will not cause a lowering of water quality for BCCs" (see Staff Reply to Appeals at 12) to be consistent with both the GLI and Department guidance. The December 2016 Draft SPDES permit neither allows the lowering of the water quality of the Niagara River, nor permits additional (meaning, increased) loading of BCCs (see e.g. December 2016 Draft SPDES Permit at 19 [Special Conditions – Restrictions on Treating and Discharging Certain Wastes]).

The December 2016 Draft SPDES permit developed by staff is consistent with the position stated by the EPA in its March 21, 2016 letter. In that letter, the EPA indicated that compliance with the GLI could be attained by "requiring the offsite treatment of leachate, or an alternative solution that decreases the discharge of BCCs" (Staff Reply to Supplemental Petitions, attachment 1 at 3). Here, the December 2016 Draft SPDES permit requires off-site disposal of leachate from several older landfills (which contain significant amounts of PCBs [see Staff Reply to Supplemental Petitions at 10]) and, in addition, according to CWM, implementation of the proposed RMU-2 project will result in an overall decrease of BCC discharges. Importantly, the EPA indicated, after review of the December 2016 Draft SPDES permit, that staff made appropriate revisions to the draft permit in response to its comments (see id., attachment 2 [EPA letter dated January 17, 2017]).

Based upon the foregoing, I concur with the ALJ that the terms and conditions in the December 2016 Draft SPDES permit, which prohibit a net increase in BCC loadings, comply with applicable federal and state antidegradation requirements, and I reject the appeals on this issue. I note that the intervening parties have not raised any argument on appeal as to the specific effluent limitations set forth in the December 2016 Draft SPDES permit, and I concur with the ALJ's conclusion that the WQBELs comply with applicable requirements and guidance.

Antidegradation Demonstrations

The ALJ ruled that any proposed issues related to the ADDs submitted by CWM as part of its SPDES permit application are not relevant to the final determination with respect to the SPDES permit application because staff did not rely on them in drafting the permit conditions related to BCCs which are set forth in the December 2016 Draft SPDES permit (see 2019 Issues Ruling at 16).[16]

The RRG petitioners argue in their appeal that, because the ADDs were found by the ALJ to be "irrelevant to the SPDES process, [they should] be removed from the record of these proceedings in its entirety, unless Applicant, Department Staff, the Municipalities or Ms. Witryol appeal the ruling of inadmissibility of the [ADDs]" (RRG Petitioners Appeal at 11-12). Upon review, consistent with the Siting Board's determination with respect to this aspect of the RRG petitioners' appeal (see SB Third Interim Decision at 12-13), I concur that this request should

[16] Department staff stated in its papers that it did not rely upon the ADDs in drafting the permit conditions related to BCCs and further elaborated as follows:

> "Rather, in response to the March 21, 2016 comment letter from the EPA, DEC incorporated a permit condition prohibiting an increased loading of BCCs to the environment from the RMU-2 operations. See Special Condition No. 4 of the draft SPDES permit modification which states [at page 19] that '[n]o additional [discharge] loading of Bioaccumulative Chemicals of Concern (BCC[s]) resulting from … operation of RMU-2 is permitted . . . at any final outfall'" (Staff Reply to Supplemental Petitions at 8).

first have been made to the ALJ.[17] However, based on the record, and to the extent that the RRG petitioners' request is appropriately before me, the request is hereby denied.

I have reviewed and evaluated the remaining issues raised by Ms. Witryol in her appeal with respect to the December 2016 Draft SPDES permit, including arguments related to the environmental impacts of the stormwater discharge from the facility and her assertion that CWM will not be able to comply with permit limits, and conclude that she has not raised any substantive and significant issue for adjudication.[18]

II. Air State Facility Permit Modification

The Department originally issued an ASF permit for the Model City facility in October 2014 (see 2015 Issues Ruling at 144). In 2015, CWM filed an application to modify its ASF permit to include the proposed RMU-2 landfill.

