

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]).

DECISION

OF

THE FACILITY SITING BOARD

SEPTEMBER 29, 2025

This Decision relates to the application of CWM Chemical Services, LLC (CWM or applicant) for a Certificate of Environmental Safety and Public Necessity (Siting Certificate or Certificate) pursuant to ECL Article 27, Title 11 to site the proposed Residuals Management Unit No. 2 (RMU-2) at its Model City Facility in the Towns of Porter and Lewiston in Niagara County. The proposed landfill would occupy about 43.5 acres of the 710 acres at the Model City Facility. The construction of the landfill would also require deconstruction and relocation of several features at the facility. As required by law, former Governor Andrew Cuomo constituted this Facility Siting Board (Siting Board or Board) in May 2014.

Pursuant to ECL Article 27, Title 11 and 6 NYCRR Part 377,¹ the Siting Board must render a decision on whether to grant, conditionally grant or deny a Siting Certificate for the proposed facility. The Board notes that this matter began in 2014,² and over the past ten years, the Board has issued five interim decisions, ten rulings on motions, and two memos to the ALJ and parties providing clarification and responses to questions. The Board members attended twenty-three days of evidentiary hearings from April 11, 2022, to April 15, 2024, on the issues that were joined for adjudication by the Administrative Law Judge (ALJ), the Siting Board, and the New York State Department of Environmental Conservation (Department or DEC) former Deputy Commissioner. After the close of the hearings, the ALJ accepted closing briefs from the parties that were received on October 1, 2024.

The Siting Board also notes that this is the first hazardous waste facility siting certificate application proceeding conducted after the adoption of the New York State Hazardous Waste Facility Siting Plan (Siting Plan) in October 2010. It is also the first application to be considered after the United States Environmental Protection Agency (EPA) determined that states would no longer be required to ensure there is in-state capacity to manage hazardous waste generated in the state so long as there is adequate national capacity (*see e.g.* Application Ex. 1, Part 361 Permit Application, Revised November 2013 [Application Ex. 1], Appendix C, Siting Plan at pp. Intro-3, Intro-5 [pdf pp. 192, 194]; Berlow-N'dolo Ex. 33, Appendix E [pdf pp. 183-186]).

On May 9, 2025, the Office of Hearings and Mediation Services issued ALJ Daniel P. O'Connell's Hearing Report and Recommended Decision, dated April 16, 2025, (*see Matter of CWM Chemical Services, LLC*, 2025 WL 1427117 [Recommend Decision Apr. 16, 2025] [Recommended Decision]) together with a notice of schedule for filing exceptions, dated May 9, 2025. Following the issuance of the ALJ's Recommended Decision, the parties were provided the opportunity to file briefs on exception and briefs opposing exceptions to the Siting Board and the DEC Region 6 Regional Director.³ Briefs on exception were timely received from CWM; Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities);

¹ Effective November 4, 2017, 6 NYCRR Part 361 was renumbered as Part 377.

² During this time, there have been twenty different agency heads, and thirteen different agency designees assigned to the Board due to retirements, departure from or movement within State service. The Board acknowledges the contributions of former agency Board members: Paul D'Amato (Chair), Deirdre Scozzafava, Matthew Forcucci, Christopher Bauer, Darrell Kaminski, Frank Cirillo, James Rusak, and Matthew Maraglio over the previous ten years.

³ By memorandum dated May 23, 2024, DEC Interim Commissioner Sean Mahar delegated decision-making authority in this matter related to the DEC permits to Randall Young, Regional Director, Region 6.

Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau) (collectively, RRG); Amy Witryol; Buffalo Niagara Waterkeeper (BNW); and the Tuscarora Nation on June 30, 2025, and briefs opposing exceptions were timely received from those parties and DEC staff on July 25, 2025.

This decision addresses those issues that fall within the Siting Board's jurisdiction as provided in ECL Article 27, Title 11 "Industrial Siting Hazardous Waste Facilities." As previously explained, the Siting Board addresses those issues and matters that are primarily Certificate related, and the DEC Commissioner, or Commissioner's designee, addresses those issues and matters that are primarily permit related (*see e.g., Matter of CWM Chemical Services, LLC*, 2016 WL 11970379, at *2 [Interim Decision Aug. 11, 2026]). The law requires the Board to render a final decision based upon the record. In this proceeding, notwithstanding the fact that the makeup of the Siting Board changed over the years, the Siting Board made a concerted and collective effort to analyze a lengthy and complex record to reach common ground on the issues presented for the Board's consideration. As a result, we unanimously adopt the ALJ's Recommended Decision as our decision except as expressly noted below.

DISCUSSION

I. Siting Industrial Hazardous Waste Facilities (ECL 27-1105[3][f])

ECL 27-1105(3)(f) provides, "[t]he board shall render a decision based upon the record either granting the application, denying it, or granting it upon such terms, conditions, limitations, or modifications thereof as the board may deem appropriate. The board shall deny an application to construct or operate a facility"

- a. "if residential areas and contiguous populations will be endangered,"
- b. "if it otherwise does not conform to the siting criteria established for such facility pursuant to section 27-1103 of this title or,"
- c. "upon final adoption of the statewide hazardous waste facility siting plan established pursuant to section 27-1102 of this title,"
 - (i) "if it is not consistent with such plan or"
 - (ii) "if the need for such facility is not identified in such plan and the board finds that the facility is not otherwise necessary or in the public interest."

(See ECL 27-1105[3][f]).

In this matter, the ALJ and the parties acknowledge that the Siting Plan and the updates to the Siting Plan conclude there is no current or near term need for increased capacity for hazardous waste management in New York State.⁴ Accordingly, the Siting Board is charged with determining whether the proposed facility: (a) will endanger residential areas and contiguous populations, (b) conforms to the siting criteria, (c[i]) is consistent with the Siting Plan, and (c[ii]) is otherwise necessary or in the public interest. CWM bears the burden of proof on each of those determinations.

⁴ The EPA has determined that adequate national hazardous waste landfill capacity exists through 2049 (*see* National Capacity Assessment Report, U.S. Environmental Protection Agency, January 24, 2025).

The intervening parties bear the burden of proof on those issues raised by the parties that were joined for adjudication.

Before addressing each of those determinations, the Board must address two general arguments presented by CWM: whether a Siting Board decision would violate federal law, and whether the Siting Board should issue a siting certificate because prior Siting Boards issued siting certificates for other facilities at Model City.

- Federal Law

Applicant argued during the initial issues conference in this matter, noted in its closing brief, and argued in its brief on exceptions that the Siting Plan states that any decision on CWM's siting application "that has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste' in New York State would violate federal law [40 CFR § 271.4(b)]" (see CWM Closing Brief at p. 103 [quoting the Siting Plan at p. 6-7]; CWM Brief on Exceptions at p. 60). Section 271.4 of Title 40 of the Code of Federal Regulations (CFR) reads:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the state manifest system does not meet the requirements of this part, the state program shall be deemed inconsistent. The state manifest system must further allow the use and recognize the validity of electronic manifests as described in § 260.10 of this chapter.

The Siting Plan states,

Any decision regarding hazardous waste facility siting must not result in the state's delegated hazardous waste management program becoming inconsistent with federal requirements pursuant to 40 CFR 271.4(b), including the requirement that '[a]ny aspect of ...the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage

or disposal of hazardous waste in the State may be deemed inconsistent.’ New York’s requirements for the siting of any new or expanded hazardous waste facilities in the state must accordingly be read in the context of this federal requirement.

(Application Ex. 1, Appendix C, Siting Plan at p. 9-4 [pdf p. 327]).

First, the CFR language quoted above demonstrates that a State program “may be deemed inconsistent,” not “would violate federal law” as asserted by applicant. Second, 40 CFR § 271.4 refers to State laws and programs, not decisions on permit or certificate applications. Therefore, the Siting Board disagrees with the sweeping representation made in the Siting Plan and the argument presented by CWM.

The State Resource Conservation and Recovery Act (RCRA) program was approved by the EPA effective May 29, 1986 (51 FR 17737) with revisions to the program authorized by EPA over the years (*see e.g.*, New York: Final Authorization of State Hazardous Waste Management Program Revision, effective July 3, 1989 [54 FR 19184], May 7, 1990 [55 FR 7896], October 29, 1991 [56 FR 42944], May 22, 1992 [57 FR 9978], August 28, 1995 [60 FR 33753], October 14, 1997 [62 FR 43111], January 15, 2002 [66 FR 57679], March 14, 2005 [70 FR 1825, as corrected on April 4, 2005 at 70 FR 17286], August 31, 2009 [74 FR 31380], and January 12, 2010 [75 FR 1617]). The approval of New York State’s RCRA program and revisions thereto did not include ECL Article 27, Title 11 or former 6 NYCRR Part 361 (currently Part 377).

The Federal RCRA program, however, does not preclude states from adopting and enforcing regulations broader in scope than the Federal program. EPA approval of state programs does not include a state’s regulations that are broader in scope (*see e.g.*, New York: Decision on Final Authorization of the State Hazardous Waste Management Program, May 15, 1986 [51 FR 17737, 17738]), and EPA will not enforce those regulations (*see e.g.* New York: Final Authorization of the State Hazardous Waste Management Program Revision, November 16, 2001 [66 FR 57679, 57684]). When Wyoming’s RCRA program was granted final authorization, the EPA found that, “Wyoming’s program is ‘broader in scope’ than the Federal program in two significant ways. First, Wyoming rules require an applicant for a permit to demonstrate fitness by requiring that the past performance of the applicant or any partners, executive officers, or corporate directors, be reviewed. Second, county commissions must approve certain hazardous waste management facilities, and certain hazardous waste management facilities must also obtain an industrial siting permit. These portions of Wyoming’s program, because they are broader in scope, are not a part of the Federally approved program” (*see* Wyoming: Final Authorization of State Hazardous Waste Management Program, October 4, 1995 [60 FR 51925]). Notably, EPA did not deem the Wyoming program provisions that were broader in scope than the Federal RCRA program to be inconsistent with the Federal program.

The Board concludes that CWM’s statements and arguments regarding 40 CFR 271.4(b) and the Siting Plan’s references thereto are unpersuasive. The Federal regulation relates to the approval of state RCRA programs or laws that are consistent with the Federal RCRA program. To obtain approval, the State program cannot act as a prohibition on the management of hazardous waste in the State. A decision on a siting certificate or a permit application does not constitute a

statewide prohibition on hazardous waste management nor is that decision governed by 40 CFR 271.4. As discussed above, New York State's siting law (ECL Article 27, Title 11) and regulations (6 NYCRR part 377) are broader in scope than the Federal RCRA program and were promulgated to set up the process for siting a hazardous waste facility in New York State and provide procedures for reviewing an application for a siting certificate. If an application for a siting certificate is denied, the denial is based on the unique and fact-specific record before the Siting Board, regardless of the reason for the denial. Such an individual result hardly constitutes a prohibition on hazardous waste management in the State.

Furthermore, DEC may deny a permit application based on the character and fitness of the applicant even when that determination has no basis in human health or environmental protection. DEC has denied landfill permit applications in the past based on the criminal record of the applicant (*see Matter of Al Turi Landfill, Inc.*, 1999 WL 566111 [Decision Apr. 15, 1999], holding that it is well established that agencies with licensing authority have implicit discretion to determine the fitness of an applicant and deny a permit when the applicant is unsuitable due to convictions for crimes involving conspiracies to defraud the government [internal citations omitted]). Similarly, a siting board could deny an application for a siting certificate based on the criminal record of the applicant even when that criminal record is not based on human health or environmental protection or the technical aspects of certificate and permit applications. If the Siting Plan's statement and CWM's arguments were followed, a siting board would not be able to deny a certificate based on the fitness of the applicant or even when an applicant failed to meet its burden of proof unless that burden involved human health and environmental protection. Such a result is inconsistent with the plain reading of ECL Article 27, Title 11 and 6 NYCRR Part 377. Accordingly, the Siting Board rejects the sweeping statement in the Siting Plan and the arguments made by CWM in this regard.

- Previous Siting Board Matters

CWM argues that this Board should issue a siting certificate for the RMU-2 proposal because previous Siting Boards issued siting certificates for new facilities at the Model City Facility by finding the proposals satisfied the siting criteria and other requirements of ECL 27-1105 (*see e.g.*, CWM Brief on Exceptions at p. 6). The Board disagrees with that assertion because previous Siting Board matters did not join any issues for adjudication and the Siting Plan did not exist. Specifically, the 1993 Siting Board, which approved RMU-1: 1) relied on the application materials to reach its determinations, 2) did not need to determine whether the facility was otherwise necessary or in the public interest, 3) did not address the legacy waste present at this facility and need for further radiological surveys prior to excavation, 4) did not benefit from the development of an evidentiary record on a variety of issues, and 5) perhaps most importantly, operated under the assumption that the facility was needed because federal law required each state to "demonstrate the continuing capacity to manage all of the hazardous waste generated within its borders" (*see Matter of CWM Chemical Services, Inc.* 1993 WL 546813, *4-5 [Decision Dec. 10, 1993]).

The Board is also aware that prior Siting Boards made requests of the applicant to supplement the record, which consisted of the application materials (*see Matter of SCA Chemical Services, Inc.*, 1986 WL 26332, at *3, 10 [Decision Oct. 23, 1986]; *Matter of CWM Chemical*

Services, Inc., 1993 WL 546813, at *5, 6 [Decision Dec. 10, 1993]). That practice may be appropriate when there were no intervenors in the proceeding, no issues joined for adjudication, and no evidentiary hearings in an era when the facility was needed for in-state hazardous waste disposal capacity. Here, however, where an evidentiary record was developed by the parties, and there is no demonstrated need for the facility, it would have been inappropriate for the Board to request CWM to supplement the application materials, especially if that request would have assisted the applicant in meeting its burden of proof. It would likewise be inappropriate for the Board to encourage the parties to introduce evidence outside of the existing record just so that could be considered during the Board's review of the record.⁵

A. Residential Areas and Contiguous Populations

The Board adopts the ALJ's conclusions and recommendation regarding this question. The Board also addresses the conflation of this issue caused by prior Siting Board decisions. CWM argues that the determination of endangerment is covered by the scoring criteria provided in 6 NYCRR 377.7 and cites previous Siting Board decisions that considered "the statutory criterion concerning endangerment of residential and contiguous populations to be enfolded in the specific criteria dealing with proximity of populations, particularly 6 NYCRR 361.7(b)(1), (2), and (4) . . ." (see *Matter of Hudson River PCB Project*, 1989 WL 66965, *6 [Decision Jan. 5, 1989]).

This Board disagrees. Even if the siting criteria ratings result in a 1 based on proximity and density of population, a board could still conceivably determine there is endangerment to residential areas and contiguous populations. The law does not require any specific distance or population density to reach that conclusion. For example, the first siting consideration could result in a rating of 1 based on density of population, but a board could still determine that even a population density of less than 150 persons per square mile could be endangered by a proposed project. According to CWM's interpretation of the regulations, a rating of 1 would demonstrate that there is no endangerment. That argument would result in the Board needing to determine how many people can be endangered before concluding significant endangerment exists. Such a result is untenable and without merit.

The Board finds that previous Siting Boards have erroneously equated the criteria as fulfilling the analysis required by ECL 27-1105(2)(f). Clearly, those Siting Boards arrived at a false equivalence that is not supported by the law or regulations. For the reasons stated in the Recommended Decision, the Siting Board concludes that the proposed RMU-2 would not significantly endanger residential areas or contiguous populations (see Recommended Decision, 2025 WL 1427117, at *15-22). This conclusion, however, should not be interpreted to mean that the Board believes that disadvantaged communities identified by the New York State Climate Justice Working Group pursuant to ECL 75-0111 would not be subjected to increased greenhouse gas emissions and noise attributed to truck traffic along the transport routes and an increased

⁵ It is, however, appropriate to require further development of the record based on issues that have been raised by the parties (see *Matter of CWM Chemical services, LLC*, 2019 WL 4567319, at *5-6 [Third Interim Decision Sept. 10, 2019] [wherein, the Siting Board required further development of the record related to the use of on-site versus off-site meteorological data that formed the basis for analysis in the Siting Certificate application and the draft DEC Air State Facility permit, respectively])

burden from the disposal of hazardous waste in the community or what constitutes an adequate buffer between a hazardous waste management facility and a school.

B. Siting Criteria (6 NYCRR 377.7[b][1-14])

Burden of Proof. In its First Interim Decision in this matter, the Board noted that pursuant to former 6 NYCRR 361.7,

Each of the specific siting criteria that must be considered by the Siting Board describes three possible options to score each of the criteria, from most favorable to least favorable. The applicant has the burden of proof to demonstrate that the site conforms to the descriptions in the most favorable or less favorable categories. The burden of proof standard applied in this proceeding is preponderance of the evidence. If the applicant fails to meet its burden, the Siting Board must find that, without any evidence on the record to the contrary, the site falls within the least favorable category.

(See *Matter of CWM Chemical Services, LLC*, 2016 WL 11970379, at *4 [First Interim Decision Aug. 16, 2016] [internal citations omitted] [emphasis added]).

Therefore, if CWM failed to meet its burden of proof on any of the siting criteria, the Board must find that the site falls within the least favorable category for those criteria. Based on the record before it, the Board concludes that CWM failed to provide information or evidence in support of its position on the following specific criteria because the record is devoid of information regarding the designated route for trucks arriving from eastern Niagara County, State Route 104:

- The residential and nonresidential population for areas within 0.5 mile of the anticipated transport routes (6 NYCRR 377.7[b][2][ii][a]);
- The projected population and the rate of growth for areas within 0.5 mile of the transport routes during the 20-year period following initial site operation (6 NYCRR 377.7[b][2][ii][b]);
- Length of transport route (6 NYCRR 377.7[b][3][ii][b]);
- Accident rate of transport route (6 NYCRR 377.7[b][3][ii][c]);
- Structures within 0.5 mile of the transportation route (6 NYCRR 377.7[b][3][ii][d]); and
- Transportation restrictions (traffic intersections, traffic/railroad intersections, tunnels, bridges, and toll booths) (6 NYCRR 377.7[b][3][ii][e]).

