

Introduction

On August 11, 2016, the Facility Siting Board (Siting Board) issued an interim decision (Interim Decision) addressing appeals from Administrative Law Judge (ALJ) Daniel P. O'Connell's December 22, 2015 Ruling on Proposed Issues for Adjudication and Petitions for Party Status (Issues Ruling) in this joint permit and siting certificate matter. The Issues Ruling granted full party status to Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities); Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau); and Amy Witryol (collectively intervenors), and joined several issues for adjudication.

In the Interim Decision, the Siting Board reversed the portion of the ALJ's Issues Ruling regarding the sufficiency of radiological surveys and the adequacy of the project-specific soil excavation monitoring and management plan (SEMMP) and recommended that the Commissioner affirm the portion of the Issues Ruling regarding the geological and hydrogeological characterization of the site. The Siting Board also affirmed the portion of the ALJ's Issues Ruling regarding the proposed issues not joined by the ALJ, and within the Siting Board's jurisdiction, and advised the parties that the record would not be further developed on those issues (*see* Interim Decision at 19).

On May 24, 2017, the Siting Board issued a Ruling and Second Interim Decision (Second Interim Decision) addressing Ms. Witryol's appeal from ALJ O'Connell's April 7, 2017 ruling that granted CWM's motion to commence discovery on the issues related to the siting certificate. Intervenors opposed CWM's motion arguing that it would prejudice intervenors to proceed because the State Pollutant Discharge Elimination System (SPDES) and air state facility (ASF) permits had not been referred to the Office of Hearings and Mediation Services (OHMS) and

because the Deputy Commissioner had not issued an interim decision on the appeals from the Issues Ruling. The ALJ issued a scheduling order for discovery and the filing of pre-filed direct testimony and provided dates for the adjudicatory hearing on the economic impact issues and transportation noise analysis.

The Siting Board concluded that it was premature to schedule discovery and pre-filed direct testimony before the SPDES and ASF draft permits had reached the procedural posture of the part 373 and part 377 (former part 361) applications. Accordingly, the Siting Board reversed and vacated the ALJ's April 7, 2017 ruling and advised the parties that, when the SPDES and ASF draft permits reached the procedural posture of the part 373 and part 377 applications, the parties will be expected to proceed without further delay (Second Interim Decision at 8).

On December 23, 2016, Department staff issued a Notice of Complete Application (NOCA) for CWM's application to modify the SPDES permit, and the draft SPDES permit was referred to the Department's Office of Hearings and Mediation Services (OHMS) on June 1, 2017. On August 18, 2017, Department staff issued a NOCA to modify the ASF permit, and the draft ASF permit was referred to OHMS on December 8, 2017.

ALJ O'Connell caused a notice of deadline for petitions for party status and supplemental issues conference to be published regarding the SPDES and ASF permit applications and draft permits. The Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol filed supplemental petitions. In addition, the Tuscarora Nation and the Buffalo-Niagara Waterkeeper filed petitions for amicus party status. CWM and Department staff filed replies to the supplemental petitions and petitions.

ALJ O'Connell conducted the supplemental issues conference on the SPDES and ASF draft permits in Youngstown, New York on July 10, 2018. All the Siting Board members

attended the supplemental issues conference. On February 14, 2019, ALJ O’Connell issued his Supplemental Rulings on Proposed Issues for Adjudication (Supplemental Ruling). The Municipalities; RRG, L-PCSD, and Farm Bureau; Ms. Witryol and Buffalo-Niagara Waterkeeper appeal from the Supplemental Ruling. *See* Appendix A attached hereto.

Supplemental Ruling

During the issues conference and in his Supplemental Ruling, ALJ O’Connell granted amicus party status to the Tuscarora Nation and Buffalo-Niagara Waterkeeper (*see* Supplemental Ruling at 30). The ALJ, however, ruled that the issues raised by the Municipalities; RRG, L-PCSD, and Farm Bureau; and Ms. Witryol in their respective supplemental petitions were not substantive and significant. The ALJ addressed the legal question raised by Buffalo-Niagara Waterkeeper and the Municipalities regarding the application of the federal and State regulations to the modification of CWM’s SPDES permit. The ALJ concluded that CWM’s facility would not be a new source, new discharger or a new Great Lakes discharger, as those terms are defined by federal regulations (Supplemental Ruling at 9-13). The ALJ also held that the Municipalities and Ms. Witryol had not identified a substantive and significant issue for adjudication regarding CWM’s ability to comply with effluent limits provided in the draft SPDES permit (*id.* at 15). Lastly, with regard to the draft SPDES permit, ALJ O’Connell determined that issues regarding the content of the antidegradation demonstration (ADD) were not relevant to the determination of the SPDES permit application (*id.* at 16).