In developing the draft ASF permit, Department staff performed a 6 NYCRR part 212 risk assessment and modeling review (see Draft ASF Permit at 2; Staff Reply to Appeals at 15-16). Staff formulated emission requirements and operational restrictions for the draft permit based upon CWM's air dispersion modeling analysis, which used the EPA's AERMOD emissions modeling system to evaluate the concentrations of contaminants present in the ambient air at the facility (see Draft ASF Permit at 2; Staff Reply to Appeals at 16). The meteorological data that Department staff used in conducting its ambient air impact analysis for the draft ASF permit was collected by the National Weather Service (NWS) at the Niagara Falls International Airport.

The modeling found that the concentrations of contaminants, except for PCBs, were less than the Short-Term Guidance Concentrations (SGCs) and the Annual Guidance Concentrations (AGCs) set forth in the version of DAR-1 in effect at that time (entitled "Guidelines for the Evaluation and Control of Ambient Air Contaminants Under 6 NYCRR Part 212") (see Draft ASF Permit at 2-3; Staff Reply to Appeals at 16). As to PCB and polycyclic organic matter (POM) emissions, the draft permit included stringent emissions limits and permit conditions designed to "cumulatively reduce or limit emissions and be considered Toxic-Best Available Control Technology (T-BACT) for PCB[]s and POM[]s" (Draft ASF Permit at 2; see Staff Reply to Appeals at 16).

The draft ASF permit also indicates that the Model City facility holds a site-wide Part 373 Hazardous Waste Management Permit and is subject to certain air emissions standards pursuant to 6 NYCRR part 373, including: (1) a Fugitive Dust Control Plan, Attachment L of the Part 373 permit; and (2) an Air & Meteorological Monitoring Plan, Attachment N of the Part 373 permit (see Draft ASF Permit at 3). The draft ASF permit states:

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[17] The request of the RRG petitioners to remove the ADDs from the record may, in any event, be moot in light of the fact that the adjudicatory hearing with respect to the socioeconomic issues was held during the pendency of these appeals.

[18] I note that Ms. Witryol's position that the closed Model City facility landfills are not currently discharging wastewater to the Niagara River (see Witryol Appeal at 6-7) is incorrect.

"To avoid duplication, the Air State Facility permit does not reiterate the air emission control requirements required under Part 373 since those are already incorporated into CWM's Part 373 Hazardous Waste Management permit. Similarly, the Air State Facility permit references certain . . . air monitoring protocols required by the Part 373 permit. Two of the protocols, however, the Fugitive Dust Control Plan (Attachment L) and the Air & Meteorological Monitoring Plan (Attachment N) have been revised to include perimeter monitoring for PM-10 (treated as PM-2.5), use of the air monitoring network to determine compliance with the [National Ambient Air Quality Standards (NAAQS)] and to include the requirements outlined in the Technical Guidance for Site Investigation and Remediation (DER-10) for construction and operation activities. Accordingly, the two revised protocols replace the versions in the draft Part 373 Hazardous Waste Management permit for the proposed RMU-2 landfill" (Draft ASF Permit at 3-4).

As noted, the ALJ found that intervening parties had raised no issues for adjudication with respect to the draft ASF permit (see 2019 Issues Ruling at 18-20, 23).

Arguments on Appeal

In their appeal, the Municipalities challenge the ALJ's conclusion that the intervening parties had not raised a substantive issue with respect to the meteorological data used in the air dispersion modeling conducted for the draft ASF permit (see Municipalities Appeal at 17-24). The Municipalities assert that, pursuant to Department guidance outlined in DAR-10, dated May 9, 2006 and entitled "NYSDEC Guidelines on Dispersion Modeling Procedures for Air Quality Impact Analysis," the use of on-site data is preferred over data collected by the NWS and further assert that they are concerned about the permit's use of weather data – here data collected at the Niagara Falls International Airport -- that they argue is not representative of the site (see id. at 17-20).

The Municipalities point out that a report prepared for the U.S. Army Corps of Engineers, which is dated December 2011 and entitled "Evaluation of Meteorological Data and Modeling Approaches to Assess the Dispersion of Airborne Releases from the Niagara Falls Storage Site" (2011 USACE Report), concluded that local data is more representative than data from the Niagara Falls International Airport (see Municipalities Appeal at 19-20). The Municipalities note that on-site data is available, as CWM maintains a meteorological tower and collects data at the site (see id. at 20). The Municipalities assert that Department staff failed to provide sufficient justification for why airport data was used in the modeling and that they have raised a factual issue as to whether staff's approach in this regard was appropriate (see id. at 19, 22-24).