The Board arrives at this conclusion because the designated route according to CWM's application is described as:

State/Federal highways only when entering Niagara County to Rte. 104 or NYS Thruway (I-190) north to Rte. 265 (north) to Rte. 104 then:

1. Route 104 to Route 18
2. North on Route 18 approximately 5 miles to Balmer Road

3. Right (east) on Balmer Road
4. Proceed 3 miles to Guardhouse at truck/plant entrance

The reverse should be followed when leaving the facility. All waste haulers MUST use this route unless the CWM guard directs the driver north on Route 18 to Route 93 east during school "black out" hours for empty loads only.

(See Application Ex. 1, Appendix A [pdf p. 114]).

State Route 104 enters Niagara County from the east and is designated as a route to the facility consistent with the holding of the 1993 Siting Board's directive that "[t]rucks carrying hazardous wastes to the facility and arriving via I-190 shall use the existing designated route. Trucks carrying hazardous wastes to the facility arriving from the eastern part of Niagara County shall use the designated state highways [Route 104] to Balmer Road" (see *Matter of CWM Chemical Services, Inc.*, 1993 WL 546813, at *8 [Decision Dec. 10, 1993]). Yet, the analysis related to the siting criteria and transportation impacts on this record are limited to the transport route leaving NYS Thruway I-190 to Rte. 104 to Rte. 18 to Balmer Road to the entrance, thus ignoring the thirty (30) miles of Route 104 in Niagara County east of the intersection with Route 18 that is also a designated transport route to the facility.⁶ CWM's application states:

The primary access routes to the facility are the NYS Thruway (I-90), I-290, I-190, NYS Route 104, NYS Route 18 and Balmer Road. Regional and local maps depicting the location of the Model City Facility are presented on Figures 1 and 2. Approximately 90% of all shipments (including supplies and products) to the site use these routes; the remainder use local roads to reach the site.

(See Application Ex. 1 at p. 7 [pdf p. 14]).

That statement is ambiguous and could mean any number of trucks up to 90% use Route 104 east of Route 18. In addition, CWM asserts in its brief opposing exceptions that the primary transportation route is the transport route from I-190. That assertion is inconsistent with the routes described in the application (see Application Ex. 6, DEIS, Revised November 2013 [Application Ex. 6 or DEIS], at p. 172 [pdf p. 195], Appendix L [pdf pp. 1033-1034]; Application Ex. 1 at p. 7 [referencing Appendix L of the DEIS]). More importantly, the siting criteria do not require the Board to focus on any primary route but instead direct the Board to look at routes over which waste will be delivered to the facility, including Route 104 east of Route 18. It is also conceivable that trucks could use Route 104 from the City of Niagara Falls, but again there is no analysis of that portion of Route 104 in the application materials. Accordingly, each of those specific criteria must be rated a 3 as being least favorable (see *Matter of the NYSDEC Division of Water*, 1982 WL 178103, *16 [Decision Apr. 22, 1982]). The Board notes that CWM already rated the first and fifth criteria above as a 3 based on the truck route from I-190. If the Board limited its analysis to the truck route from I-190, the Board would adopt the ALJ's recommendations as to each of the above-referenced criterion subject to our comments below.

⁶ As stated above, it would have been inappropriate for this Siting Board to request additional information from the applicant regarding the use of Route 104 from eastern Niagara County or Niagara Falls as a transport route.

Although the Siting Board has the authority to condition a Siting Certificate so that hazardous waste transport would be prohibited on Route 104 east of Route 18, that would be inconsistent with the agreement arrived at between the Community Advisory Committee and CWM as approved in the siting of RMU-1 by the 1993 Siting Board.

Weights. The facility siting criteria provides that “[t]he tables following this section represent guidelines for evaluating the relative importance of each criterion. The board may alter the weight given to any or all the criteria depending upon specific circumstances unique to the proposed site. The board shall reallocate weights among remaining criteria should one or more criteria not be applicable to a specific site, such that the sum of the average weights for the remainder of the criteria equals 100. The board shall determine the importance assigned to each criterion and signify the same in its report” (6 NYCRR 377.7[c][2]). The siting evaluation worksheet included in the regulations recommends percentages of siting consideration weight assigned to individual siting criteria as well as the weight assigned to each siting consideration.

Here, the Board’s primary concerns are the following siting considerations: populations adjacent to the transport route; risk of accident in transportation; proximity to incompatible structures; municipal effects; conservation of historic and cultural resources; and open space, recreational and visual impacts. Due to the proximity of the Lewiston-Porter Schools, the Board would have been justified in increasing the distances in several categories provided in the regulations. The Board, however, refrained from doing so, but instead increased weights for some of those siting considerations of primary concern to the Board, which is consistent with prior Siting Boards’ analysis of the Board’s discretion concerning weights assigned to the siting considerations (see e.g., *Matter of Hudson River PCB Project*, 1989 WL 66965, *1, *6 [Decision Jan. 5, 1989]; *Matter of the NYSDEC Division of Water*, 1982 WL 178103, *27 [Decision Apr. 22, 1982]; *Matter of SCA Chemical Services, Inc.*, 1986 WL 26332, *6 [Decision Oct. 23, 1986]). In addition, the Board also shifted the percentage of siting criteria weight within specific siting considerations to reflect the relevant importance of the criteria to those considerations.

As expressed in the regulations, “the relative desirability of a proposed facility shall be determined by the Board by applying its conclusions to the siting criteria” (6 NYCRR 377.7[3][c][3]). The scoring applied by the Board represents the relative desirability of the proposed facility and determines whether the siting criteria have been satisfied. Scores of 200 and above do not meet the siting criteria. CWM, Ms. Witryol and the Tuscarora Nation submitted siting evaluation worksheets which resulted in scores of 152, 292.7 and 246 respectively.⁷ ALJ O’Connell provided his recommended ratings of the criteria and arrived at a total score of 209.2. Based on the Board’s review of the record, the Board hereby adopts the ALJ’s ratings subject to our modifications below. The Board finds that the record supports a score of 229.9 and concludes that the siting criteria have not been met.⁸ Therefore, CWM’s application for a Siting Certificate is denied.

⁷ Ms. Witryol’s Siting Evaluation Worksheet inadvertently omitted the score of 3 that Ms. Witryol assigned to *Degree to which the proposed facilities are readily noticeable to passersby*. With the score included, Ms. Witryol’s total would be 294.5.

⁸ The Siting Board’s Siting Evaluation Worksheet is attached hereto as Appendix A.

The site. For the reasons cited in the 1993 Facility Siting Board's decision, the Board also concludes that the site boundary to be used when applying the siting criteria is CWM's Model City Facility site boundary as depicted in the application (see Rizzo Ex. 1, Figure 2 "Property Limit"), not the proposed RMU-2 footprint or distances from a centroid on the site (see *Matter of CWM Chemical Services, Inc.*, 1993 WL 546813, *2 [Decision Dec. 10, 1993]). The Board takes issue with CWM's application materials because in many instances the Board cannot determine where CWM took the measurements required by the siting criteria, and it appears CWM's measurements are inaccurate when compared to measurements from the site boundary using Google maps. CWM's measurements related to siting criteria are expressed in narrative descriptions in the application materials and CWM's briefs. Some of those descriptions are vague in describing where measurements are being taken from or provide statements that are inconsistent with the specific criteria under consideration. The only visual depiction of a measurement for a siting consideration is contained in CWM's Brief on Exceptions (see CWW Brief on Exceptions at p. 21 [Figure 2]). Clearly, the 1993 Siting Board did not have the advantage of using Google maps to verify or compare distances expressed in the application materials. Because the ALJ took official notice of Google maps for determining distances, without objection from the parties, the Board adopts the use of Google maps in determining distances required by the relevant siting requirements and criteria discussed below.

The discussion that follows addresses instances where the Board modifies the ALJ's recommended ratings, weights and percentages, or disagrees with the rating assigned by CWM to the siting criteria as well as the ratings proposed by Ms. Witryol and the Tuscarora Nation. In addition, the Board provides reasoning for changing the weights or percentages thereof for certain considerations and criteria.

The ALJ's recommended score results in a total score of 209.2. The Board, however, independently of the ALJ's recommendations, redistributed weights and percentages of siting criteria weights differently than the ALJ, based on the Board's primary concerns identified above and through considerable deliberation by the Board. The Board agrees with the ALJ's conclusion that the siting criteria results in a score over 200, but the Board's analysis of the record and application of weights to siting considerations differs from the ALJ's recommendations. Although the Board finds that the ALJ's analysis and ratings are supported by the record, the Board nonetheless reviewed the record and arrived at its own conclusions.

1. Population Density (6 NYCRR 377.7[b][1]).

The Board chose to reduce the weight assigned to population density within 0.5 miles of the site boundary from a weight of 10 to 8 due to the historically relatively low population density within 0.5 miles of the site boundary. Under the circumstances here, the next three siting considerations more adequately address those portions of the population likely to experience impacts from the proposed siting of RMU-2. This is one consideration where the Board, in the alternative, felt that increasing the distance to include the schools would have been justified. School property is approximately 1 mile west of the site boundary, with the school buildings and athletic fields falling within 1.5 miles of the site boundary. If the Board had adjusted those distances, as advocated by some of the parties, the total criteria scoring would have increased accordingly. The Board, however, chose a more conservative approach by adjusting weights rather

than rewriting the specific criteria by adjusting distances even though the regulations authorize the Board to adjust those distances if “specific conditions unique to a particular site dictate [the consideration of greater distances] (see 6 NYCRR 377.7[b][1][i]). The Board also concludes, as discussed below, that too much emphasis is placed on the projected population within 0.5 miles of the site boundary over the next twenty years and reduces the percentage of siting consideration weight to 10% (down from 30%) for that criterion and increases the percentage for the first criterion to 90% (up from 70%).

As expressed further below, the Board’s conclusion is not an opinion on what constitutes an adequate buffer between a hazardous waste management facility and a school. The ALJ and CWM rated both criteria in this siting consideration a 1, whereas Ms. Witryol argued that the distance should be expanded to three miles to include the Lewiston-Porter schools, and the first criteria should be rated a 3. The application states that there are “23 residential households and four non-residential businesses within 0.5 mile of the site boundary” and estimates the population density (see Application Ex. 1 at p. 39 [pdf p. 46]).

On exceptions, Ms. Witryol argues that increasing the distance from 0.5 mile to 3 miles for these criteria is warranted due to the size of CWM’s operation, the presence of radiological contamination at the site, the obsolete surveys included in the application materials, and the lack of evidence regarding population growth (see Witryol Brief on Exceptions at pp. 6-8). In part, Ms. Witryol is arguing that CWM did not meet its burden of proof on these criteria.

As discussed above, the Board refrains from increasing the distances for these criteria. Based on the record, the Board adopts the ALJ’s recommended ratings. Due to the low density of population within 0.5 miles of the site boundary, the Board concludes the two specific criteria in this siting consideration should be rated a 1.

2. Population Adjacent to Transport Route (6 NYCRR 377.7[b][2]).

The Board chose to increase the weight of this consideration from 7 to 9 based on the number of homes and sensitive receptors (schools, churches, hospitals, and residences) that are located along the designated transport routes and the number of waste trucks that would traverse the routes. Notably, up to 220 waste trucks per day and up to 35 waste trucks per hour during certain times of day can transport waste along the designated routes (see Application Ex. 1, Traffic Impact Study at p. 4 [pdf p. 675]; Application Ex. 6, Traffic Impact Study at p. 4 [pdf p. 962]). In addition, the portion of the transport route, as well as CWM’s property, in the Town of Porter is located in a disadvantaged community as identified by the New York State Climate Justice Working Group pursuant to ECL 75-0111. The Board also considered the fact that CWM provided no information regarding the population adjacent to the other authorized routes to the facility from eastern Niagara County. As discussed above, when the applicant fails to meet its burden of proof that the site conforms with the descriptions in the most favorable or less favorable categories, “the Board must find that, without any evidence on the record to the contrary, the site falls within the least favorable category” (see *Matter of CWM Chemical Services, LLC*, 2016 WL 11970379, at *4 [First Interim Decision Aug. 16, 2016], citing *Matter of the NYSDEC Division of Water*, 1982 WL 178103, at *16 [Decision Apr. 22, 1982]). The regulations are phrased in the terms “anticipated transport routes” and “transport routes” “defined as the route(s) between the site entrance and the

interstate/limited access highway interchange(s), which is to be used by site-bound motor vehicles to deliver wastes to the site” (see 6 NYCRR 377.7[b][2][i] and [ii][a][b]).

In addition, the Board reallocated the percentage of siting consideration weight with 90% (up from 70%) assigned to the population for areas within 0.5 miles of the transportation routes and 10% (down from 30%) assigned to the projected population and rate of growth because the current population experienced the truck traffic from the operation of RMU-1 and would again experience those impacts if the proposed RMU-2 were sited. Moreover, once trucks enter the Town of Porter, they are entering a disadvantaged community and subjecting that community to increased greenhouse gas emissions and noise. Therefore, the Board finds the present populations along the transport route should be afforded greater weight in this consideration than the regulations provide. ALJ O’Connell recommends the Board increase the weight of this siting consideration from 7 to 10. The Board, however, in its independent judgment, finds increasing the weight from 7 to 9 addresses the Board’s concerns and is supported under the circumstances.

CWM takes exception to the ALJ’s recommended increasing of the weight for this siting consideration from 7 to 10 and argues that doing so amounts to double counting because the ALJ’s concerns are addressed by other siting considerations. The Board disagrees. There is nothing in the regulations that prohibit a set of facts or a single fact from being considered for increasing the weight for one or more siting considerations or for rating several criteria.

Population for areas within 0.5 mile of the anticipated transport routes. The parties agree, and the ALJ recommends, that the residential and nonresidential population within one-half mile of the transport route from I-190 to the gate on Balmer Road is greater than 1500 persons and should be rated a 3. The Board agrees but also notes, in addition, that due to the lack of record evidence regarding the transport route from eastern Niagara County, this criterion must be rated a 3. Accordingly, the Board rates this criterion a 3.

CWM did not take exception to the rating but objected to the overall increase in weight for this siting consideration. As explained above, the Board’s increase in the overall weight of this siting consideration and reallocation of the percentage assigned to each criterion in this siting consideration reflects the Board’s concerns regarding the impacts to the populations within 0.5 mile of the transport routes.

The projected population and rate of growth for areas within 0.5 mile of the transport route during the 20-year period following initial site operation. The parties differ in the rating that should be assigned to the projected population and rate of growth over the next twenty years, with CWM assigning a rating of 1 and arguing that any projected growth in the Town of Lewiston will not take place within 0.5 mile of the transport route. The ALJ found that the record regarding potential development in the Town of Lewiston supported “a reasonable inference that populations along the transportation route and the rate of growth would increase in the coming years, but not necessarily above current levels within 0.5 miles of the site boundary” (Recommended Decision, 2025 WL 1427117, at *27). Therefore, the ALJ assigned a rating of 2 to this criterion.

CWM takes exception to the ALJ’s recommended rating and argues the record does not support the conclusion that development will occur within 0.5 miles of the transport route from I-

190. As noted above, there is no information in this record regarding this criterion related to the designated transport route from eastern Niagara County. Ms. Witryol takes exception to the ALJ's rating because she interprets the regulations as requiring a rating of 3 for this criterion whenever the first criterion is rated a 3. The Board finds Ms. Witryol's argument is not supported by the plain language of the regulations. The Board concludes CWM failed to meet its burden of proof, therefore with no evidence to the contrary, the Board assigns a rating of 3 to this criterion.

If the Board limited its analysis to the truck route from I-190, the Board would adopt the ALJ's recommendations as to the rating for each of the above-referenced criterion.

3. Risk of Accident in Transport (6 NYCRR 377.7[b][3]).

Due to the transport route passing churches, hospitals, schools and many homes and the number of waste trucks that can traverse the route each day, the Board increased the overall weight of this consideration from 10 to 11. If an accident were to occur, it has the potential of impacting many people, including school age children. In addition, the Board decreased the percentage of siting consideration weight assigned to the accident rate of the transportation route to 10% (down from 20%) and increased the percentage assigned to the structures within 0.5 miles of the transportation route to 20% (up from 10%) due in large part to the presence of the school, churches, hospitals, and residences along the route.

As previously discussed, the record contains no discussion or evidence related to the designated transport route from eastern Niagara County. The general siting considerations require the Board to consider the "transport route(s) between the site entrance and the interstate/limited access highway interchange(s) over which the wastes will be delivered to the site" (see 6 NYCRR 377.7[b][3][i]). As discussed above, the designated transport routes include "State/Federal highways only when entering Niagara County to Rte. 104 or NYS Thruway (I-190) north to Rte. 265 (north) to Rte. 104" (see Application Ex. 1, Appendix A [pdf p. 114] [emphasis added]). Therefore, several of the criterion under this siting consideration must be rated a 3. Because Route 104 is a state road traversing Niagara County from east to west, it would not have been unduly burdensome to include that route, at a minimum, in the analysis required by this siting consideration. In addition, trucks arriving from Canada could use Route 104 starting in Niagara Falls, but there is no discussion of that portion of Route 104 in the application materials.

CWM and the ALJ rated all but one of the criteria (*Mode of Transportation*) the same in this siting consideration. Ms. Witryol assigned a rating of 3 to all the criteria in this consideration.

Mode of transportation. CWM rated this criterion a 1 based on its conclusion that transport by truck has a lower associated accident rate compared to other modes of transportation. The ALJ rated this a 3, relying upon the discussion and rating provided by the 1993 Siting Board and the conclusions in the Federal Emergency Management Agency (FEMA) *Handbook of Chemical Hazard Analysis Procedures* (Handbook), which is referenced in the application materials. The ALJ found the conclusions of the 1993 Siting Board were persuasive, and when combined with FEMA's conclusion that trucks carrying hazardous materials account for the greatest number of accidents, the ALJ determined this criterion should be rated a 3 (Recommended Decision, 2025

WL 1427117, at *28-29). The criteria, however, requires the Board to review the rate of accidents not the number of accidents (*see* 6 NYCRR 377.7[b][3][ii]).