With the regard to the ASF draft permit, the intervenors proposed issues regarding a requested health risk assessment, dispersion modeling, and the SEMMP. The ALJ determined that the parties did not meet their burdens of persuasion regarding those proposed issues (Supplemental Ruling at 18, 20, 22-23).

The Supplemental Ruling also addresses several additional proposed issues that were not related to the draft SPDES and ASF permit. The ALJ granted Ms. Witryol's request to add Patrick Whalen as a witness to testify regarding the December 2015 *Niagara Falls Prospect Survey* "as it relates to whether CWM's proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts, as well as the subtopic concerning potential effects on second home purchases as a measure of tourism spending" (Supplemental Ruling at 25). The ALJ, however, denied Ms. Witryol's request to expand the issue already joined by the 2015 Ruling (*id.* at 26) and Ms. Witryol's request to offer evidence related to a no-action alternative (*id.*). The ALJ also denied Ms. Witryol's request to supplement her 2014 petition through the proposed testimony of Nicholas Rockler, PhD to the extent that intervenor was attempting to expand an issue previously joined for adjudication (*id.* at 26-27). The ALJ, however, would allow Dr. Rockler to testify in place of or in addition to Daniel Barufaldi regarding the issue previously joined – impacts on other economic development (*id.*). In addition, ALJ O'Connell denied Ms. Witryol's request to change the scope of CWM's record of compliance, which was discussed and ruled upon in the 2015 Ruling (*id.* at 27).

Ms. Witryol also offered two witnesses, Sean C. Chapel and Karen K. Barcal, to testify regarding the sufficiency of radiological surveys relied upon in developing the SEMMP (Supplemental Ruling at 28). The adequacy of the SEMMP has already been joined as an issue for adjudication by the Siting Board (Interim Decision at 18). ALJ O'Connell ruled that the witnesses may provide relevant testimony, but the scope of such testimony is dependent upon how the issues are framed by the Deputy Commissioner (Supplemental Ruling at 28).

The ALJ determined that proposed issues raised by Sections 10 through 16 of Ms. Witryol's supplemental petition did not raise substantive and significant issues and in many

instances the proposed issues had already been rejected in the 2015 Ruling (Supplemental Ruling at 28-29).

RRG, L-PCSD and Farm Bureau proposed an issue related to buffer zones between schools and hazardous waste facilities that the ALJ determined the parties should further develop in closing briefs (Supplemental Ruling at 29).

DISCUSSION

On these appeals, the Siting Board must determine whether the ALJ's Supplemental Ruling properly applied the standard for adjudicable issues as set forth in 6 NYCRR 624.4(c). The contested issues on the draft SPDES and ASF permits are not the result of a dispute between applicant and Department staff (*see* 6 NYCRR 624.4[c][1][i] and [ii]), but are proposed by petitioners. Therefore, the petitioners' proposed issues must be "both substantive and significant" to be adjudicable (*see* 6 NYCRR 624.4[c][1][iii]).

The Supplemental Ruling discusses the standards for adjudicable issues, and those regulatory requirements will not be discussed further here (*see* Supplemental Ruling at 15). In addition, ALJ O'Connell addresses attempts by the intervenors to reargue issues previously raised and ruled upon in the 2015 Issues Ruling. In doing so, the ALJ applied the regulatory provisions for late filed petitions found at 6 NYCRR 624.5(c).

APPEALS

SPDES requirements

On appeal, the Municipalities argue that ALJ O'Connell's rejection of the Municipalities' argument that RMU-2 "may not as a matter of law discharge leachate and collected contaminated stormwater to a wastewater treatment facility that discharges to the Niagara River" is not

supported by law or regulation. The Municipalities argue that the ALJ's reliance on case law is misplaced and the ALJ's reading and application of federal regulation is incorrect. According to the Municipalities, federal regulation requires CWM to transport effluent from the proposed RMU-2 landfill outside the Great Lakes basin. Buffalo-Niagara Waterkeeper and Ms. Witryol advance similar arguments on appeal, and Ms. Witryol argues that this issue is also a Siting Board concern.