The Municipalities also urge that a multi-media health risk assessment should be performed with respect to the proposed project and request that revised air dispersion modeling be incorporated into the assessment for the proposed project (see Municipalities Appeal at 17-18). The Municipalities further argue that analysis of the adequacy of the Fugitive Dust Control Plan and the Air & Meteorological Monitoring Plan contained in the draft ASF permit is dependent upon, and should be considered with, the adequacy of the SEMMP, an issue which has already been joined for adjudication (see id. at 21).

In their appeal, the RRG petitioners argue that the ALJ erred by finding that a health risk assessment was not required for the development of the draft ASF permit, especially where the proposed RMU-2 landfill is approximately one mile from a school (see RRG Petitioners Appeal at 12-13).

In her appeal, Ms. Witryol argues, among other things, that a factual question exists as to why off-site data was used in the dispersion modeling (see Witryol Appeal at 14-16). She also argues that issues pertaining to the SEMMP (regarding radiological exposure) should not be considered separately from issues pertaining to the draft ASF permit (regarding chemical exposure) because the separate consideration "would preclude any evaluation of the combined impacts and risk to populations in the vicinity of the Model City facility" (id. at 18).

Air Dispersion Modeling

As noted, Department staff developed the terms and conditions of the draft ASF permit based upon CWM's air dispersion modeling analysis, which used the EPA's AERMOD emissions modeling system. Department staff provided CWM's consultant with meteorological data collected by the NWS at the Niagara Falls International Airport between 2012-2016 for use in the model (see Staff Reply to Appeals at 17; Issues Conference Transcript at 68). According to Department staff, the data collected at the airport was "the closest" available data to the Model City facility (see Issues Conference Transcript at 69), and the data collected on-site at the Model City facility was not provided to CWM because it was not in the proper format for the AERMOD system (see id. at 68-69).

CWM's consultant stated in the Air Quality Modeling Protocol submitted by CWM to the Department that the meteorological data from Niagara Falls, New York was "utilized as representative meteorological data for the Facility [because] Niagara Falls, New York and the Facility have similar weather patterns" and that the Niagara Falls meteorological station "is also in the closest proximity to the Facility compared to other stations with similar weather patterns and land use" (CWM Reply to Supplemental Petitions, Exhibit [Exh] G, attachment 2 at 12 [CWM's responses to comments, quoting from the Air Quality Modeling Protocol]).

With respect to meteorological data, former DAR-10, in effect when this draft ASF permit was developed, states: "On-site (i.e. site specific) meteorological data is generally preferred over [NWS] data. This is especially true for complex terrain settings. EPA guidance requires at least one year of on-site data or five consecutive years of most recent, readily available, off-site data" (DAR-10 [former] § 1 [c]).

Federal regulations as to meteorological data provide:

> "The meteorological data used as input to a dispersion model should be selected on the basis of spatial and climatological (temporal) representativeness as well as the ability of the individual parameters selected to characterize the transport and dispersion conditions in the area of concern. The representativeness of the measured data is dependent on numerous factors including, but not limited to: (1) The proximity of the meteorological monitoring site to the area under consideration; (2) the complexity of the terrain; (3) the

> exposure of the meteorological monitoring site; and (4) the period of time during which data are collected. The spatial representativeness of the data can be adversely affected by large distances between the source and receptors of interest and the complex topographic characteristics of the area" (40 CFR part 51, Appendix W § 8.4.1 [b]).[19]

The federal regulations further provide that "[t]he meteorological data should be adequately representative and may be site-specific data, data from a nearby . . . NWS . . . or comparable station, or prognostic meteorological data" (id. § 8.4.1 [c]) and that "[t]he use of 5 years of adequately representative NWS or comparable meteorological data, at least one year of site-specific, or at least 3 years of prognostic meteorological data, are required. If one year or more, up to 5 years, of site-specific data are available, these data are preferred for use in air quality analyses. Depending on completeness of the data record, consecutive years of NWS, site-specific, or prognostic data are preferred" (id. § 8.4.2 [e]).