On exceptions, CWM argues that the ALJ's reliance on the 1993 Siting Board's analysis is misplaced and not supported by the record. CWM describes the accident rates by mode of transportation, as estimated in the FEMA Handbook to be:

Truck: 2×10^{-6} accidents per truck mile

Train: 3×10^{-6} accidents per train mile (6×10^{-7} railroad car mile)

Marine Vessel: 1×10^{-5} accidents per marine vessel mile

(*See* CWM Brief on Exceptions at p. 17).

The FEMA Handbook states that the accident rate for mainline rail accidents is 6×10^{-7} /car-mile and the accident rate for rail yard accidents is 3×10^{-6} /car-mile (*see* FEMA Handbook at p. 11-17, Table 11.5 [pdf p. 175]). In other words, the accident rate for accidents in rail yards is greater than the accident rate per truck mile, but the accident rate for accidents on rail mainlines is lower per mile than the accident rate per truck mile. According to the Handbook, more accidents occur within the rail yards than on the mainline by an order of magnitude. Rail yard accidents would be the equivalent of accidents that occur when a truck is being loaded with hazardous waste and exiting that site or facility, or when those trucks enter the gate at the Model City Facility and traverse the site to be unloaded. The Handbook does not provide accident rates for trucks while they are being loaded or unloaded or are leaving or entering facilities. Instead, the Handbook addresses accidents resulting from loading and unloading under fixed facilities (*see* FEMA Handbook at p. 11-6 [pdf p. 164]). Therefore, the Board concludes that the mainline accident rate for rail should be compared to the truck accident rate in this siting criterion.

The Handbook assigns various accident rates to marine transportation. The 1×10^{-5} assigned to accidents per marine vessel mile cited by CWM is only part of the Handbook's analysis. The Handbook lists several categories of marine accidents and assigns different rates to each. For instance, the accident rate for collisions on lakes, rivers and intercoastal waterways is 1×10^{-5} . The accident rate for groundings on lakes, rivers and intercoastal waterways is 5×10^{-6} . For collisions and groundings in harbors and bays the accident rate is 1×10^{-3} and for port call for collisions/casualties while moored the accident rate is 2×10^{-4} . Only the first two accident rate categories are based on a per mile accident rate. If the Board were to average the accident rate of the first two categories, the result would be an accident rate of 7.5×10^{-6} per marine transport per mile (*see* FEMA Handbook at p. 11-23, Table 11.6 [pdf p. 181]).

As a result, the Board compares the accident rate for trucks (2×10^{-6}) to rail (6×10^{-7} equivalent to 0.6×10^{-6}) to marine (7.5×10^{-6}) and concludes that rail transport has the lowest accident rate followed by truck and marine transport (*compare* FEMA Handbook, Tables 11.4, 11.5, 11.6 [pdf pp. 167, 175, 181]). Even if the Board averaged the two rail transport accident rates, the result would be 1.8×10^{-6} and still be lower than the truck accident rate. Although CWM and the FEMA Handbook described the spill size distribution in each category of transport, the Siting Board does not consider anything other than the accident rate for each category of transportation in this criterion.

Based on the Siting Board's analysis of the FEMA Handbook, the Board rates this criterion a 2, the transport mode used would have a somewhat higher accident rate associated with its utilization.

Length of transport route, Accident rate of transport route and Transport restrictions. On exceptions, Ms. Witryol argues that the application excludes accident data for significant portions of the transport route such as Military Road (Route 265) where trucks would pass a hospital. Therefore, Ms. Witryol asserts these three criteria must be rated a 3 (Witryol Brief on Exceptions at p. 9). In response, CWM asserts that Military Road can be "used as a short (less than one mile) alternate route from I-190 to NYS Route 104" and further argues that "the Hearing Report cites 18 years of accident data for NYS Route 104, NYS Route 18, and Balmer Road, which are correctly identified as the primary transportation route to the Facility" (CWM Brief Opposing Exceptions at p. 7).

The Board agrees with Ms. Witryol insofar as the application lacks accident data for Military Road (Route 265), which is part of the designated transport route as discussed above. That, however, only applies to and further supports the Board's conclusion that CWM failed to meet its burden of proof on the one criterion – accident rate of transport route. Because there is no analysis in the record regarding the truck route along Route 104 east of its intersection with Route 18 or south to Niagara Falls, the Board finds that CWM failed to meet its burden of proof and each of these criteria must be rated a 3.

Structures within 0.5 mile of the transportation route and Nature and volume of waste being transported. The parties and the ALJ assign these two criteria a 3. Based on the record, the Board agrees.

Again, if the Board limited its analysis to the truck route from I-190, the Board would adopt the ALJ's findings, conclusions, and recommended ratings regarding the remaining criteria in this siting consideration subject to our comments above and with the exception that the accident rate of the transport route must be rated a 3 due to the lack of analysis of the accident rate on Military Road.

4. Proximity to Incompatible Structures (6 NYCRR 377.7[b][4]).

Again, the Board would have been justified in increasing the distances in these considerations due to the proximity of the schools but chose to increase the overall weight to a 5 from a 3 and to decrease the percentage for proximity to airports to 20% (down from 50%) and increase the percentage for proximity to other incompatible structures to 80% (up from 50%) due to the small airport size and location of private residences.

Proximity to Airports. Contrary to CWM's assertion, the nearest airport (Windsor Airport) is between one and two miles away from the facility boundary. The ALJ took official notice of Google maps for the purpose of measuring distances from CWM's property boundary and concluded that the location of the Windsor Airport was between one and two miles away from CWM's site boundary and supported rating this criterion a 2. CWM did not take exception to the

ALJ's recommended rating for this criterion. Ms. Witryol, however, argues that because CWM did not include the information about Windsor Airport in its application, CWM failed to meet its burden of proof, and this criterion must be rated a 3. In opposition, CWM points out that Windsor Airport did not exist as an active airport when CWM submitted its application and provides links to support that argument (*see* CWM Brief Opposing Exceptions at p. 7). Those links, however, are outside the evidentiary record. At the September 14, 2022, hearing, CWM affirmatively stated that no changes were needed for the Part 377 Application or the DEIS when they were offered into evidence (*see* Rizzo Testimony, Sept. 14, 2022 Tr. p. 14 [Bates No. 001720]). If the Board considers the links provided by CWM, it will only serve to impeach the testimony of Mr. Rizzo.

Notwithstanding Ms. Witryol's argument, given the fact that this proceeding has lasted more than ten years, it is inevitable that some application information may be dated. The ALJ took the correct course here because Ms. Witryol brought the airport to the attention of the ALJ in her closing brief. As a result, the ALJ was able to determine, based on the publicly available Google maps, that an airport was in the vicinity of the site boundary and determine the distance between the site boundary and the airport. This was all based on taking official notice of Google maps to supplement the record subject to any comments from the parties. There were no objections taken to the ALJ taking official notice of Google maps. Therefore, the Board agrees with the ALJ and assigns a rating of 2 for this criterion.

Proximity to other incompatible structures. As reiterated by the ALJ, incompatible structures include such things as residences, schools, hospitals, churches, commercial centers, or nursing homes. The Board is to consider whether: (1) there are no incompatible structures within 0.5 mile of the site boundary; (2) there is one or more incompatible structure within 0.25 to 0.5 mile; or (3) there is one or more incompatible structure within 0.25 mile or less (*see* 6 NYCRR 377.7[b][4][ii][b].)

ALJ O'Connell determined that the residences near the intersection of Porter Center Road and Langdon Road are within 0.25 mile of the site's southeast boundary (*see e.g.*, Application Ex. 1, Figure 2 [pdf p. 103]; Application Ex. 6, Figure 3-2 [pdf p. 230]). The ALJ verified the distances on Google maps. CWM, however, failed to address the location of those residences in its application materials, but instead CWM asserted the closest residences were 0.4 mile from the property boundary. Neither Application Exhibits 1 or 6 demonstrate the location of the property boundary or residence CWM was referencing in its measurement.

On exceptions, CWM asserts that the southeast property boundary depicted in the application materials cannot be used for the purpose of this criterion because the southeast parcel is located in the Town of Lewiston and serves as a buffer because no waste management activities occur on that parcel or in the Town of Lewiston. CWM's exceptions include a map image in support of its argument that the residences near the intersection of Porter Center Road and Langdon Road are 0.52 mile from the CWM property boundary line in the Town of Porter as chosen by the applicant (*see* CWM Brief on Exceptions at p. 21).

The Board rejects CWM's analysis and its assertions regarding the distance between the site boundary and the nearest residences. First, the only reference to buffers in the application materials are generic references to buffers immediately around waste management activities,

buffers to wetlands, or the Town of Porter's buffer requirements. The CWM parcel in question is not identified as a buffer. Second, while the general considerations for these siting criteria note that acceptable buffer zones are needed, the siting criterion does not provide an exception for when there are buffers within the site boundary, nor does the criterion require a Siting Board to consider such buffers, if they exist. The regulations specifically require the Board to consider incompatible structures within 0.5 mile of the site boundary, not the footprint of hazardous waste management activities. Third, the application and DEIS figures referenced above depict CWM's property boundary as the "Property Limit" in the Towns of Porter and Lewiston and as the "Limits of RCRA Permitted Area." Notwithstanding the fact that all hazardous waste management activities occur in the Town of Porter, as discussed above, the Board concludes that the site boundary as depicted in the application materials as "Property Limits" is the boundary to be measured from when determining appropriate distances required by the siting considerations. Such a result is consistent with the 1993 Siting Board's conclusion that the entire area within the boundary of the Model City Facility must be considered for purposes of evaluating the siting considerations. Lastly, it is inconceivable to the Board that the application states for purposes of determining population density that there are 23 residences within 0.5 mile of the facility if the survey referenced in the application did not include residences within 0.5 mile from the southeast corner of CWM's property boundary. CWM's limited reading and application of the 1993 Siting Board's decision to this criterion is unconvincing.

ALJ O'Connell rated this criterion a 3. The Board agrees and concludes this criterion should be rated a 3.

This discussion of incompatible structures should not be interpreted as the Board's agreement that the regulatory distances included in this siting consideration are acceptable buffers between this or any proposed hazardous waste management facility and a school. The Board questions the reasoning behind regulations that create a larger buffer between a hazardous waste management facility and an airport of any size than for a sensitive population of elementary, middle school, and high school students. Because the residences within 0.25 mile of the site boundary already require this to be rated a 3, it is unnecessary for the Board to increase the buffer for the school.

5. Utility Lines (6 NYCRR 377.7[b][5]).

Proximity to major utility lines. CWM rates this criterion a 1 claiming, "[t]he nearest major utility lines are 0.8 miles from RMU-2 and 0.3 miles from any Facility infrastructure; operation of the Facility has never damaged or disrupted those lines" (CWM Closing Brief at p. 67). CWM's analysis ignores the plain language of the regulatory considerations and specific criterion. CWM admits that major utility lines run outside of the western site boundary, but still rates this a 1, which means "[t]here are no such utility lines in the vicinity of the site" (6 NYCRR 377.7[b][5][ii][a][1]).

CWM's attempts to measure distances from other areas of the site rather than the site boundary are contradicted by the plain language of the regulations. Here, there are major utility lines adjacent to CWM's western site boundary that do not need to be relocated. Pursuant to the plain language of the regulation, this must be rated a 2. The ALJ assigned a rating of 2 to this criterion, and the Board agrees.

On exceptions, CWM argued that because its operations have not interfered with, damaged, or disrupted the utility lines in any way for more than fifty years, that this criterion must be rated a 1. Although the general considerations state the reason for the criteria is to ensure that the management of hazardous waste does not interfere with, damage or disrupt the operation of major utility lines, the specific criterion plainly requires the Board to consider whether there are major utility lines in the vicinity of the site, and if so, whether relocation is required. CWM's operational history is not part of the consideration.

Ms. Witryol argues that the application materials demonstrate utilities must be moved therefore a rating of 3 is required for this criterion (see Witryol Opposing Brief at p. 23; Application Ex. 6 at pp. 36-37 [pdf pp. 59-60]). The utilities that may need to be removed or relocated, however, appear to serve CWM's operations and do not appear to be major utility lines.

Accordingly, the Board finds CWM's exception and Ms. Witryol's argument are without merit and rates this criterion a 2.

6. Municipal Effects (6 NYCRR 377.7[b][6]).

The importance of these considerations cannot be overstated. ECL 27-1107 prevents local municipalities from determining whether a hazardous waste management facility should be sited in their respective communities. From the passage of the federal Superfund Amendments and Reauthorization Act of 1986 until 1995, EPA required all states to be able to treat, store and dispose of the hazardous waste generated in-state or potentially lose Federal superfund assistance to remediate contaminated sites in that state. Such an outcome is now extremely unlikely because since 1995, EPA has viewed capacity assurance at the national level, not the state level. When states were required to demonstrate that they could meet their own hazardous waste capacity needs, it made sense for the New York State Legislature to include a prohibition on local zoning or land use laws and ordinances regarding the operation, permitting and approval of hazardous waste management facilities (see *e.g.* Hazardous Waste-Planning for Disposal Capacity for Future Needs, 1987 N.Y. Sess. Law Ch. 618, § 1). Now that states are no longer required to provide in-state capacity assurance for their own hazardous waste, and the Hazardous Waste Facility Siting Plan and its updates conclude there is no need for additional disposal capacity in New York State, the State interest underlying ECL 27-1107 may no longer be relevant.

Although the Board did not add more weight to this siting consideration, the Board does reallocate the percentage of siting consideration weight to be applied to the criteria. In the Board's view, the allocation of 80% of the weight to the tradeoffs between public expense and revenue is inappropriate under the circumstances here. During the public comment period, the municipalities and the Lewiston-Porter Central School District made it clear that they did not want the tax revenues associated with the proposed RMU-2 if it meant subjecting the communities to continued hazardous waste truck traffic and operation of a hazardous waste landfill on CWM's property. The same public sentiment is expressed in the surveys included in the Town of Porter's Comprehensive Plan and the fact that the Municipalities, the Lewiston-Porter Central School District and the Niagara County Farm Bureau oppose the application. The Board concludes that the will and

intentions of the local municipality, as expressed in the comprehensive plan, deserve more weight than the 10% assigned in the regulations. Accordingly, the Board increases the weight afforded consistency with the intent of the master land use plans from 10% to 40% and decreases the weight afforded public expense/revenue tradeoffs from 80% to 50%. The remaining 10% stays with the criterion for consistency with local laws, ordinances, rules and regulations.

Consistency with the intent of master use plan. The Town of Porter's Comprehensive Plan (see *A Comprehensive Plan for the Town of Porter: Connecting Our Past to the Future*, Aug. 2004 [Porter Plan]) acknowledges the potential impacts on the environment related to CWM and considers that as an important factor in all policy that is developed in the Town. The Porter Plan expresses an intent to limit further expansion of CWM in the Town and prevent CWM from expanding beyond its current site. The Porter Plan also allows for CWM to operate under its current permit (RMU-1) but also intends to provide assurances to residents that the landfill will not expand. Another intent of the Porter Plan is to develop an end-use plan for the CWM site. The Plan recognizes the local opposition to CWM by County legislators, environmental groups and local citizens. The Porter Plan includes survey results that demonstrate a large majority of residents of the Town surveyed are concerned with the planned expansion (RMU-2) of CWM and believe future expansion should be prohibited. A similarly large majority of residents surveyed would be willing to pay more taxes if CWM is closed. (See Porter Plan at pp. 4, 24, 52, 92, 203, 208-209, and 223 [pdf pp. 12, 32, 60, 100, 211-212, and 231].)

The regulations provide three rating considerations - whether the proposed facility: (1) would be consistent with the specific intent and overall approach of the master land use plan(s); (2) would be generally consistent with the specific intent and overall approach of the master land use plan(s), although some inconsistencies are present; or (3) has major inconsistencies with the specific intent and overall approach of the master land use plan(s) (see 6 NYCRR 377.7[b][6][ii][a].)

In consideration of this criterion, CWM asserted this criterion should be rated a 2 because the proposed RMU-2 is an authorized activity within the industrial zones of the towns and is generally consistent with the master use plans. The ALJ agreed, finding the proposal was generally consistent with the intent of the master land use plans of the Towns of Porter and Lewiston. Therefore, CWM did not take exception to the ALJ's findings and conclusions.

On exceptions, the Municipalities disagree with the ALJ's conclusion that the *Niagara Communities Comprehensive Plan 2030* is not a master land use plan as defined in the regulations and therefore not relevant to the analysis required by this siting criterion. The Municipalities further assert that the proposed RMU-2 is not consistent with the comprehensive plans of Niagara County and the Towns of Lewiston and Porter (see Municipalities Brief on Exceptions at pp. 2-5).

The Board finds that the proposed RMU-2 is not "generally consistent with the specific intent and overall approach" of Porter's Plan as CWM argues. Although the Plan demonstrates an intent to keep CWM within its existing property boundaries, the Plan also demonstrates the Town's intent to protect the environment and put a stop to further landfilling of hazardous waste in the Town. The overall approach, as expressed in the Plan, is to eliminate active hazardous waste management in the Town and develop other economic drivers such as tourism and agriculture.

Three of the guiding principles expressed in the Plan are to: 1) Maintain the rural, agricultural character of Porter; 2) Preserve waterfront and accessibility to all residents; and 3) Protect and improve the quality of the environment, including limiting future impacts of CWM (see Porter Plan at pp. 2-4 [pdf pp. 10-12]).

Furthermore, the Plan states:

The Comprehensive Plan will guide Planning Board and Zoning Board members, as public appointed servants, as they review development applications; this will ensure implementation continues on a consistent basis over the life of the Plan. The vision and actions outlined by the residents should always be top priority as decisions are made on new proposed development to ensure they conform to the goals and policies outlined in this Plan.