Department staff argues that intervenors failed to demonstrate that the ALJ did not properly apply the standards for determining adjudicable issues and failed to provide a legal basis on the appeals for challenging the ALJ's ruling on the legal issues raised by intervenors. Staff concludes that the intervenors fail to refute the determinations by the Department, United States Environmental Protection Agency (USEPA) and ALJ that the draft SPDES permit complies with all applicable law, and the appeals should be denied.

CWM argues the Municipalities are raising a new issue on appeal than that contained in their supplemental petition and that intervenors' arguments are without merit and contrary to law.

The interpretation and application of federal and State laws and regulations pertaining to the draft SPDES permit are permit-related and fall within the jurisdiction of the DEC Deputy Commissioner in this matter. The Siting Board has no role in determining appropriate discharge limits for a permitted activity. It is well settled that the Department, as a State agency, has broad power to construe statutes and regulations it administers and the Department's construction of such statutes and regulations should be upheld unless it is unreasonable or irrational (*see New York Pub. Interest Research Group v Williams*, 127 AD2d 512 [1st Dept 1987]; *Matter of Memorial Hosp. v Axelrod*, 68 NY2d 958, 960 [1986]). The Siting Board, however, does not

administer the law or regulations pertaining to Department permits. The Siting Board is not authorized to review or adjudicate the Department's construction of the laws and regulations the Department administers. Accordingly, the Siting Board concludes it would not be appropriate for the Board to rule upon these questions of law, and to the extent this proposed issue is appealed to the Siting Board, those appeals are dismissed.

ASF requirements

- Dispersion modeling

The Municipalities argue that the air dispersion modeling is substantive and significant because the modeling required by the draft permit is not based on on-site meteorological data. Instead, the air dispersion modeling is based on meteorological data from the Niagara Falls International Airport. Ms. Witryol also argues that on-site data must be used. In addition, Ms. Witryol argues that the Siting Board cannot properly review the impacts on the area without dispersion mapping based from on-site data.

Department staff argues that the ALJ correctly held that no factual issues for adjudication existed related to the use of meteorological data from the Niagara Falls International Airport in the dispersion modeling for the ASF permit because the use of that data is consistent with Department guidance. Staff argues that intervenors did not proffer any witness on the proposed meteorological data issue and provided no legal basis to support their claim.

CWM proffers similar arguments as Department staff and adds that intervenors did not raise a substantive issue for adjudication because petitioners did not raise sufficient doubt about the applicant's ability to meet statutory or regulatory criteria regarding the draft ASF permit.

The Siting Board, however, is concerned that the draft ASF permit is not based on on-site meteorological data. For the reasons that follow, the Siting Board concludes the record needs

further development regarding the use of meteorological data from Niagara Falls International Airport rather than on-site meteorological data. One of the facility siting criteria the Board is required to consider is “potential air quality problems which may occur as the result of historical or estimated meteorological conditions and to what extent such respective problems and conditions will affect neighboring communities” (6 NYCRR 377.7[b][10][i]). Among the air quality metrics to be considered, the Board must evaluate the site for atmospheric stability, prevailing wind direction and wind speed (6 NYCRR 377.7[b][10][ii]).

In the Part 361 Siting Certificate Application, CWM discusses the result of modeling data collected at the Model City Facility (Part 361 Siting Certificate Application [revised November 2013] at 71-76). Table 8 shows the average monthly wind speeds from 2006 through 2011 and Figure 8 provides a wind rose analysis for 1994 (*id.* at 73-76). CWM draws conclusions from the on-site data to score the siting consideration for air quality (*id.* at 82 [Table 9]). CWM maintains a meteorological tower at the Model City Facility (*id.* at 39; Supplemental Ruling at 19).

The draft ASF permit dispersion modeling used 2012-2016 surface and profile meteorological data that DEC provided to CWM, which incorporated site specific elevation modeling (*see* Air Quality Monitoring Report [June 2017]). At the issues conference, Department staff confirmed that the meteorological data provided to CWM was from Niagara Falls International Airport and that data was used because on-site meteorological data was not in the correct format for USEPA’s dispersion modeling software (Supplemental Ruling at 20; Transcript at 68).

Although the use of meteorological data from Niagara Falls International Airport in dispersion modeling for the draft ASF permit may satisfy Department guidance and may not

raise an issue for adjudication on the ASF permit, the data and resulting dispersion modeling do not necessarily assist the Board in evaluating the siting criterion outlined in 6 NYCRR 377.7(b)(10). In order for the Siting Board to evaluate the air quality problems that may result from the siting of RMU-2, consistency between the modeling provided in the Part 361 application and the modeling provided in the ASF permit application is required. At a minimum, it needs to be demonstrated to the Board's satisfaction that the use of on-site meteorological data will not result in a different dispersion model than that reached by using the airport's meteorological data. Although Department staff discussed the fact that on-site data was not in the correct format, there is no indication from staff or CWM that on-site data could not be provided in the correct format.