Upon review, I disagree with the determination in the 2019 Issues Ruling that the intervening parties failed to raise an issue for adjudication with respect to the meteorological data used in the air dispersion modeling for the draft ASF permit. On this point, the ALJ concluded that the use of NWS data from the Niagara Falls meteorological station in the modeling was consistent with Department guidance set forth in DAR-10 (see 2019 Issues Ruling at 20; Issues Conference Transcript at 102-103).[20] However, the Department guidance in effect at the time (DAR-10), provided that on-site data "is generally preferred over [NWS] data" (DAR-10 [former] § 1 [c]).[21] Moreover, according to federal regulations, data that is the most representative of the site should be used in the dispersion modeling program (see 40 CFR part 51, Appendix W §§ 8.4.1 [b], [c], 8.42 [e]).

Here, staff asserted that the on-site data – although available -- was not used because it was not in the correct format for the AERMOD system (see Issues Conference Transcript at 68-69). However, as the Siting Board noted, "there is no indication from staff or CWM that on-site data could not be provided in the correct format" (SB Third Interim Decision at 10). Staff and

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[19] This regulation was in effect at the time the draft ASF permit was issued.

[20] The ALJ also ruled that the petitioners' reliance on the 2011 USACE Report was misplaced in light of revisions made by the EPA to its modeling software (see 2019 Issues Ruling at 20). Department staff provided adequate support for the finding that the conclusions in the 2011 USACE Report with respect to meteorological data collected at the Niagara Falls International Airport are no longer valid because the airport data used in the dispersal modeling for the proposed RMU-2 was based upon updated software which provides a more accurate evaluation (see Issues Conference Transcript at 64-65; Staff Reply to Supplemental Petitions at 13-14; Staff Reply to Appeals at 17-18).

[21] I note that a revised version of DAR-10 was issued on September 1, 2020, and that guidance currently provides as follows:

> "EPA guidance requires the use of at least one year of on-site (site-specific) data or five consecutive years of the most recent, readily available off-site data. On-site data are preferred, particularly in areas with complex terrain, provided that those data are acquired with appropriate instrumentation and that proper quality assurance procedures are followed in the collection of the data. . . . If on-site data is unavailable, five years of recent meteorological data from a representative . . . NWS . . . site may be used. The modeling protocol should include a discussion of the representativeness of the chosen meteorological data site for the project being modeled" (DAR-10 § 2.5 [Meteorological Data]).

CWM provided no other explanation or basis for the use of NWS data, rather than on-site data, in the dispersion modeling.

Based upon my review, I find that, under the circumstances, the record requires development as to whether the on-site data should have been used for purposes of the air dispersion modeling rather than the NWS data from the Niagara Falls International Airport. This proposed issue is both substantive and significant, and thus raises an adjudicable issue. It is substantive because it raises a question as to the sufficiency and accuracy of the dispersion modeling done by CWM and relied upon by Department staff in drafting the modified ASF permit and raises "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the proposed project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4 [c][2]). The issue is significant because it may result in "the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4 [c][3]).

In presenting evidence with respect to the issue of why off-site data was used rather than on-site data, Department staff and applicant should refer to current DEC guidance set forth in DAR-10 (issued September 1, 2020) as well as relevant current federal regulations and, at a minimum, address the following:

--whether the on-site data was acquired with appropriate instrumentation (see DAR-10 § 2.5 [Meteorological Data]);

--whether proper quality assurance procedures were followed in the collection of the on-site data (see id.);

--the representativeness of the on-site data for the project being modeled and the representativeness of the off-site data that was used for the modeling (see id.; 40 CFR part 51, Appendix W § 8.4.1 [b]);

--the factors that led to the conclusion that the on-site data was inappropriate for use in the draft ASF permit modeling;

--whether air dispersion modeling has been performed for the Model City facility using on-site data; and

--any other considerations that are relevant to facilitating the use of the on-site data in the air dispersion modeling for the draft ASF permit.