(See Porter Plan at p. 6 [pdf p. 14]).

It is clear to the Siting Board that the residents of the Town of Porter (and surrounding municipalities) are not in favor of the application before the Board as demonstrated in the surveys attached to the Plan and the comments received during the public comment period. Although the survey responses and public comments are not evidentiary in nature, they are indicative of the vision and actions of the residents related to CWM's proposal and further demonstrate that the proposed RMU-2 has major inconsistencies with those visions and actions as expressed in the Porter Plan. Although the Board agrees with the ALJ that the Niagara Communities Comprehensive Plan 2030 is not a master use plan as defined in the regulations, the plan is indicative of Niagara County's intent to establish prohibitions on the further development of hazardous waste treatment, storage and disposal facilities:

Given past and ongoing environmental problems faced by Niagara County and its communities resulting from the operations of former and existing industrial hazardous waste treatment, storage, and disposal facilities, as defined in New York Environmental Conservation Law Section 27-1101(5), and consistent with an equitable distribution of such facilities throughout New York State, Niagara County should continue to work with local communities as well as State and Federal agencies to establish prohibitions to the future development and/or expansion of any industrial hazardous waste treatment, storage, and disposal facility within the County consistent with the policies established by the Niagara County Legislature via numerous resolutions passed in recent decades.

(*Niagara Communities Comprehensive Plan 2030: A Plan to Communicate, Collaborate & Connect Niagara County, New York* [July 2009] at Chapter V p. 33, Chapter IX p. 11 [pdf pp. 255, 361]).

Ms. Witryol takes exception to the ALJ's rating due to many of the reasons stated by the Board. Notwithstanding the fact that the proposed RMU-2 is consistent with town zoning, the Board concludes that the proposed RMU-2 has major inconsistencies with the specific and overall approach and intent of the Town of Porter's Comprehensive Plan, which is to divest itself of

hazardous waste management in the Town and to develop and promote economic opportunities associated with tourism and agriculture. The Board concludes this specific criterion should be rated a 3, not a 2 as proposed by applicant and recommended by the ALJ.

Consistency with local laws, ordinances, rules and regulations. The ALJ recommends that this criterion be rated a 1 because the facility is located in an area zoned for industrial use, including waste disposal and landfill facilities. CWM agrees. Ms. Witryol, however, takes exception to the ALJ's recommendation and argues this should be rated a 3 as least favorable because truck traffic would violate the Town of Lewiston's noise ordinance and would disturb the peace, comfort and repose in violation of the Town codes (see Witryol Brief on Exceptions at pp. 12-14). The ALJ, however, fully analyzed Ms. Witryol's arguments and found they were not supported by the record in this matter.

The Board agrees and adopts the ALJ's analysis and recommended rating.

Public expenses and revenue. CWM cites the application and record as demonstrating that significant public revenue would be generated if the proposed RMU-2 is approved. Consequently, CWM rates this criterion a 1. The ALJ acknowledged the substantial revenue that would be generated but also found that the "hearing record includes little about the potential public expenses" (Recommended Decision, 2025 WL 1427117, at *41-42). Therefore, the ALJ recommends a rating of 2 be assigned to this criterion, concluding that public expenses would only marginally exceed public expenses due to the lack of information on this record regarding public expenses.

CWM takes exception to the ALJ's rating arguing that the application states "the public revenues associated with the Model City Facility will far exceed the public expenses that are likely to be incurred over the short- and long-term" (see Application Ex. 1 at p. 62 [pdf p. 69]). CWM also asserts: 1) that the Town of Porter's Plan does not mention any significant municipal expenses associated with operation for the facility; 2) the Plan demonstrates that revenue from the facility has a stabilizing influence on Town taxes; and 3) the tax burden on residents would more than double without revenue from the facility (see CWM Brief on Exceptions at pp. 24-25). CWM argues further that intervenors did not present any evidence contradicting the data/conclusions in the CWM's application. On that note, the Board finds it is CWM's burden to demonstrate what public expenses are incurred due to operation of the facility. CWM's attempt to shift that burden to other parties is a non-starter.

CWM rationalizes its argument by pointing to the Town of Porter's analysis that the property tax rate will more than double without revenue from the facility as demonstrating that revenues from the proposed RMU-2 must far exceed public expenses (see CWM Brief on Exceptions at p. 27). In estimating what the tax rate in the town would be without the income from CWM, the Porter Plan also states that the rate would still be comparable with other local municipalities (Porter Plan at p. 157 [pdf p. 165]).

On exceptions, Ms. Witryol argues that CWM failed to meet its burden of proof on this criterion and argues it should be rated a 3. The Board agrees with the ALJ's finding that there is little in the record regarding public expenses. The application arrives at its conclusory statement

that public revenues will far exceed public expenses without demonstrating what constitutes the public expenses. CWM goes to great lengths to demonstrate the various public revenue streams associated with fees and taxes but provides nothing on public expenses. CWM's conclusory statements do not constitute proof without a showing of the expected public expenses that would be incurred if the siting of the proposed RMU-2 was approved. The Board concludes that CWM has failed to meet its burden of proof, therefore with no evidence to the contrary, the Board assigns a rating of 3 to this criterion.

7. Contamination of Ground and Surface Waters (6 NYCRR 377.7[b][7]).

Groundwater and surface water aspects. CWM rates this criterion a 2, which by regulatory description means the "site is less than optimally located and is in hydraulic contact with" . . . floodplains, wetlands, recharge zones, surface waters, or aquifers, but "it is anticipated that these locational limitations can be overcome without extensive effort" (6 NYCRR 377.7[b][7][ii][a][2]). The record, however, demonstrates that in order to site RMU-2, that a corresponding State Pollution Discharge Elimination System (SPDES) permit would require CWM to truck all leachate from SLF (secure landfill) 1-7 to be disposed of "off-site via a method which does not result in the subsequent discharge of any [of] this leachate to any surface waters of the United States of America" (see Draft SPDES Permit, 19). That provision was included in the draft SPDES permit to address the additional discharge from a proposed RMU-2 and ensure the entire facility does not increase the discharge of bioaccumulative chemicals of concern (BCCs) to the receiving waters, namely the Niagara River and Lake Ontario.

ALJ O'Connell found the need to truck all leachate from SLF 1-7 off-site to be disposed of by a method that will not result in the subsequent discharge of any of the leachate into any surface waste of the United States to constitute an extensive mitigation effort to overcome potential adverse impacts. The ALJ recommended rating this criterion a 3. On exceptions, CWM argues that the criterion cannot be rated a 3 unless the record demonstrates RMU-2 would present severe problems with respect to water contamination and concludes there is no such showing in the record. CWM also argues that draft SPDES Permit Special Condition 2 relates solely to SLF 1-7 not RMU-2 and has nothing to do with whether RMU-2 would contaminate ground and surface water.

CWM's position is unconvincing. As noted in the Deputy Commissioner's Second Interim Decision, CWM's application for a SPDES permit modification to add the effluent from RMU-2 and the first draft permit were criticized by the EPA who demanded that its comments be satisfactorily addressed. The EPA stated that DEC should be requiring the offsite treatment of leachate, or an alternative solution that decreases the discharge of BCCs and that DEC cannot allow additional loading of BCCs to the Great Lakes System (see *Matter of CWM Chemical Services, LLC*, 2023 WL 5322622, at *10 [Second Interim Decision Aug. 11, 2023] [Second Interim Decision]). Therefore, in order to modify the permit to include discharges from RMU-2, DEC staff added special conditions to require leachate from SLF 1-7 to be taken off-site for deep-well injection in Ohio and off-site incineration of residuals leftover from any on-site treatment. Previously only leachate from SLF 7 was disposed off-site. Additionally, the draft SPDES permit prohibits an increased loading of BCCs to the environment due to RMU-2 operation (*id.* at *11; see also Application Ex. 3G at pp. 9-11 [pdf pp. 13-15]). Both conditions are required to comply with antidegradation requirements and satisfy EPA's concerns (Second Interim Decision, 2023

WL 5322622, at *11). Contrary to CWM's argument, both of those conditions relate to the proposed RMU-2 because without the trucking of SLF 1-7 leachate off-site, leachate from RMU-2 would cause an increase in loading of BCCs to the environment and the draft SPDES permit could not be issued. In simplest terms, any increase in loading of BCCs that could be caused by RMU-2 needed to be offset by off-site disposal of other leachate from the Model City Facility. CWM's attempt to draw a distinction between the two draft SPDES permit conditions is without merit.

The Board considers any potential for increased loading of BCCs to the Niagara River and Lake Ontario to be a severe problem, as demonstrated by EPA's comments on the draft SPDES permit. The Board considers the need to truck leachate for deep well injection in another state as well as potential incineration in another state of residuals derived from treatment of the leachate before shipment to constitute extensive efforts to overcome any increased loading of BCCs. According to the application materials, CWM currently ships the leachate from SLF 7 to Ohio for deep-well injection and any residue from treatment of the leachate is shipped to Texas for incineration (see Application Ex. 3G at pp. 9-11 [pdf pp. 13-15]). Without the two conditions, RMU-2 would not be permitted to discharge to the Niagara River. Contrary to CWM's arguments, but for the addition of RMU-2 to the SPDES permit, off-site disposal of leachate from SLF 1-6 would not be required.

The Board, however, finds the general considerations require more analysis. The regulations provide, "the board shall consider the potential for groundwater and surface water contamination as a result of the construction and operation of the site. Both onsite and off-site effects and proposed methods to mitigate any adverse effects relating to the contamination of all ground and surface waters shall be analyzed" (6 NYCRR 377.7[b][7][i]). In addition to the SPDES program, the revised soil excavation monitoring and management plan (SEMMP) is specifically designed to prevent ground and surface water contamination during excavation and construction of the landfill. The SEMMP requires the site to be surveyed for radiological and chemical contamination in six-inch lifts and provides for run-on/run-off controls and sequestering contaminants, so contaminants are not dispersed into the surrounding environment. The potential presence of legacy waste at the site presents an additional severe problem with respect to water contamination. The Board finds that the requirements of the SEMMP also constitute an extensive effort to address potential ground and surface water contamination.

Therefore, the Board concludes that the site's locational characteristics associated with groundwaters and surface waters with respect to discharges to the Niagara River and Lake Ontario, as well as stormwater runoff to Four Mile and Twelve Mile Creeks, and the potential presence of legacy waste at the site, present severe problems with respect to water contamination that would require extensive efforts to overcome. This specific criterion must be rated a 3 as least favorable.

Runoff: The ALJ and CWM agree that this criterion should be rated a 2. Ms. Witryol takes exception to the rating by conflating the SPDES discharges to the Niagara River with surface water runoff. The Municipalities also take exception to the rating based on BNW's brief on exceptions, but that brief does not address this criterion.

The Board agrees with the ALJ's analysis but notes that analysis generally addresses impacts from operation of the proposed landfill. The Board, however, in further support of the ALJ's conclusion, also finds the SEMMP is designed to address runoff during construction, especially to prevent runoff if contaminants are encountered during excavation. Therefore, the Board rates this criterion a 2.

Hydrogeological characteristics. CWM rated this a 1, "natural soil conditions at the site are optimal; soil characteristics would impede groundwater contamination." The ALJ determined that, notwithstanding the generally low permeability of the soils underlying the footprint of the proposed RMU-2, the need for additional engineering controls such as the construction of a low permeability cutoff wall that would extend into the Glaciolacustrine Clay unit at the site indicated that the subsurface conditions at the site do not present any major problems with respect to groundwater contamination, but site modifications in the form of the low permeability cutoff wall are required to reduce the risk of groundwater contamination (see Recommended Decision, 2025 WL 1427117, at *46). Therefore, the ALJ recommends a rating of 2 for this criterion.

CWM takes exception to the ALJ's conclusion based, in part, on CWM's reading that the ALJ found the use of a landfill liner constituted a site modification supporting the ALJ's conclusion. The Board does not read the ALJ's Recommended Decision as stating a landfill liner on its own constitutes a site modification for purposes of this criterion. The Board, however, does find that the low permeability cutoff wall is a site modification required to address the hydrogeologic characteristics at the site and reduce the risk of groundwater contamination, and adopts the ALJ's recommendation.

The Municipalities argue this criterion should be rated a 3 based on the testimony of Dr. Michalski and evidence offered at hearing. According to the Municipalities, evidence demonstrates there would be migration of contaminants due to several hydrogeological characteristics present at the site, and as a result, groundwater contamination could not be adequately monitored (see Municipalities Brief on Exceptions at pp. 8-22; Municipalities Brief Opposing Exceptions at pp. 9-24).

The Board finds that the ALJ performed a thorough analysis of the hydrogeological characteristics of the site (see Recommended Decision, 2025 WL 1427117, at *46, 102-104, 106-135). Therefore, the Board agrees with the ALJ's determinations related to the evidence and testimony provided by parties. To be rated a 1, the Board would need to conclude that natural soil conditions at the site are optimal, and the soil characteristics would impede any groundwater contamination. The record, however, reflects that a low permeability cutoff wall is required to reduce the risk of groundwater contamination. In other words, a site modification is required to further reduce the risk of groundwater contamination. Accordingly, the Board rates this criterion a 2.

8. Water Supply Sources (6 NYCRR 377.7[b][8]).

The ALJ and CWM rated this criterion a 2 concluding that the proposed facility is located in an acceptable location that may be in close proximity to water supply resources and that mitigative measures could be implemented to protect water supply resources.

The Municipalities take exception to the Recommended Decision arguing that the draft environmental permits, including the draft SPDES permit, would not protect water supply resources because the draft SPDES permit allows low levels of BCCs such as mercury, dioxins and PCBs to be added to the Niagara River. Therefore, the rating should be a 3 meaning that the mitigative measures may not be sufficient to ensure the protection of water supply sources (Municipalities Brief on Exceptions at pp. 6-8). BNW likewise argues that the river cannot be adequately protected by the draft SPDES permit because the river already is not able to be used for its designated uses for drinking, primary and secondary contact recreational purposes, and fishing. According to BNW, the continued discharge of BCCs to the river contributes to the inability of the Niagara River to meet its designated uses (BNW Brief on Exceptions at pp. 2-3). The Tuscarora Nation argues that RMU-2 would be located in an unfavorable location because of its immediate proximity and connection to Four Mile Creek, Twelve Mile Creek, the Niagara River and Lake Ontario, which are waters relied upon by the Nation for subsistence use. The Nation also points out that during operation of RMU-1 partially treated and untreated aqueous hazardous waste was released from secondary containment on two occasions thereby demonstrating that permit conditions cannot always safeguard the environment (Tuscarora Nation Brief on Exceptions at pp. 2-3). The Nation and BNW both assert this criterion should be rated a 3.

The general considerations direct the Board to consider the current use and potential uses for such bodies of water and the extent to which the facility will create conditions inconsistent with those uses. Although the Board assigned a rating of 3 to the ground and surface water aspects discussed above, this criterion raises separate questions related to the uses of water supply. For reasons discussed below related to proximity to open space and recreational resources, the Board concludes the record supports the ALJ's recommended rating of 2. On this record, the Board cannot determine to what extent CWM's permitted discharges affect the designated uses of the Niagara River. The EPA and DEC would require a SPDES permit for RMU-2 to result in no additional loading of BCCs to the river. That demonstrates the regulatory goal of maintaining the status quo of effluent from CWM but it does not necessarily improve the river's contaminant concentrations. The problem here is nothing in the record demonstrates why the Niagara River is an impaired river. Is it because of permitted discharges or the result of decades of uncontrolled discharges from areas as far away as Lake Erie and the Cities of Buffalo and Niagara Falls or the result of contaminated sites near the river leaching contaminants into the river? The Board concludes, as did the ALJ, that here mitigative measures will be used to protect water supply sources, and this criterion is rated a 2.

9. Fires and Explosions (6 NYCRR 377.7[b][9]).

Due to the rural setting and the total size of the Model City Facility (710 acres), most immediate risks from fires or explosions would be contained on site (except for any resulting air impacts). The Board finds such circumstances warrant reducing the weight of this siting consideration from 11 to 10. CWM did not take exception to the ALJ's recommended ratings for the three criteria to be considered. Therefore, the Board adopts to the ALJ's findings, conclusions and recommendations for each criterion under this consideration, subject to the decrease in weight assigned by the Board.

10. Air Quality (6 NYCRR 377.7[b][10]).

Atmospheric Stability. The ALJ recommends that this criterion be rated a 2, meaning the atmospheric conditions at the site are historically neutral or less stable. The Municipalities take exception to that recommendation arguing that CWM failed to meet its burden of proof and therefore the criterion should be rated a 3. The Municipalities quote language from the Recommended Decision in support of their argument (Municipalities Brief on Exceptions at p. 8). The quoted language, however, relates to the ALJ's determination that the opinion of the Municipalities' witness was not supported by the record (Recommended Decision, 2025 WL 1427117, at *51-52). In sum, the ALJ found that the Municipalities failed to meet their burden of proof. Accordingly, the Board agrees with the ALJ's conclusion and recommendation. This criterion is rated a 2.

Prevailing wind direction. CWM rated this a 1 in its application, as it did in 1993 for RMU-1. The 1993 Siting Board for RMU-1 rated this criterion a 3 based on Ransomville being downwind from the proposed facility. CWM asserts that Ransomville is too far away to be considered when applying this criterion and that only the nearest populations and receptors should be considered. CWM estimates that Ransomville is 4 to 5 miles from the proposed RMU-2 (*see* Application Ex. 1 at 92 [pdf p. 99]). The ALJ found that Ransomville is a neighboring community located downwind from the proposed facility and recommends that the Siting Board follow the reasoning of the 1993 Siting Board (*see* Recommended Decision, 2025 WL 1427117, at *53-54). On exceptions, CWM argued that the term "vicinity" as used in the regulations must mean 0.5 mile from the site boundary as expressed in other siting criteria to be consistent with the provisions of 6 NYCRR 377.7. CWM also continued to argue that the densest populations are located upwind of the proposed RMU-2, and the Board should follow the 1986 Siting Board's rating of this criterion a 1.

CWM's attempts to rewrite Part 377 to include a distance for this criterion is not supported by the regulations. The siting criteria, 6 NYCRR 377.7(b), provide for specific distances in several siting considerations, as discussed above. If the Department wanted a specific distance included in this criterion, it would have so provided. Therefore, the Board concludes it is within its discretion to determine whether Ransomville is within the vicinity of the proposed RMU-2 for the purposes of this criterion. The record reflects that the highest wind speeds tend to be associated with the prevailing wind direction (*see* Schroeder Ex. 1 at p. 2-5 [pdf p. 12]). Therefore, pollutants, smoke, and odors would be expected to travel further than the 0.5 mile proposed by CWM. Ransomville is less than 3 miles away from CWM's site boundary (not 4 to 5 miles as asserted by CWM) and is downwind of the prevailing winds from the Model City Facility.

The general considerations require the Board to consider potential air quality problems that may result from operations or accidental fires and explosions (6 NYCRR 377.7[b][10][i]). This criterion is directing the Board to examine the favorability of meteorological data associated with the location of the facility. For the reasons noted above, the Board finds that Ransomville is a populated area located downwind in the vicinity of the proposed facility and, therefore, the siting of RMU-2 would be least acceptable. The Board disagrees with CWM's assertion that Ransomville is too far away to be considered and concludes prevailing wind direction should be rated a 3.

Wind speed. The ALJ recommends wind speed be rated a 2 because the wind speeds at the site are predominately moderate. None of the parties took exception to the ALJ's recommendation. The Board agrees with the ALJ and adopts the ALJ's recommendation.

11. Areas of Mineral Exploitation (6 NYCRR 377.7[b][11]).

Risk of Subsidence. CWM takes exception to the ALJ's reducing the weight of this criterion from 3 to 1 and increasing the weight of conservation of historic resources criterion from a 4 to 6 without providing the rationale or justification for the reduction and increase (see CWM Brief on Exceptions at p. 36). The Board reads the ALJ's reasoning for rating this criterion a 1 as support for the weight reduction. ALJ O'Connell reduced the weight of this criterion because "[a]ccording to CWM, no records exist of any subsurface mineral exploitation in the immediate project vicinity. Consequently, the risk of subsidence is very low" (Recommended Decision, 2025 WL 1427117, at *55).

The Board agrees that the weight of this criterion should be reduced from 3 to 1. The Board, however, does not correspondingly increase the weight for historic and cultural resources as the ALJ recommends. Accordingly, the Board adopts the ALJ's recommended reduction in weight for this siting consideration and rates this criterion a 1.

12. Preservation of Endangered, Threatened, and Indigenous Species (6 NYCRR 377.7[b][12]).

Developmental and operational impacts on endangered, threatened, and indigenous species or critical habitat. ALJ O'Connell acknowledges there are no records of endangered or threatened species known in the Niagara County area and that there are no unique or critical habitats present on CWM's site. The Recommended Decision discusses the arguments of the parties and rests upon the Tuscarora Nation's representation that the Nation relies on species in areas adjacent to CWM and the Nation's argument that CWM's proposal would impede habitat restoration. The Nation also argues that a comprehensive field survey was not conducted, and the potential impacts on indigenous species in the area would be profound. Based on the arguments offered by the Nation combined with the ALJ's conclusions regarding the siting considerations for ground and surface water contamination, the ALJ recommends a rating of 2 for this criterion (Recommended Decision, 2025 WL 1427117, at *55-56).

CWM takes exception to the ALJ's findings and conclusions arguing there is "nothing in the evidentiary record indicating that any endangered, threatened, or rare species or their habitats are present at the Facility . . ." (see CWM Brief on Exceptions at p. 36). CWM argues further that the representations and arguments presented by the Tuscarora Nation are "legally flawed and lack any evidentiary foundation" (see *id.* at p. 37).

The Siting Board agrees that there is no evidentiary record supporting the Nation's arguments and representations. The Nation provides general statements identifying the Nation's cultural use of the lands surrounding CWM and the Nation's reliance on natural resources for sustenance and cultural identity. In part, the Nation's closing arguments are comments on the DEIS identifying studies or surveys the Nation believes should have been included. If the evidentiary

record had been developed showing the Nation's historical and current use of the area in the vicinity of the Model City Facility for cultural and subsistence purposes, the resulting rating for this criterion may be different. The record, however, is absent any evidentiary identification and proof of how and what land is used by the Nation and what indigenous species the Nation claims will be impacted by the siting of the proposed RMU-2. As discussed further below, the Tuscarora Nation's participation as an amicus party is limited to submission of briefs based on the evidence presented at hearing.

The ALJ, however, examined the Nation's arguments in the context of the potential increased loading of BCCs into the environment by referring to his discussion of ground and surface water contamination, but the ALJ did not provide further explanation. The record reflects that the Niagara River is a Class A Special Waterbody and is listed as an impaired water due to the presence of dioxin, mirex and PCBs, all of which are BCCs (*see* Second Interim Decision, 2023 WL 5322622, at *9). As a result, the draft SPDES permit includes the two conditions discussed above to prevent the increased loading of BCCs to the environment, and namely the Niagara River. The draft SPDES permit conditions are intended to mitigate the potential increase of BCCs being discharged into the environment.

BCCs such as PCBs and mercury are substances that accumulate in living organisms resulting in potential health risks to humans, fish, birds, mammals, etc. BCCs increase in concentration as they move up the food chain (*see e.g., Matter of Hudson River PCB Project*, 1989 WL 66965, at *4 [Decision Jan. 5, 1989] ["as the contaminant passes through the food web higher order species are exposed to ever increasing concentrations which are stored for indeterminate and perhaps permanent periods in the body. These biological facts dictate that exposures must be eliminated or reduced whenever possible"]).

The general consideration directs the Board to focus on the adverse impacts on protected and indigenous species or critical habitat for wildlife generally and whether mitigation can effectively address any identified impacts. Although the ALJ places his analysis in the context of the arguments made by the Nation, the Board takes a broader view in that indigenous species have been and continue to be adversely impacted by BCCs in the environment. To mitigate against CWM further exacerbating the presence of BCCs, EPA and DEC would require the two draft SPDES conditions discussed at length above to be included in a final permit. The Board also views the presence and possible addition of BCCs in the environment to affect the general public's use, not just the Tuscarora Nation's use, of indigenous species of flora and fauna for sustenance. For instance, species of fish indigenous to the Niagara River and Lake Ontario include game fish such as northern pike, muskellunge, lake trout, walleye, and smallmouth bass (black bass) (*see e.g.* 6 NYCRR 10.2[d]; Porter Plan at pp. 86-87 [pdf pp. 94-95])). The Board finds the ALJ's recommended rating is supported, but for reasons beyond those explained by the ALJ.

The Application states, "the development and operation of the proposed RMU-2 unit will not jeopardize the continued existence of endangered, threatened or indigenous species by destruction or adverse modification of their habitat. Additional information is presented in Section 3.5.5 of the RMU-2 DEIS" (*see* Application Ex. 1 at p. 77 [pdf p. 84]). The Application, however, limits its analysis to the lack of endangered or threatened species and critical habitat with no analysis of indigenous species. The DEIS considers loss of habitat for indigenous species and

concludes, “[s]ince the proposed location for RMU-2 and associated facilities lies entirely within a currently developed portion of the Model City Facility, no significant impacts to wildlife are anticipated” (see Application Ex. 6 at p. 169 [pdf p. 192]). Again, the analysis is limited to species that are likely to be present at the facility and does not consider discharges to surface waters that may affect indigenous species. Consequently, the Board could conclude that CWM failed to meet its burden of proof on this criterion and rate this a 3 as least favorable.

The Board concludes, however, that the addition of BCCs to the Niagara River from the proposed operation of RMU-2 could possibly jeopardize the continued existence of species indigenous to the river by adverse modification of the habitat – e.g. increased loading of BCCs – but effective mitigation measures are expected to be used. The ALJ’s recommended rating is supported and appropriate based on the discussion above, and the Board rates this criterion a 2.

13. Conservation of Historic and Cultural Resources (6 NYCRR 377.7[b][13]).

Proximity to historical or cultural resources. CWM argues there are no historical or cultural resources in the vicinity of the facility and this criterion should be rated a 1. CWM’s analysis included review of the proximity of local cultural resources such as the Fatima Shrine, as well as the Tuscarora Indian Reservation, archaeological records, and the National Register of Historic Places (see Application Ex. 1 at pp. 77-79 [pdf pp. 84-86]).

The Tuscarora Nation points out that there is an archaeological site within a mile and a half of the facility (see e.g. Application Ex. 6 at p. 97 [pdf p. 120]) and numerous archaeological buffer zones in the vicinity of the proposed RMU-2 that demonstrate the proposed facility is within an archaeologically sensitive area. The Nation also argues that the “New York State Historic Preservation Office identifies all of Niagara County as an area of interest for the Nation regarding cultural resource preservation” (Tuscarora Nation Closing Brief, at pp. 3-4).

ALJ O’Connell found that CWM’s proposal would adversely affect the use of natural resources such as Four-Mile and Twelve-Mile Creeks and the Niagara River, which are culturally important to the Tuscarora Nation and recommended this criterion be rated a 2. On exceptions, CWM argues that there is nothing in the evidentiary record supporting the ALJ’s findings and conclusions.

The Board agrees with the Tuscarora Nation in that cultural resources should include traditional cultural properties and landscapes and not just those that yield artifacts. The fact remains, however, that the evidentiary record was not developed in this regard or regarding the Nation’s current or historic use of the lands encompassing the area around the facility. The Board is sensitive to the concerns raised by the Nation, and acknowledges that hunting, fishing, and gathering are activities of cultural and spiritual significance to the Indian Nations (see e.g. DEC Policy CP-42: Contact, Cooperation, and Consultation with Indian Nations [Mar. 27, 2009]). In its brief opposing exceptions, the Nation argues that in granting the Nation amicus party status in this proceeding, the ALJ recognized the Nation’s expertise and knowledge related to the cultural importance of indigenous species to the Nation as well as impacts on those species and their habitats. In sum, the Nation asserts the ALJ confirmed that facts presented by the Nation are appropriate sources for this siting consideration (Tuscarora Nation Brief Opposing Exceptions at

pp. 3-5). The Nation also argues that its petition is part of the evidentiary record and cites 6 NYCRR 624.12(b) in support of that argument. The regulation states,

The record of the evidentiary hearing must include: the application (including the DEIS where applicable) and all notices (including the notice of hearing) and motions; any affidavit of publication of the notice of hearing; the transcript of any issues conference or evidentiary hearing, and the exhibits entered into evidence; any motions, appeals or petitions and any rulings or decisions thereon; where applicable, comments on the DEIS and responses thereto; any admissions, agreements or stipulations; a statement of matters officially noticed; offers of proof, objections thereto and rulings thereon; proposed findings; and the hearing report; and briefs as may have been filed including any comments on the hearing report filed pursuant to paragraph 624.13(a)(3) of this Part.

(6 NYCRR 624.12[b] [emphasis added]).

It is not clear to the Board whether the inclusion of petitions in the regulations refers to petitions for party status or some other form of petition. The Board is not aware of any DEC decisions that apply the regulation in the manner argued by the Tuscarora Nation. The ALJ, however, denied the parties requests to have a petition for party status, or a portion thereof, moved into the evidentiary record. In sum, petitions for party status are not evidence and are not entered into evidence unless sponsored by a witness or stipulated by the parties (*see e.g.* October 16, 2023 Tr. pp. 93-94 [Bates Nos. 003605-003606]).

In granting the Tuscarora Nation amicus party status, the ALJ noted that “[a] number of issues have already been joined for adjudication. It would be appropriate to hear from the Tuscarora Nation about that as part of a closing brief” (*see* Supplemental Issues Conference Tr. at p. 177 [July 10, 2018]). In other words, the ALJ found that the Nation’s petition was adequate support for the Nation to provide its legal and policy arguments regarding the evidence adduced at hearing. As an amicus party, the Nation is limited to relying on the evidentiary record to support its legal and policy arguments (*see e.g., Matter of Crossroads Ventures, LLC*, 2005 WL 2178473, at *15 [Ruling Sept. 7, 2005]; *Matter of Saratoga County*, 1995 WL 1780808, at *46 [Ruling Aug. 1, 1995]). With its amicus status, the Tuscarora Nation is authorized to make arguments and submit a closing statement based on the evidence that is presented. An amicus party cannot offer facts or evidence into the record (*see* 6 NYCRR 624.1[e][5] [“*Amicus status* means a person who is not otherwise eligible for full party status but who is allowed to file a brief and, at the discretion of the ALJ, present oral argument, but does not have any other rights of participation or submission”]).

While the Board feels the record would have benefitted by including more information on the Tuscarora’s historical and cultural resources that may be affected by CWM’s proposal, the lack thereof is not enough for the Board to conclude that CWM failed to meet its burden of proof on this criterion. CWM’s application, however, appears to conflate this criterion with the distance from the facility to historic and cultural resources. The application states:

In 1979, a cultural resource survey of the Model City Facility was undertaken to identify and evaluate any prehistoric or historic sites located in the area of the

facility (Hart & Associates, 1979). The survey indicated that there are no known prehistoric or historic sites located within at least 0.5 mile of the Model City Facility. Further study is not indicated.

(See Application Ex. 1 at p. 77 [pdf p. 84]).

Nothing in the general considerations or specific criteria reference any specific distance associated with this criterion. It is the disturbance or loss of a historic or cultural resource that is to be considered by the Board, not the distance to the facility. The Board is also to consider the facility's impact on the public's access to nearby historic and cultural resources and any negative impact on the visitation to those resources (*see* 6 NYCRR 377.7[b][13][i]).

The DEIS states that the Tuscarora Indian Reservation "is not adjacent to the facility transportation routes" (*see* Application Ex. 6 at pp. 89, 151 [pdf pp. 112, 174]). Route 104, however, is a designated route to and from eastern Niagara County that, according to Google maps, runs through the northwest corner of the Reservation for about 0.5 mile and past a couple of residences situated within the Reservation. Route 104 also runs parallel to the entire northern boundary of the Reservation within 0.25 mile of the Reservation. The Town of Lewiston's Comprehensive Plan lists the "Tuscarora Indian Reservation - a 6,000-acre center of Native American culture and tradition" as one of the Town's existing regional influences and recognizes the Reservation as "a significant open space resource for the surrounding community" (*see* Town of Lewiston Comprehensive Plan at pp. 3-3, 4-4 [pdf pp. 30, 79]).

The Tuscarora Nation takes exception to the ALJ recommending a rating of 2 for this criterion and argues that a rating of 3 is warranted because,

RMU-2 would sit directly within Haudenosaunee ancestral territory and be visible from the Nation's treaty-confirmed Reservation territory, which Tuscarora Nation citizens are obligated to preserve and protect for future generations. RMU-2 would threaten the health and integrity of waterways relied upon by Nation citizens for subsistence and other cultural purposes, and would threaten the health and well-being of species throughout the Nation's territory upon which Nation citizens also rely. It would severely impact the viewshed and visual scene enjoyed by Nation citizens from Nation territory, with views from the Nation serving as a constant reminder to Nation citizens of the range of threats posed by the facility. Taken together, these significant impacts cumulatively threaten the Nation's cultural resources with harm that is highly likely, if not certain. CWM proposes no effective mitigative measures for these harms.

(See Tuscarora Brief on Exceptions at pp. 3-4).

As previous noted, those assertions are lacking evidentiary support except as they relate to the impact of BCCs on indigenous species discussed above and the visual impacts discussed below. The Nation cites to the ALJ findings and conclusions in support of its factual assertions but does not cite to any record evidence in support of its arguments. The Board is not deaf to the Nation's concerns, but the Board is mindful that the statute requires the Board to render a decision based

upon the record (*see* ECL 27-1105[3][f]) and that an amicus party must rely upon the record developed by those with full party status.

Here, the record reflects that the development and operation of the proposed RMU-2 would result in trucks using Route 104, east of Route 18, for the delivery of materials and waste to the Model City Facility. Those trucks will be traveling through a small segment of the Tuscarora Indian Reservation and within 0.25 mile of the Reservation's northern boundary for approximately 3.5 miles. The number of trucks that have used this designated transport route in the past or may in the future is never discussed in the application. The Tuscarora Indian Reservation has been identified as a disadvantaged community by the New York State Climate Justice Working Group, which would be subjected to increased greenhouse gas emissions and noise due to a designated transportation route running through and adjacent to the Reservation. The record also supports the conclusion that the Tuscarora Indian Reservation is a significant cultural resource for the Nation and the surrounding communities.

Notwithstanding the lack of evidentiary record regarding the Tuscarora Nation's current use of natural resources such as Four-Mile and Twelve-Mile Creeks and the Niagara River, the fact remains that CWM's application materials fail to consider waste transport along Route 104 from eastern Niagara County, a route approved by the Community Advisory Committee and 1993 Siting Board when considering the siting of RMU-1. Not only does CWM's application fail to address siting considerations along Route 104 as discussed above, but the application also affirmatively states that the transportation routes are not adjacent to the Tuscarora Indian Reservation. That is plainly erroneous. Nonetheless, the application concludes that the development and operation of proposed RMU-2 is not expected to adversely affect the preservation or use of the Tuscarora Indian Reservation.

As the result of the lack of any meaningful discussion of potential impacts on the Tuscarora Nation due to the use of Route 104 for waste transport in the application materials, the Board concludes that CWM has failed to meet its burden of proof on this criterion, and with no evidence to the contrary, the Board assigns a rating of 3 to this criterion. The Board, however, does not increase the weight of this siting consideration as recommended by the ALJ.