As previously noted, the Siting Board identified the need for a further explanation of the meteorological data that was utilized in the air dispersion modeling (see SB Third Interim Decision at 10 [directing CWM and Department staff "to present direct testimony and evidence, subject to cross examination by the Municipalities and Ms. Witryol, related to the meteorological data provided in support of the Part 361 Certificate Application and the meteorological data provided in support of the air dispersion modeling for the ASF draft permit. Such testimony and

evidence should discuss and compare the data associated with atmospheric stability, prevailing wind direction and wind speed as used in the respective certificate and air permit applications"]).

I hereby direct that Department staff and CWM present direct testimony and evidence, subject to cross examination, related to the components that I have listed above, in addition to the further explanation, discussion and comparison directed by the Siting Board. The Municipalities (as the only intervening party which provided an offer of proof on this issue [see 6 NYCRR 624.5 (b)(2)(ii)][22]) may offer rebuttal evidence with respect to the issue, subject to cross examination. To facilitate the consideration of this issue, I recommend that the ALJ consider requiring the submission of pre-filed direct testimony as has been done throughout this proceeding. It shall be in the sole discretion of the ALJ after consultation with the parties to direct the manner, timing and sequence of any filings related to the adjudication of this issue.

III. Health Risk Assessment

In this proceeding, given the legacy contamination at the site, intervening parties have argued that the potential public health and environmental risks associated with the construction and operation of the proposed RMU-2 landfill should be evaluated through a health risk assessment (see 2019 Issues Ruling at 18). The ALJ ruled that this proposed issue raised by the petitioners was not substantive and significant and that the intervening parties failed to meet their burden of persuasion on this point (see id. at 18). The ALJ found that "the multi-media health risk assessment requested by the intervening parties" was unnecessary, given the analysis required to be conducted by 6 NYCRR part 212 and Department staff's application of the regulations (id.).

The record before me reflects that, in developing the terms and conditions of CWM's draft ASF permit, Department staff relied on health-based standards set forth in Department guidance which are derived from analysis conducted and data collected by the DEC, the EPA and the New York State Department of Health (see DAR-1 at 40-43; Staff Reply to Appeals at 16-17; Issues Conference Transcript at 70-71). The intervening parties do not challenge any specific term or condition set forth in the draft ASF permit, but argue that Department staff should, in its discretion, perform an additional health risk assessment in light of the particular circumstances of this matter (see RRG Petitioners Appeal at 12-13), and/or in light of the claimed flaw in the air dispersion modeling (see Municipalities Appeal at 17-18, 24-25).

Upon review, I agree with the ALJ that the intervening parties failed to meet their burden to demonstrate that this proposed issue is both substantive and significant.[23] The intervening parties have not demonstrated that such an additional assessment is necessary in light of the 6 NYCRR part 212 and DAR-1 requirements. Moreover, the intervening parties have not cited any statutory or regulatory authority, or any Department guidance, which would require that the Department conduct, in addition to the 6 NYCRR part 212 analysis, the health risk assessment

[22] In this regard, the Municipalities proffered the expert testimony of Dr. Ranajit Sahu with respect to the air dispersion modeling issue (see 2019 Issues Ruling at 19).

[23] The Siting Board also agreed with the ALJ that petitioners had not met their burden of demonstrating that this proposed issue is substantive and significant (see SB Third Interim Decision at 11).

requested by the Municipalities and the RRG petitioners. I reject the argument that the outcome of the adjudication of the air dispersion modeling issue may trigger the need for a health risk assessment and find that no health risk assessment as requested by petitioners is required in this context.

IV. Soil Excavation Monitoring and Management Plan (SEMMP)

In my First Interim Decision, I concurred with the Siting Board that the sufficiency of the radiological surveys and the adequacy of the SEMMP were appropriate issues for adjudication (see First Interim Decision at 18). Both the Municipalities and Ms. Witryol raise arguments in their appeals which challenge the fact that the air issues have been considered separately from the hazardous waste issues in this proceeding and essentially seek to include, as part of the adjudication of the SEMMP issues, an evaluation of the draft ASF permit terms and conditions (including the Fugitive Dust Control Plan and the Air & Meteorological Monitoring Plan contained in the draft ASF permit) (see Municipalities Appeal at 21-22; Witryol Appeal at 17-18).