14. Open Space, Recreation and Visual Impacts (6 NYCRR 377.7[b][14]).

Proximity to open space and recreational resources. CWM's application rates this criterion a 1 and considers the following local recreational resources: Four Mile Creek State Park, Fort Niagara State Park (Old Fort Niagara), Joseph Davis State Park, Artpark, the Tuscarora Indian Reservation and the Fatima Shrine in its application. The application concludes that because those resources are located several miles away and not along CWM's transport route, the construction and operation of the proposed RMU-2 will have no impact on those recreational resources (*see* Application Ex. 1 at pp. 79-80 [pdf pp. 86-87]).

ALJ O'Connell considered the open space and recreational resources provided by the presence of the Tuscarora Indian Reservation and the Niagara River Anglers Association (NRAA) property and concluded that many of these areas were hydraulically connected to CWM and were

in the vicinity of the facility (*see* Recommended Decision, 2025 WL 1427117, at *58). The ALJ recommended that this criterion be rated a 2.

CWM takes exception to the ALJ's conclusions and recommendation for this criterion. CWM argues that the Recommended Decision is relying on factual assertions in closing briefs that have no foundation in the evidentiary record. CWM asserts that there is nothing in the evidentiary record supporting Ms. Witryol's claims about the NRAA property and point out that the Tuscarora Nation does not cite to anything in the record to support its claim that CWM lists the Nation as a recreational resource or that the Nation will be adversely affected by RMU-2's operation (*see* CWM Brief on Exceptions at p. 43).

The Tuscarora Nation takes exception to the ALJ's rating this criterion a 2 because the entire Model City Facility adversely impacts the Nation's use of its resources and mitigation measures are not implemented during the operation of RMU-2 (Tuscarora Nation Brief on Exceptions at p. 4).

In rating this criterion a 1, CWM limits its assessment of open space and recreation resources to parks, the Tuscarora Indian Reservation and the Fatima Shrine and discounts Four Mile and Twelve Mile Creeks as being intermittent in the vicinity of CWM's property. Such a narrow reading is not supported by the plain language of the regulation which requires the Board to "consider the extent to which the facility will diminish available open space and recreational resources used by the surrounding communities and the visual aesthetic impact of the facility and its proximity to areas that are much traveled by the general public" (*see* 6 NYCRR 377.7[b][14][i]).

The facility, including the proposed RMU-2, is in close proximity to the recreational resources of Four Mile and Twelve Mile Creeks and hydraulically connected to the creeks via stormwater runoff and outfalls. Four Mile Creek and Twelve Mile Creek are noted recreational resources in the Town of Porter, as is the NRAA, which owns a recreational facility within 2,000 feet of the CWM site boundary. The NRAA property provides for fishing, camping, picnicking, etc. at its 61 acres preserve for its some 700 members (*see* Porter Plan at pp. 81, 87, 123-127 [pdf pp. 89, 95, 131-135]). CWM's application materials make no mention of the NRAA property even though it is a recreational area closer in proximity to CWM than any of the other open space/recreational features considered in the application.

The Board agrees with the ALJ's conclusion that Four Mile Creek and Twelve Mile Creek as well as Six Mile Creek, are hydraulically connected to the Model City Facility (*see* Application Ex. 1 at p. 65 [pdf p. 72]; Application Ex. 6, DEIS, at pp. 13, 63-64, 112, 162, 164 [pdf pp. 36, 86-87, 135, 185, 187]; Application Ex. 6, Exposure Information Report, at pp. 7, 28-30 [pdf pp. 607, 628-630]). The record is clear that stormwater runoff from the Model City Facility ultimately drains to Six Mile Creek, Four Mile Creek and Twelve Mile Creek. The stormwater discharges are currently regulated by CWM's SPDES permit and would be regulated by the draft SPDES permit if RMU-2 were sited.

Because prior Boards have rated this criterion a 1, and according to CWM, there being no factual basis for rating RMU-2 differently, CWM argues it would be arbitrary and capricious for this Board to do so (CWM Brief on Exceptions at p. 41). The arbitrary and capricious standard is

a standard applied by reviewing courts. Here, however, under 6 NYCRR Part 624, it is the applicant's burden to establish "by a preponderance of the evidence" that the application meets all statutory and regulatory standards (see 6 NYCRR 624.9[c]). Additionally, as discussed above, this Board is not bound by prior Siting Board determinations, especially those that were considered at a time when the proposed facility was needed for in-state capacity assurance and where there were no intervenors.

CWM's application does not even consider the fact that stormwater runoff and other SPDES effluent can adversely affect the presence or use of existing or proposed open space and recreation resources. If not mitigated by a SPDES permit, BCC loading could increase and stormwater runoff could leave the site unabated, impacting the recreational uses, such as recreational fishing, of Four Mile and Twelve Mile Creeks and the Niagara River. The Town of Porter recognizes that fish stocking in the Niagara River not only enhances recreational fishing but also restores the native species to these waters (see Porter Plan at pp. 86-87 [pdf pp. 94-95]). Adding pollutants to any of these waters can impair the recreational use of the streams and rivers. Therefore, the Board cannot agree with CWM's conclusion, based on this record, that the development and operation of RMU-2 would not be expected to adversely affect the use of Four Mile Creek, Twelve Mile Creek and the Niagara River. Rather, the discharge of pollutants from the development and operation of the proposed facility would be controlled and mitigated by the conditions of the draft SPDES permit.

Accordingly, the Board concludes this criterion must be rated a 2 because the development and operation of the proposed RMU-2 "could possibly affect the presence or use of existing or proposed open space and recreation resources, but . . . effective mitigative measures are expected to be used" (6 NYCRR 377.7[b][14][2]).

Relationship to scenic views or vistas. CWM rates this criterion a 1 and discounts any view of the proposed RMU-2 from the Niagara escarpment due to distance and the temporary nature of visibility during operation. CWM asserts, "Once the unit has reached capacity, it will be capped and vegetated. At that time, it will blend in with the rest of the scenery and, thus have little or no impact on the view from the escarpment" (see Application Ex. 1 at p. 80 [pdf p. 87]). In other words, because the viewshed will not be permanently altered, in the opinion of CWM, the quality of the visual scene is either improved or maintained.

Upon review of the DEIS, the ALJ concluded this criterion should be rated a 1. On exceptions, the Tuscarora Nation argues this criterion should be rated a 3 because "the entirety of RMU-2, now including its general operations within the entire Model City Facility, will be visible from the Nation territory along the Niagara escarpment and from the Nation's territory along NY Route 104, causing the visual scene to be severely diminished" (Tuscarora Nation Brief on Exceptions at p. 4).

The Board disagrees with the ALJ's recommended rating. To be rated a 1, the Board would need to conclude that the view is not adversely affected and "[o]verall, the quality of the visual scene is either improved or maintained" (see 6 NYCRR 377.7[b][14][ii][a]). CWM admits that nighttime flood lighting will be used during construction and operation, and glow from the lighting would be visible in the night sky (see Application Ex. 6 at pp. 156, 170 [pdf pp. 179, 193]). The

Board finds that neither the lighting or the construction and operation of RMU-2 will constitute maintenance of the viewshed and certainly would not constitute an improvement. The Board also finds that an impact on a viewshed lasting for years is not temporary. The proposed RMU-2 will be viewable from locations on Balmer Road, Ridge Road and Indian Hill Road (see Application Ex. 6, Figure 7 sheets 1, 3, 4, 5, 21 and Appendix A [pdf pp. 744, 746 – 748, 764 and 765]). The Board understands that many of those viewing locations, including views from Tuscarora territory, are some distance away from the proposed facility, but the very image of scenic views and vistas includes an expansive and often distant view of the surroundings. At night, the viewshed will be impacted by the nighttime flood lighting at the facility. Based on those factors, the Board finds that this criterion should be rated a 2 as the proposed facility partially eliminates or obstructs the view of scenic points, vistas and other elements that are visually pleasing to the general public and the Tuscarora Nation.

Degree to which proposed facilities are readily noticeable to passersby. CWM rated this a 1, reasoning that the proposed RMU-2 is deeper within the property than RMU-1, for which the 1993 Siting Board rated this a 2 due to nighttime visibility of the glow from flood lighting.

The ALJ concluded that when lighting is used for night work, the facility would be readily noticeable to passersby, as well as residences at higher elevations along the escarpment (Recommended Decision, 2025 WL 1427117, at *60). CWM did not take exception to the ALJ's recommendation.

The Board agrees and finds the facility would be readily noticeable to passersby, due in part to the night lighting when it is used, as well as the view from Balmer Road and residences on the escarpment (see Application Ex. 6 at Figure 7 Sheet 1 [pdf p. 744]). The Board, however, finds that no effective barriers or cover have been proposed or would be expected to be effective with regard to the views of night lighting. Accordingly, the Board finds that a rating of 3 is appropriate for this criterion.

Conclusion. The Siting Board has reviewed the remaining exceptions and argument of the parties related to the siting criteria and finds them to be without merit. Although the Board changed some of the weights as discussed above, the siting consideration weights still equal 100 as provided in 6 NYCRR 377.7(c)(2). As a result of the above discussion, findings and conclusions, the Board assigns a total score of 229.90. Accordingly, the Siting Certificate application is denied.

C. Otherwise Necessary or in the Public Interest

The ALJ concluded that CWM failed to meet its burden of proof of demonstrating that the proposed RMU-2 is otherwise necessary or in the public interest. The Siting Plan provides limited guidance in considering whether a facility is otherwise necessary or in the public interest, and the Siting Plan admits that the guidance offered for consideration by the Board is not intended to be definitive or limiting (see Application Ex. 1, Appendix C, Siting Plan at p. 9-5 [pdf p. 328]). The items listed for consideration in the Siting Plan applicable to the current application are an evaluation of:

- past and present activities at the property;

- the facility's size and impact on the surrounding area including transportation issues;
- the facility's compliance history;
- environmental justice considerations;
- whether the siting of the proposed facility will result in measurable and significant environmental and public health benefits or impacts;
- whether the facility will promote moving up the hierarchy for management of hazardous waste and employ sustainable options for the management of hazardous waste;
- whether approving the facility will result in significant economic costs or benefits to New York State, the community where the proposed facility will be located or New York industry, or, alternatively, whether the denial of an application will cause significant economic cost or benefit, such as potential reduction in property values, new housing construction, attracting new clean and sustainable business, tourism and tax dollars, and the cost to New York hazardous waste generators for alternative management options or longer transportation distances; and
- whether the availability of the proposed facility will offer New York customers other significant benefits, or alternatively, the availability of the facility will cause other significant impacts to the state or the community for which it is proposed.

(*Id.* at pp. 9-5 - 9-6 [pdf pp. 328-329]).

Most of those considerations are discussed below within the topic headings used by the ALJ. The Siting Plan also references several DEC priorities, policies and guidance which may have a bearing on public interest related to environmental justice; promoting a toxic free future; safeguarding wetlands, watersheds, habitat, and tourism; and fostering green and healthy communities including air and water quality. Other than the Siting Plan, DEC staff did not provide information related to whether the proposed RMU-2 is otherwise necessary or in the public interest but limited its participation to providing support for and testimony related to DEC's draft permits.

The Siting Board agrees with the ALJ's conclusion that CWM failed to meet its burden. Of particular interest to the Board, is the fact that CWM's facility stopped receiving waste for disposal in the fall of 2015, nearly ten years ago. Over those ten years there has been no demonstration made to this Board that hazardous waste generators or contaminated site clean ups have suffered economically or environmentally from the lack of a disposal site in New York State. The record reflects that historically CWM has received waste from many states and Canada (*see* Application Ex. 1, Appendix C, Siting Plan at p. 1-8 [pdf p. 205]), and that out of state waste constitutes slightly less than half the waste disposed at the facility with about 70% of the in-state waste coming from a few remedial projects (*see id.* at pp. 1-18 – 1-19 [pdf pp. 216-217]).

The Siting Board is also mindful that local interests and State interests must be considered in determining whether a site is otherwise necessary or in the public interest, and that those State and local interests may not be aligned.

1. Potential Economic and Fiscal Benefits

The ALJ found that the economic benefits associated with the proposed RMU-2 would be substantial but concluded that those benefits do not demonstrate the proposal is otherwise necessary or in the public interest. The ALJ also found that the local municipalities' reliance on funding sources other than those provided by CWM since the closure of RMU-1 demonstrates that the proposal is not necessary for the local economy. As a result, the ALJ concluded that CWM failed to meet its "burden of proof about the potential economic and fiscal impacts of the proposed RMU-2 landfill." (Recommended Decision, 2025 WL 1427117, at *67-68).

On exceptions, CWM argues that so long as there is a substantial economic benefit associated with the proposed RMU-2, the proposal is *ipso facto* in the public interest. CWM asserts that the ALJ raised the bar and basically requires an applicant to demonstrate that economic benefits would amount to an economic necessity (see CWM Brief on Exceptions at p. 48). CWM also argues that the ALJ ignored Mr. Berlow's testimony that his calculations for cost and greenhouse gas savings were based on hazardous waste generated in New York State and did not include imported waste (*id.* at pp. 53-55). CWM asserts that the denial of a Siting Certificate would frustrate DEC's green remediation policy (DER-31). In essence, CWM rests its argument on the asserted economic benefits and the economic and greenhouse gas savings associated with transportation distances for New York generators, thus limiting its argument to responding to the seventh bulleted question above - whether approving the facility will result in significant economic costs or benefits and the cost to New York hazardous waste generators for alternative management options or longer transportation distances.

CWM claims that the economic benefits outweigh the burdens on the local economy. It is undisputed that significant State and local revenues would be generated if RMU-2 were approved. But this is not the market need analysis applied to the need for a facility, which generally concludes that mere pursuit of an application is evidence of the applicant's calculated business judgment that there is a market need for the proposed facility. The Board already found above that CWM did not provide any public expense information in its application materials. It is equally clear that the local municipalities do not want that revenue if it means the continued operation of a hazardous waste disposal facility in or near their respective communities. Pointedly, the municipalities and the State have not received the various tax revenues associated with hazardous waste management at the Model City Facility since the last loads of waste were received at RMU-1 in 2015. Nearly ten years have passed and there is no indication in the record that the municipalities have shifted their opposition to the proposed RMU-2 because of missed revenue streams. Niagara County, the town and village of Lewiston, the village of Youngstown and the Lewiston-Porter Central School District are all parties to this proceeding and oppose the siting of RMU-2. The Town of Porter's Comprehensive Plan expresses a willingness by its residents to forego the revenues generated by CWM. In essence, the general view of the residents of this area of Niagara County is that the community character of the towns and villages has suffered and will continue to suffer if CWM is allowed to site RMU-2 and continue receiving waste for disposal. When combined with the legacy waste that may be present at the site and the neighboring Niagara Falls Storage Site many express concerns for their health and well-being. As discussed above, the Town of Porter's Comprehensive Plan expresses a preference to maintain the growth and development of tourism and agricultural economies and associated human health and environmental benefits from those economies.

This Siting Board finds that more is needed than a demonstration that the proposed RMU-2 can generate significant public revenues and reduce the costs for New York State hazardous waste generators and remediation efforts. An applicant's willingness to make the investment, create jobs and generate public revenues through taxes and fees is only a small part of the analysis whether the proposal is otherwise necessary or in the public interest. Of the considerations provided in the Siting Plan, CWM limits its testimony and evidence to its analysis of economic costs and benefits in support of its position that the proposed RMU-2 is otherwise necessary or in the public interest. The Siting Board, however, is not convinced that any amount of revenue can compensate the residents of Niagara County, the Towns of Lewiston and Porter, the Villages of Youngstown and Lewiston, and the Lewiston-Porter Central School District for hosting the only commercial hazardous waste landfill in New York State since 1990. Prior to that, Niagara County was host to the only two commercial hazardous waste landfills in New York State, with land disposal at the Model City Facility commencing in 1971. As noted above, there is nothing in this record demonstrating the municipalities have missed the revenue from CWM or have expressed an interest in receiving revenue from the siting of RMU-2.

CWM's argument that the ALJ is requiring a demonstration of economic necessity is unpersuasive. The Board is to consider whether a proposal is otherwise necessary, which implies some demonstration of necessity for the proposed facility. For instance, a demonstration that a proposed facility is the only one that can manage a particular hazardous waste would show there is a necessity for the facility or in words used by the legislature, the facility is otherwise necessary. The Siting Plan provides a similar example, a "facility may be 'otherwise necessary' if it is proposed to manage new types of wastes generated in New York using processes not envisioned at the present time" (see Application Ex. 1, Appendix C, Siting Plan at p. 9-5 [pdf p. 328]). Moreover, economic necessity was part of CWM's argument that New York generators would be saving money by trucking hazardous waste to RMU-2 rather than Wayne, Michigan.

Accordingly, for the reasons stated above and by the ALJ, the Siting Board concludes that CWM failed to meet its burden of proof that economic benefits alone support a conclusion that the proposed RMU-2 is otherwise necessary or in the public interest.

2. Potential Public Interest Benefits - Transportation Costs and Greenhouse Gas Emissions

Notwithstanding CWM's demonstration of the increased costs to ship hazardous waste for disposal elsewhere, there is no record evidence that New York hazardous waste generators or remediation efforts have suffered economically because of the closure of RMU-1 or that they have been forced to ship their waste to Wayne, Michigan. That is instrumental to the assumptions made in the Berlow report. While RMU-1 was receiving hazardous waste, on average New York generators shipped a greater percentage of hazardous waste to out-of-state facilities than in-state facilities (see Application Ex. 1, Appendix C, Siting Plan at pp. 3-4 [Table 3-1] and 3-8 [Table 3-3] [pdf pp. 239, 243]). Furthermore, the Siting Plan acknowledges,

New York State generators do not and need not consider State borders when determining how to meet their hazardous waste management needs. Due to the nature of a specific waste stream, a nearby facility may not be capable of meeting a

generator's specific waste management requirements. Certain components of a generator's waste stream may allow the waste to be handled more effectively or at lower cost at a facility located further away.

(Application Ex. 1, Appendix C, Siting Plan at p. 5-11 [pdf p. 284]).

The Siting Plan also states, "even though there is a permitted hazardous waste landfill in-state, in 2007, 32% of the hazardous waste shipped out of state was destined to be land disposed at an out-of-state facility. In 2008 this percentage dropped to 7% reflecting decisions by generators to send remedial waste to the in state facility" (Application Ex. 1, Appendix C, Siting Plan at p. 5-12 [pdf p. 285]). The Siting Plan recognizes that the increased in-state disposal was due to large quantities of remedial waste from a few sites being disposed in-state (Application Ex. 1, Appendix C, Siting Plan at p. 3-8 [pdf p. 243]). The Siting Plan also recognizes the fluctuating nature of waste destined for out-of-state versus in-state disposal.

The Board finds that the Berlow report and testimony is largely speculative in that the assumptions it is based on such as tonnage of waste, truck transport and destination facility could have easily been verified with real data following the closure of RMU-1 in 2015. Mr. Berlow was aware of the hazardous waste landfill near Montreal and that hazardous waste was exported from the US to Canada (*see* Berlow Testimony, Sept. 15, 2022 Tr. pp. 138-141 [Bates Nos. 002090-002093]; Sept. 16, 2022 Tr. pp. 10-12 [Bates Nos. 002171-002172]). His testimony and report, however, do not address landfills in Canada as an alternative to trucking hazardous waste to Wayne, Michigan.

The Siting Plan notes that Canada received waste from New York generators in the amounts of 40,101 tons (2005), 62,892 tons (2007) and 43,233 tons (2008), and recognizes (as of the date of the Siting Plan) that "[o]ne of the gaps in the federal data is that it generally does not include hazardous waste exported to Canada and other countries. This can have major impacts on the ability to interpret the data, particularly for border states such as New York and Michigan" (Application Ex. 1, Appendix C, Siting Plan at p. 2-16, Tables 5-4[a], [b], [c] [pdf pp. 233, 283]). The Siting Plan does not identify how much of the waste exported to Canada in 2005, 2007, and 2008 was destined for land disposal.

In 2010, while RMU-1 was operating, the United States exported 34,000 tons of hazardous waste to foreign countries annually for land disposal (*see* National Capacity Assessment Report, at p. 18, Table VI [pdf p. 23] [2014]). The report indicates some New York transport waste was sent to Stablex Canada, Inc. (*id.* at p. 192 [pdf p. 197]). In 2022, the United States exported 162,081 tons of hazardous waste to Clean Harbors Canada, Inc. (Lambton, Ontario) and Stablex Canada, Inc. (Blainville, Quebec) for land disposal (*see* National Capacity Assessment Report, Exhibits E-1 and E-2 [pdf pp. 190-195] [2025]). Notably, the transport distance from much of eastern and northern New York State to the Blainville, Quebec facility is shorter than the distance from those locations to the Model City Facility. In addition, the Clean Harbors facility in Ontario is approximately 80 miles closer to the intersection of I-190 and Route 104 in Niagara County than the Wayne, Michigan facility.

The Board finds that CWM's failure to address the exportation of hazardous waste to the facilities in Quebec and Ontario, Canada in its Berlow Report and the DEIS severely diminishes the weight to be given to Mr. Berlow's testimony on the potential impacts of waste being shipped to Michigan rather than the proposed RMU-2. The estimated increase in transportation costs and greenhouse gas emissions over the life of the proposed RMU-2 and the method employed in arriving at those estimates is unconvincing when other disposal locations closer than Wayne, Michigan were available and have been used for the disposal of hazardous waste generated in the United States. Because Mr. Berlow framed his testimony in the context of national disposal capacity (much of which was stricken from the record), he limited his analysis to available disposal facilities located in the United States. This Board does not feel so constrained when the question before the Board is whether the facility is otherwise necessary or in the public interest, not whether there is national capacity or a need for the facility. With 162,000 tons of hazardous waste being exported to Canada in 2022 for disposal at either the Quebec or Ontario facility (the only foreign hazardous waste landfills listed in the National Capacity Assessment Report), the Siting Board finds the export of hazardous waste should have been considered in estimating truck distances, fuel costs and greenhouse gas emissions. As a result, the Siting Board concludes that CWM failed to demonstrate that denial of the application will cause significant economic costs to New York industry or result in environmental impacts.

Also relevant to the discussion of potential greenhouse gas impacts from transportation of waste is the fact that CWM did not present evidence on the added greenhouse gas impacts from the trucking of leachate required by the draft SPDES permit. There is no estimate of the number of truck trips needed or their destination and no discussion of the route(s) to be taken. Similarly, the record reflects that some waste from the treatment of leachate from SLFs 1-7 will need to be sent out of state for incineration, which in the past was trucked to Texas (*see* Application Ex. 6 at p. 158 [pdf p. 181]). Again, there is no discussion of the transportation impacts associated with the draft SPDES permit conditions. As noted above, trucks travelling along the transport routes in the Town of Porter or through and near the Tuscarora Reservation are travelling through disadvantaged communities and exposing those communities to increased greenhouse gas emissions and noise.

The Siting Board concludes that CWM failed to meet its burden of proof on the economic and environmental savings from transporting waste to the proposed RMU-2, and therefore, failed to demonstrate that the proposed RMU-2 is otherwise necessary or in the public interest based on these asserted grounds.

3. Potential Impacts to: Property Values, Property Tax Receipts, Second Home Purchases, Economic Development, Marketability of Agricultural Products

In addition to the evidence and testimony presented by CWM, Ms. Witryol sponsored witnesses testifying on potential impacts to second home purchases and economic development, and RRG sponsored witnesses on potential impacts to property values, property tax receipts, and marketability of agricultural products. ALJ O'Connell generally found that the intervenors failed to meet their burdens of proof on each of those respective issues joined for adjudication. On

exceptions, the intervenors argue that the ALJ incorrectly discredited or discounted the testimony of their respective witnesses, and the evidence presented.

The issues that were joined for adjudication and litigated were related to the potential local impacts that may be caused by the siting of RMU-2 and were of particular interest to the Siting Board. The Board, however, agrees with the ALJ that the intervenors failed to demonstrate by a preponderance of the evidence that the asserted impacts would occur if RMU-2 was sited. In addition, intervenors needed to show that any asserted impacts caused by the proposed RMU-2 could be isolated from potential impacts attributable to the neighboring Niagara Falls Storage Site and Modern Landfill. The ALJ concluded that the intervenors' failure to meet their respective burdens of proof obviated the need to consider whether the asserted impacts could be isolated. The Board agrees and finds nothing in the record to support that secondary required showing.

Although the ALJ considered the following topics (topics 4-7) separate from his analysis on whether the siting of RMU-2 was otherwise necessary or in the public interest, the Board finds it is appropriate to consider these topics together with the costs and benefits as demonstrated by the considerations expressed in the Siting Plan.

4. Record of Compliance

The ALJ analyzed the record of compliance and concluded that CWM's record of compliance would not form the basis for denial of the DEC permits or the Siting Certificate. RRG took exception to the ALJ's conclusions, arguing that the disclosed record of compliance may not be complete. RRG also argues that CWM's compliance incidents are very serious especially when considering the proximity of the public schools (RRG Brief on Exceptions at Section VI). On exceptions, the Tuscarora Nation argues that CWM's record of compliance demonstrates that CWM is an unqualified and unsuitable applicant. The Tuscarora argue that any violation of permit conditions would mean that an applicant is unqualified and unsuitable, and that the ALJ should have applied ECL 27-0913(3)(a) without qualification. According to the Nation, CWM's permit violations demonstrate a failure to prioritize environmental protection (Tuscarora Nation Brief on Exceptions at pp. 4-6).

Because the record of compliance is applicable to both the permit and siting certificate applications, DEC staff opposed the exceptions presented by RRG and the Tuscarora Nation. DEC staff argues:

Neither ECL 27-0913(3) nor DEE-16 mandates the denial of a permit application or the revocation, modification, or suspension of an existing permit if a record of compliance contains prior violations. Rather, flexibility is required in evaluating an applicant's fitness since it requires "...a careful balancing of facts and policy considerations." Towpath at 7 (citing *Matter of Laidlaw Environmental Services, Inc.*, supra at 1 and *Matter of CECOS International, Inc.*, Decision of the Commissioner, supra at 4). Subsequent administrative decisions have upheld that DEE-16 does not create a quantitative model or formula "...for determining how many violations or what amount of civil penalties would render an applicant unsuitable for a permit." *Waste Management of New York, LLC (Towpath*

Environmental & Recycling Center), Interim Decision, May 15, 2000) (“Towpath”) at 7 [2000 WL 33354685 at *5].

(DEC Staff Brief Opposing Exceptions at p. 5).

DEC staff argues that the ALJ correctly determined that CWM’s record of compliance does not demonstrate a “pattern of significant, continuous, or repetitive noncompliance with applicable environmental laws, regulations, orders or permits issued by the Department to CWM” or reflect a history of willful noncompliance (*id.* at p. 6).

The Board finds that the record of compliance tables developed for this proceeding were the result of discussions at the issues conference, the Issues Ruling, and the comments of the parties. Therefore, the Board sees no reason to question the completeness of the record of compliance based on RRG’s assertion. Moreover, the Board finds the ALJ correctly applied ECL 27-0913(3), which outlines several factors to be considered, and the Record of Compliance Enforcement Policy (DEE-16 revised March 5, 1993). If the Siting Board or the Commissioner were to apply the strict standard urged by the Tuscarora Nation, then many DEC permits would never be renewed.

The violations depicted in the record of compliance are serious and demonstrate that even a heavily regulated industry cannot attain perfection in its operations and experiences accidents, equipment failure, or lapses in operational oversight and controls. The violations were reported and addressed to the satisfaction of DEC staff. Therefore, the Board adopts the ALJ’s findings and conclusions regarding CWM’s record of compliance and agrees that the violations do not rise to the level of persistent violations that would provide the basis for denial of the Siting Certificate.

5. Past and present activities at the property – Other non-operating hazardous waste landfills at the site of the Model City Facility

There are 11 closed hazardous waste and industrial non-hazardous waste landfills on CWM’s site, with the first landfill, SLF-1 commencing operation in 1971. Approximately 9 million tons of hazardous and industrial non-hazardous waste have been landfilled at the Model City Facility (*see Matter of CWM Chemical Services, LLC*, 2015 WL 9581260, at *77-78 [Ruling Dec. 22, 2015]; Application Ex. 1, Appendix C, Siting Plan at p. 1-8 [pdf p. 205]; Recommended Decision, 2025 WL 1427117, at *99-100). The record also reflects the site is located within the boundary of the former Lake Ontario Ordnance Works (LOOW), which the US Department of Defense (DOD) used to store radioactive wastes, such as residues from uranium processing operations. There is a potential that legacy radioactive and chemical contamination remains at the site; therefore, CWM would be required to conduct walk over radiological surveys of all areas to be excavated pursuant to the terms of the revised project-specific SEMMP (*see* Recommended Decision, 2025 WL 1427117, at *104-105).

CWM argues that the site is ideal for locating the proposed RMU-2 because the site has been used for the management of hazardous waste for decades, and CWM has invested millions of dollars in the Model City infrastructure. The ALJ, however, found that argument tenuous because national capacity exists for the management of hazardous waste and the approval of RMU-

2 would perpetuate an inequity born by Niagara County as the only county with commercial hazardous waste landfills (*see Recommended Decision*, 2025 WL 1427117, at *99-100).

CWM argues on exceptions that the Siting Plan embraces market forces and that CWM's considerable investment carries greater weight than the equity argument adopted by the ALJ (*see CWM Brief on Exceptions* at pp. 61-62). CWM argues that the Model City Facility is not the only place where closed hazardous waste landfills are located in New York State and cites to information outside the record in support of that argument. In doing so, CWM appears to be equating on-site or captive disposal of hazardous waste to disposal at a commercial facility that accepts hazardous waste from other generators. Nothing in this record demonstrates that there are other hazardous waste disposal sites in New York State that harbor anywhere near the 9 million tons of hazardous waste landfilled at the Model City Facility, or even a small fraction of that amount, or that other disposal sites involved approximately 45 years of trucking hazardous waste past residences, schools, hospitals, and churches with another 29 years proposed. In addition, nothing in the record demonstrates there are any other hazardous waste landfills that are required to dispose of their leachate through deep well injection in another state.

On this record, the only commercial hazardous waste disposal facilities in New York State that have been sited and permitted pursuant to ECL Article 27, Title 11 are located in Niagara County – CECOS and CWM (previously SCA). Each of these landfills requires maintenance and monitoring in perpetuity. It is not beyond reason to conclude that an inequity exists when a few communities in one county host more than 11 closed landfills containing more than 9 million tons of waste with another landfill proposed to continue and increase that inequity.

CWM's reliance on the Siting Plan regarding market forces is unconvincing. The Plan states that it embraces "market forces that have served to assure adequate hazardous waste management capacity and does not discourage the consideration of private sector siting proposals that meet the requirements of the ECL and regulations, including the siting criteria at [6 NYCRR Part 377]" (*see Application Ex. 1, Appendix C, Siting Plan* at pp. 6-7 – 6-8 [pdf pp. 302-303]). In other words, the Siting Plan recognizes that the private sector will invest in and build capacity to meet the needs of the national market, and the Siting Plan will not serve as a deterrent to private sector proposals that comply with the ECL and regulations, including 6 NYCRR Part 377. Adequate hazardous waste management capacity, however, is now viewed on the national rather than the state level. A market needs analysis would result in market forces, rather than the regulatory process, being relied upon to demonstrate that proposed hazardous waste management facilities were otherwise necessary or in the public interest. Under a market needs analysis, if CWM is willing to spend the money to build RMU-2 and compete in the hazardous waste disposal market, there would be an adequate demonstration that the facility is otherwise necessary or in the public interest. Such a result is not supported by the ECL, regulations, or the guidance in the Siting Plan.

Here, the ALJ concluded that the presence of several closed hazardous waste landfills and the proposal to construct and operate an additional landfill result in an inequity born by Niagara County because no other county in the state hosts commercial hazardous waste landfills, open or closed. The ALJ's conclusion is one issue the Board is to review in considering whether the proposed RMU-2 is otherwise necessary or in the public interest. For the reasons stated above, the

Siting Board expressly rejects CWM's arguments that its investment carries greater weight than the ALJ's equity reasoning and that a market needs analysis demonstrates the proposed RMU-2 is otherwise necessary or in the public interest.

Notwithstanding CWM's investment in the Model City Facility and the historic use of the site for hazardous waste management, the Siting Board finds that the siting of RMU-2 would exacerbate the inequity experienced by residents of Niagara County and in particular the towns and villages hosting and surrounding the proposed facility. Therefore, the Board concludes that the public interest would not be served by the siting of RMU-2 based on the Board's consideration of other non-operating hazardous waste landfills at the site of the Model City Facility and Niagara County. As discussed further below, because the facility is not needed for capacity assurance, there is no compelling State interest in siting another hazardous landfill at the Model City Facility.

6. Geographic distribution of hazardous waste landfills in New York State

ALJ O'Connell recognized that the CWM's proposed RMU-2 would be the only commercial hazardous waste landfill in New York State and concluded that the approval of RMU-2 would result in an inequitable geographic distribution of disposal facilities in New York State. The ALJ also based his conclusion on the continuing determination by DEC and EPA that adequate national capacity for the treatment, storage and disposal of hazardous waste exists until 2039 (Recommended Decision, 2025 WL 1427117, at *98). The latest National Capacity Assessment Report demonstrates that capacity exists through 2049 (*see* National Capacity Assessment Report, U.S. Environmental Protection Agency, at pp. i, 9, 21, 28 [pdf pp. 7, 17, 29, 36] [January 24, 2025]). Due to the status of this current proceeding, the EPA considered the available and future capacity for CWM's Model City Facility to be zero in the EPA's assessment of national capacity (*id.* at p. 9 [pdf p. 17]). The ALJ also concluded that the Siting Board has the discretion to consider the equitable distribution of hazardous waste landfills in the State in determining whether CWM's proposal would be consistent with the 2010 Siting Plan (Recommended Decision, 2025 WL 1427117, at *98).

On exceptions, CWM argues that the Siting Plan concludes that there is an equitable distribution of hazardous waste treatment, storage and disposal facilities (TSDFs) throughout New York State, and as a result, the ALJ's conclusion cannot be reconciled with the Siting Plan. CWM also argues that the ALJ's conclusion on equitable geographic distribution violates federal law. The Board already addressed CWM's argument regarding federal law above in Section I and repeats here that the argument is without merit. A decision on an application before the Siting Board is not a flat prohibition on any future hazardous waste landfills in the State. Lastly, CWM argues that the economic benefits of the proposed RMU-2, combined with the lack of significant endangerment to residential areas or contiguous populations, should be considered, and because those benefits greatly "outweigh any possible local adverse effects, operation of RMU-2 at the facility will not cause an inequitable geographic distribution of hazardous waste management facilities in New York State" (CWM Brief on Exceptions at pp. 59-60).

In response, Ms. Witryol argues that CWM ignores relevant language in the Siting Plan and the ECL. In particular, she argues that the siting of a landfill is not a preferred method of hazardous waste management pursuant to the hierarchy established by ECL 27-0105. Ms. Witryol

takes issue with CWM's assertion that the Siting Plan concludes that there is equitable geographic distribution of TSD facilities in the New York because the Siting Plan states that due to the lack of need for TSDFs, "there is no required evaluation of the impact of new or expanded facilities on the geographic distribution of facilities to evaluate at this time" (Application Ex. 1, Appendix C, Siting Plan at p. 6-12 [pdf p. 307]; *see also* ECL 27-1102[2][f]). Generally, Ms. Witryol argues that the determination of equitable geographic distribution should not be limited to counting all types of TSDFs to satisfy this consideration. Rather, the Siting Board should be looking at the geographic distribution of disposal facilities because disposal is permanent and requires monitoring and maintenance in perpetuity. (Witryol Brief Opposing Exceptions at pp. 49-51).