The ALJ has directed CWM to prepare the Residuals Management Unit No. 2 (RMU-2 Air Monitoring Plan [RAMP]) as required by the Air & Meteorological Monitoring Plan (revised June 2017) prior to the commencement of the adjudicatory hearing (see 2019 Issues Ruling at 22-23). The RAMP, which must be based on Appendix 1A and 1B of DER-10, will be considered as part of the adjudication of the SEMMP issue because it relates to activities associated with the construction of the proposed RMU-2 landfill. I agree with the ALJ's recommendation that any concerns of the parties with respect to the RAMP are to be raised and addressed with respect to the adjudication of the SEMMP. I discern no prejudice to the parties arising from the way that the issues have been addressed by the ALJ.

V. Other Issues Raised on Appeal

A. CWM's Current Operations

On appeal, the RRG petitioners assert that the ALJ failed to address their argument, made in their supplemental petition, that CWM's current treatment and storage operations violate its existing Siting Certificate (see RRG Petitioners Appeal at 14). The RRG petitioners argue that this issue "remains viable" in this proceeding (id.).

In its Third Interim Decision, the Siting Board dismissed this portion of the RRG Petitioners' appeal, finding that this proposed issue "relates to what is authorized by the existing permit" and is not an issue related to the current siting application before the Siting Board (SB Third Interim Decision at 13). I concur with the Siting Board's determination on this point. The question of whether CWM is in compliance with its existing permits and/or Siting Certificate (see RRG Supplemental Petition at 17-18) is not before me in this proceeding. This proceeding is limited to CWM's pending permit applications related to the proposed RMU-2 landfill. The RRG petitioners' appeal relating to the status of the facility's current operations is dismissed.

B. Additional Arguments of Ms. Witryol on Appeal

In addition to the issues Ms. Witryol has raised and which have been addressed herein, Ms. Witryol makes various additional arguments in her appeal. A number of her arguments are addressed to matters within the jurisdiction of the Siting Board and not the Department, and accordingly will not be addressed here. Among the procedural arguments made by Ms. Witryol are that: (1) the ALJ improperly limited the scope of the 2018 issues conference and thereby violated petitioners' due process rights (see Witryol Appeal at 3-4); (2) the ALJ overlooked or failed to consider certain evidence or arguments submitted by her in her supplemental petition (see e.g. id. at 5, 11, 13, 18-26); and (3) CWM was improperly permitted to supplement or modify its SPDES permit application in response to her supplemental petition (see id. at 11-12). Ms. Witryol also offers factual corrections to the 2019 Issues Ruling (see id. at 14-15) and moves to strike a portion of the issues conference transcript (see id. at 26).

It is clear that the ALJ has thoughtfully and thoroughly addressed, in the 2019 Issues Ruling, the additional matters raised by Ms. Witryol in her supplemental petition. I have considered and evaluated the entirety of the additional issues raised that are within the Department's jurisdiction, including those not specifically referenced herein.

Based upon my review of the record, Ms. Witryol has not raised any substantive and significant issue with respect to these additional arguments. As to her procedural arguments, I find these to be without merit. The ALJ properly limited the scope of the supplemental issues conference to matters pertaining to the draft SPDES permit and the draft ASF permit. In this administrative proceeding on the proposed project, the parties had a full and fair opportunity to raise any and all issues relevant to all other matters at the first issues conference. I do not see any indication that the ALJ overlooked or failed to consider the arguments referenced, nor does the record reveal any improper supplementation or modification by CWM of its permit applications.

Finally, I decline to make the corrections requested by Ms. Witryol and deny her request to strike a portion of the issues conference transcript. As to the latter, such a request to strike a portion of the transcript should first have been made to the ALJ. Notwithstanding the foregoing, for purposes of judicial economy, I have considered Ms. Witryol's request and hereby deny it.

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To the extent that any other issues have been raised on the appeals which are subject to the Department's jurisdiction, these have been considered and are found to be lacking in merit.

CONCLUSION

The 2019 Issues Ruling is affirmed except for my determination that the meteorological data used in the air dispersion modeling is an issue for adjudication, as set forth herein. I hereby remand the matter to ALJ O'Connell for further proceedings consistent with this Second Interim Decision and the Ruling and Third Interim Decision of the Facility Siting Board.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Louis A. Alexander
Deputy Commissioner

Date: August 11, 2023
Albany, New York