The Municipalities urge the Board to also consider the history of operations when reviewing the geographic distribution of TSDFs. Quoting the Siting Plan, the Municipalities note, "The Facility Siting Board may use as guidance the criteria employed in the Plan to evaluate equitable geographic distribution, but is not limited by these criteria. For example, the Board may choose to consider the history of facility operations in an area and the presence of non-operating facilities, such as closed hazardous waste landfills" (Municipalities Brief Opposing Exceptions at p. 33). In addition to the 11 closed landfills at the Model City Facility, the Municipalities point out that five closed hazardous waste landfills are located in the Town of Niagara, Niagara County and argues that there is no concentration of non-operating hazardous waste landfills in New York outside of Niagara County (*id.*). The Municipalities, therefore, assert that siting RMU-2 would be inconsistent with the Siting Plan and the ECL.

The ECL and the Siting Plan speak to equitable geographic distribution of facilities (ECL 27-1102[2][f]; Application Ex. 1, Appendix C, Siting Plan at pp. 6-1, 6-12, 9-4 [pdf pp. 296, 307, 327]). The Board, however, finds that the law demonstrates a concern that areas or localities could be disproportionately burdened if, as here, all the commercial hazardous waste landfills are located in one county or one community.

In 1987, when ECL Article 27, Title 11 was amended, there were only two commercial hazardous waste landfills in New York, CECOS and SCA (now CWM), both located in Niagara County, and New York State was required to provide in-state capacity for the management of its hazardous waste. Although the intent of the law, in part, was to establish TSDFs around the State and provide a mechanism for siting such facilities, the siting law has had the opposite effect and resulted in the concentration of commercial disposal facilities in Niagara County.

The Governor's Approval Memo for the amendment of ECL Article 27, Title 11 noted that the legislation provided for the equitable distribution of disposal facilities:

- "In addition, the bill also expands the scope of projects or proposals which will be reviewed by industrial hazardous waste facility siting boards and requires the siting process to implement an equitable geographic distribution of hazardous waste disposal capacity."
- "Under the bill, the plan will include a determination of the types and nature of facilities which will make the plan consistent with an equitable geographic distribution of disposal capacity across the state. With these

provisions, the State will be able, consistent with the enacted hazardous waste disposal hierarchy, to avoid the further concentration of disposal facilities in only one part of the state.

(Governor's Memo approving L 1987, ch 618, 1987 McKinney's Sess Laws of NY at 2708 [emphasis added]).

It has been nearly forty years since ECL Article 27, Title 11 was amended to include equitable geographic distribution of hazardous waste management facilities as a planning tool, yet Niagara County remains the only county hosting a commercial disposal facility. The Siting Plan's analysis of the equitable geographic distribution of "facilities" is generalized and, in light of the intent expressed in the Governor's Memo, unconvincing to the Board. The term equitable geographic distribution is not defined in law or regulations and certainly not in the Siting Plan. The Siting Plan's "assessment" of TSD facilities by DEC Region only considers total TSDFs and does not address the type of TSD facility. The Siting Plan sets up different definitions for TSDFs including commercial facilities, such as the Model City Facility, that received regulated hazardous waste from off-site (see Application Ex. 1, Appendix C, Siting Plan at pp. 1-1 – 1-6 [pdf pp. 198-203]).

The Board finds, however, that disposal facilities present greater concerns for the communities hosting them than treatment and storage facilities, due in large part to the permanent nature of land disposal and the potential for contamination in the event of accidents or containment failure, as well as the transportation of large quantities of hazardous waste. The Siting Board agrees with the ALJ that the Siting Plan provides the Siting Board with the discretion to distinguish disposal facilities from treatment and storage facilities. The Board also agrees that the Board may consider factors such as the need to manage and maintain disposal facilities in perpetuity.

Prior to 1995, there was a compelling State interest in siting hazardous waste disposal facilities – in-state capacity assurance was required by law (see *e.g.* L 1987, ch 618, § 1 [1987 McKinney's Sess Laws of NY at 1078-1079]). After 1995, with the EPA viewing capacity assurance at the national level, not the state level, that compelling State interest was rendered moot. There is also a State interest in ensuring that hazardous waste is properly managed pursuant to the ECL and regulations including transportation, storage and treatment. In the absence of any justifiable need for disposal capacity in New York, the Board concludes that the siting of RMU-2 would be inconsistent with ECL 27-1102(2)(f) and result in the further concentration of hazardous waste disposal facilities in Niagara County. A result that is inconsistent with the intent of the 1987 amendments to ECL Article 27, Title 11.

Based on the lack of local public interest in the siting of RMU-2 discussed in previous sections and the lack of a demonstrated State interest, the Siting Board concludes that the siting of RMU-2 and continued disposal of hazardous waste at the Model City Facility would, therefore, not serve the public interest based on the Board's consideration of equitable geographic distribution of disposal facilities.

7. Environmental Justice and Disadvantaged Communities

No issues were joined for adjudication related to environmental justice. CWM's application materials, however, failed to recognize that there are environmental justice considerations that should have been addressed by the applicant. CWM admits that the Tuscarora Indian Reservation is an identified environmental justice area but states in its application that the "Tuscarora Indian Reservation is approximately 3.5 miles south of the Model City Facility and is not adjacent to facility transportation routes" (see Application Ex. 6 at pp. 89, 151 [pdf pp. 112, 174]). As discussed above, Route 104 is a designated transportation route from eastern Niagara County and runs through and adjacent to the Tuscarora Indian Reservation.

The ALJ also discussed a related topic regarding disadvantaged communities as outlined in the Climate Leadership and Community Protection Act (L 2019, ch 106 [2019 Sess. Law of N.Y. Ch. 106] [Climate Act]) and the Environmental Justice Siting Law (L 2022, ch 840 [2022 Sess. Law of N.Y. Ch. 840]; L 2023, ch 40 [2023 Sess. Law of N.Y. Ch. 40]). Pursuant to ECL Article 75, the Climate Justice Working Group identified disadvantaged communities in New York State. The ALJ correctly recognized that the Ransomville Census Tract and the Tuscarora Indian Reservation are presently listed as disadvantaged communities. The Ransomville Census Tract includes the transportation route and the Model City Facility in the Town of Porter. The ALJ also notes pursuant to section 7(3) of the Climate Act that in considering and issuing permits, licenses, and other administrative approvals and decisions, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities.

The ALJ concluded that because he recommends denying the Siting Certificate, the Siting Board does not need to make determinations on the potential impacts on disadvantaged communities. The ALJ also concluded, based on Department guidance DEP 24-1, that section 7(3) of the Climate Act and the Environmental Justice Siting Law do not apply to this matter because the applications and completeness determinations pre-date those laws (Recommended Decision, 2025 WL 1427117, at *176).

On exceptions, the Tuscarora Nation argues that if the Siting Board rejects the ALJ's recommendation to deny the Siting Certificate, the Board should address impacts of the project on disadvantaged communities (Tuscarora Nation Brief on Exceptions at pp. 6-7). Again, much of the Nation's argument centers on impacts not being adequately addressed, which in the Board's opinion is more of a comment on the sufficiency of the DEIS and potentially a lack of coordination with the Nation at the start. Ms. Witryol argues in her brief opposing exceptions that the DEIS would need to be supplemented before the issuance of any permits (Witryol Brief Opposing Exceptions at p. 52).

The Siting Board agrees with the ALJ that the Environmental Justice Siting Law and 7(3) of the Climate Act do not apply to this proceeding or the permit applications. ALJ O'Connell correctly addressed and discussed the applicability of those laws to the instant proceeding (Recommended Decision, 2025 WL 1427117, at *176).

Notwithstanding the ALJ's correct recommendation and the fact that this topic was not joined for adjudication, the Siting Board feels additional discussion is warranted. The Board

understands that disadvantaged communities are defined as “communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households, as identified pursuant to section 75-0111 of this article” (ECL 75-0101[5]). DEC policy, DEP 24-1: Permitting and Disadvantaged Communities under the Climate Leadership and Community Protection Act, defines disproportionate burden to mean “a burden within an affected disadvantaged community that is, or would be, significantly greater than that same burden in comparable non-disadvantaged communities, as a result of the proposed action.”

Therefore, in the Siting Board’s review of the record, the Board recognizes that if RMU-2 were approved, disadvantaged communities would experience an increase in truck traffic and associated greenhouse gas emissions, as well as noise. The Board acknowledges that the record was not developed regarding such impacts and, therefore, there is no showing that the disadvantaged communities would be disproportionately burdened by truck emissions and noise. The Board, however, finds based on this record that the Ransomville Census Tract is and will be disproportionately burdened by the continuing disposal of hazardous waste in the Town of Porter if RMU-2 is approved because no other municipality in New York State receives hazardous waste for land disposal. Such a result would increase the existing burden on the community.

Therefore, the Board concludes it would not serve the public interest to site the proposed RMU-2 based on the Board’s consideration of environmental justice and disproportionate burdens on disadvantaged communities. The Siting Board, however, does not base its decision on this conclusion.

Conclusion: The Siting Board has reviewed the remaining exceptions and argument of the parties related to whether the proposed RMU-2 is otherwise necessary or in the public interest and finds them to be without merit. Based on the discussion above, the Siting Board agrees with the ALJ’s recommendation and concludes that CWM failed to meet its burden of proof that the proposed RMU-2 is otherwise necessary or in the public interest. The Siting Board, however, is compelled to take the ALJ’s recommendation a step further and conclude, based on the discussion above, that the siting of the proposed RMU-2 is not otherwise necessary or in the public interest.

Accordingly, CWM’s application for a Siting Certificate is denied.

II. Environmental Permits

The Siting Board recognizes that the decisions on the environmental permits fall outside its purview, but acknowledges that the concerns raised by the Siting Board in the Board’s first interim decision (*Matter of CWM Chemical Services, LLC*, 2016 WL 11970379 [Interim Decision Aug. 11, 2016]) regarding the hydrological characteristics of the site and the SEMMP were addressed by the ALJ to the Board’s satisfaction.

III. Miscellaneous Topics

Transportation Noise, Buffer Zone and Disadvantaged Communities

The Board adopts the ALJ's discussions and recommendations regarding these topics except as discussed above related to disadvantaged communities. With respect to transportation noise, however, the Siting Board notes that no feasible mitigation was presented for the noise increases of more than 6.0 dBA at the four receptors identified in the record (*see e.g.* Kellogg Testimony, Sept. 6, 2023 Tr. p. 35 [Bates No. 003085]) other than the no action alternative.

IV. State Environmental Quality Review

As an involved agency, a Siting Board is normally required to make findings on the final environmental impact statement (FEIS). Here, however, a FEIS has not been prepared by the Department. In circumstances such as this proceeding, where the Siting Board has denied the application for the Siting Certificate, it is well settled that compliance with SEQRA and completion of any remaining steps in the environmental review process are unnecessary when a permit has been denied (*see e.g., In the Matter of An PC Group, LLC*, 2009 WL 2141503, at *11-13 [ALJ Ruling June 26, 2009]; *Matter of Logiudice v. Southold Town Bd. of Trustees*, 50 AD3d 800 [2d Dept 2008]). As the courts have reasoned, when the environmental permit applications have been denied, no action having a significant effect on the environment is being undertaken (*Matter of Logiudice v. Southold Town Bd. of Trustees*, 50 AD3d 800, 801 [2d Dept 2008]; *Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead*, 301 AD2d 530, 531-32 [2d Dept 2003]; *Matter of Cappelli Assoc. v. Meehan*, 247 AD2d 381 [2d Dept 1998]; *Matter of Wade v Kujawski*, 167 AD2d 409, [2d Dept 1990]). Based on the case law, the Siting Board concludes the same reasoning is applicable to the denial of a Siting Certificate. Accordingly, the Board makes no written findings statement.

CONCLUSION

Based upon the foregoing, the Siting Board affirms the ALJ's Recommended Decision subject to our comments above and concludes:

1. There is no current or near-term need for increased capacity for hazardous waste management, such as the proposed RMU-2 landfill, in New York State;
2. The proposed RMU-2 landfill does not conform to the siting criteria established for such facility pursuant to ECL 27-1103 and 6 NYCRR 377.7;
3. CWM Chemical Services, LLC failed to demonstrate by a preponderance of the evidence that the proposed siting of the RMU-2 landfill is otherwise necessary or in the public interest; and
4. The proposed siting of the RMU-2 landfill is not otherwise necessary or in the public interest.

Based upon the record of this proceeding, CWM Chemical Services, LLC's application for a Certificate of Environmental Safety and Public Necessity is denied.

Facility Siting Board

/s/

TIMOTHY P. WALSH, Designee-Chair for
AMANDA LEFTON, Commissioner
NYS Department of Environmental Conservation

/s/

SARA A. HEIM, Designee for
JAMES V. McDONALD, M.D., M.P.H., Commissioner
NYS Department of Health

/s/

ERIC A. MEKA, Designee for
MARIE THERESE DOMINGUEZ, Commissioner
NYS Department of Transportation

/s/

LYNN MARINELLI, Designee for
HOPE KNIGHT, Commissioner
NYS Department of Economic Development and
President & CEO of Empire State Development

/s/

MICHAEL SNYDER, Designee for
WALTER T. MOSLEY, Secretary of State
NYS Department of State

/s/

JOHN F. BENOIT, Member

/s/

LEE SIMONSON, Member

/s/

A. SCOTT WEBER, Member

APPENDIX A
Siting Evaluation Worksheet for Proposed RMU-2 Landfill

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1	6 NYCRR PART 361 REGULATIONS - APPENDIX 17, TABLE 2 - SITING EVALUATION WORKSHEET (Page 1)														
2	Siting						% of Siting		Rating	Siting	Sum of	Siting		Siting	
3	Consideration		Criteria				Consideration		1, 2 or	Scores	Criteria	Consideration		Consideration	
4							Weight		3		Score	Weight		Score	
5	Population	Population with 0.5 miles of the				90			1	0.90					
6	Density	site boundary													
7		The projected population and the rate				10			1	0.10					
8		of growth for the area within 0.5 miles													
9		of the site boundary during the 20 year													
10		period following initial site operation									1.00	8	(10)*	8.00	
11	Population	Population for areas within 0.5 miles				90			3	2.70					
12	Adjacent to	of anticipated transportation routes													
13	Transport Route	The projected population and the rate				10			3	0.30					
14		of growth for areas within 0.5 miles of													
15		the transport routes during the 20 year													
16		period following initial site operation									3.00	9	(7)*	27.00	
17	Risk of	Mode of transportation				10			2	0.20					
18	Accident in	Length of transport route				15			3	0.45					
19	Transportation	Accident rate of transport route				10			3	0.30					
20		Structures within 0.5 miles of the				20			3						
21		transportation route								0.60					
22		Transportation restrictions				15			3	0.45					
23		Nature and volume of waste				30			3						
24		being transported								0.90	2.90	11	(10)*	31.90	
25	Proximity to	Proximity to airports				20			2	0.40					
26	Incompatible	Proximity to other incompatible				80			3						
27	Structures	structures								2.40	2.80	5	(3)*	14.00	
28	Utility Lines	Proximity to major utility lines				100			2	2.00	2.00	1	(1)*	2.00	
29	Municipal Effects	Consistency with the intent of				40			3						
30		master land use plan								1.20					
31		Consistency with local laws,				10			1						
32		ordinances, rules and regulations								0.10					
33		Public expense/revenue tradeoffs				50			3	1.50	2.80	4	(4)*	11.20	
34	Contamination of	Ground and surface water aspects				40			3	1.20					
35	Ground and	Runoff				20			2	0.40					
36	Surface Waters	Hydrogeological characteristics				40			2	0.80	2.40	18	(18)*	43.20	
37	Water Supply	Relationship to water supply				100			2						
38	Sources	resources								2.00	2.00	8	(8)	16.00	

APPENDIX A
Siting Evaluation Worksheet for Proposed RMU-2 Landfill

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
39	6 NYCRR PART 361 REGULATIONS - APPENDIX 17, TABLE 2 - SITING EVALUATION WORKSHEET (Page 2)														
40	Siting					% of Siting		Rating	Siting	Sum of	Siting		Siting		
41	Consideration		Criteria			Consideration		1, 2 or	Scores	Criteria	Consideration		Consideration		
42						Weight		3		Score	Weight*		Score		
43	Fires and	Minimum distance	50					1	0.50						
44	Explosions	Fire Department and emergency	20					2							
45		medical services							0.40						
46		Proximity to fire department and	30					2							
47		fire fighting water supply. A suitable													
48		water supply shall be as recommended													
49		by the New York State Department of													
50		State Office of Fire Prevention													
51		and Control							0.60	1.50	10	(11)*	15.00		
52	Air Quality	Atmospheric stability	20					2	0.40						
53		Prevailing wind direction	50					3	1.50						
54		Wind speed	30					2	0.60	2.50	12	(12)*	30.00		
55	Areas of Mineral	Risk of subsidence	100					1							
56	Exploitation								1.00	1.00	1	(3)* +1**	1.00		
57	Preservation of	Developmental and operational	100					2							
58	Endangered,	impacts on endangered, threatened, and													
59	Threatened, and	indigenous species or critical habitat													
60	Indigenous Species								2.00	2.00	6	(6)*	12.00		
61	Conservation of	Proximity to historical or cultural	100					3							
62	Historic and	resources													
63	Cultural Resources								3.00	3.00	4	(4)*	12.00		
64	Open Space,	Proximity to open space and	50					2							
65	Recreational and	recreational resources							1.00						
66	Visual Impacts	Relationship to scenic views or vistas	30					2	0.60						
67		Degree to which proposed facilities are	20					3							
68		readily noticeable to passerby							0.60	2.20	3	(3)* +1-2**	6.60		
69	Site Score (Sum of Siting Consideration Scores:													229.90	
70															
71	FOOTNOTES:														
72	* The Siting Consideration Weight values shown in brackets represent guidelines provided by the regulations (see 6 NYCRR 377.7(c)(2)).														
73	Actual values for each Siting Consideration Weight must be entered by the Board in the box preceding (to the left) each bracketed value.														
74	** These values represent adjustments (additions) to Siting Consideration Weights as recommended for landfills by the regulations														
75	(see Appendix I7, Table 1)														