Because the Board must evaluate meteorological conditions at the site, and on-site data was presented in the Part 361 Certificate Application, the Board concludes that this issue must be developed further solely for the reasons stated above related to the Part 361 Certificate Application and the evaluation the Board is required to perform. Intervenors have not proffered a witness related to this issue. The Siting Board directs CWM and Department Staff to present direct testimony and evidence, subject to cross examination by the Municipalities and Ms. Witryol, related to the meteorological data provided in support of the Part 361 Certificate Application and the meteorological data provided in support of the air dispersion modeling for the ASF draft permit. Such testimony and evidence should discuss and compare the data associated with atmospheric stability, prevailing wind direction and wind speed as used in the respective certificate and air permit applications. The ALJ's Supplemental Issues Ruling is modified as discussed and limited above.

- Health Risk Assessment

In addition, the Municipalities, Ms. Witryol and RRG request that the Department require CWM to conduct a health risk assessment (based on the requested dispersion modeling) in association with the ASF draft permit due to the historically contaminated soils found on the site.

Department staff argues that a comprehensive health assessment is performed in developing the air regulations, and emission limits are established based on a comprehensive inhalation risk assessment. Staff also asserts that the guideline concentrations values used by staff are conservative, health based standards. Staff further argues that intervenors have not demonstrated that the request for a health risk assessment is a substantive or significant issue and notes that no witness was proffered by intervenors. CWM additionally argues that there are no statutory or regulatory provisions that require a multi-media health risk assessment, therefore, intervenors' requests do not raise a substantive issue.

The intervenors' request that the Department direct CWM to conduct a health risk assessment is a matter for the Deputy Commissioner to address. The ALJ concluded that the intervenors did not meet their burden of persuasion to demonstrate the proposed issue is substantive and significant (Supplemental Ruling at 18). The Board agrees, and notes that the effluent limitations established for SPDES permits and emission standards established for air permits are health based standards. The Board relies on those standards as being protective of human health and the environment. The Board has already joined the adequacy of the SEMMP for adjudication, based in part on the argument that more frequent radiological and chemical surveys prior to excavation are required for the protection of human health and the environment. The Board held that that CWM's proposed project-specific SEMMP increased the likelihood of the migration of historic chemical and radiological contamination and elevated potential risks

and impacts on human health and the environment (Interim Decision at 15). The Siting Board expects that the adjudication of issues related to the SEMMP will include the potential for impacts.

To the extent that the intervenors seek to raise this proposed issue on appeal to the Siting Board, those appeals are dismissed.

- Segregation of Air Impacts

The Municipalities and Ms. Witryol also contend that the analysis of air impacts is being segregated by application of two separate programs and permits – the hazardous waste program and permit, which regulates dust emissions and excavation procedures versus the air program and permit, which regulates chemical emissions from operational processes. The Board acknowledges that this is an issue for the Deputy Commissioner to address, but agrees with the ALJ that the intervenors did not meet their burden of demonstrating this is a substantive and significant issue requiring adjudication. To the extent that the intervenors seek to raise this issue on appeal to the Siting Board, those appeals are dismissed.

The Board recognizes, however, that this matter has lacked procedural continuity and cohesiveness because the ASF and SPDES draft permits are being reviewed four years after the hazardous waste permit and siting certificate applications were submitted. Such delays lend themselves to the arguments being made.

Other Appeals of RRG, L-PCSD and Farm Bureau

- Antidegradation Demonstrations

To the extent RRG requests that CWM's Antidegradation Demonstrations (ADDs) be removed from the record of these proceedings in its entirety, it is the Siting Board's opinion that

such a request must first be made to the ALJ and should be made at the time the ADDs or portions thereof are being introduced into the hearing record or during discovery via a motion. CWM submitted the ADDs in support of its SPDES permit application, but as indicated in the Supplemental Ruling, the ADDs were not relied upon by Department staff when drafting the SPDES permit conditions. The ALJ concluded that the ADDs were not relevant to the Deputy Commissioner's final determination on the SPDES permit application (Supplemental Ruling at 16). The ALJ recognized, however, that the ADDs, in part, address issues already joined for adjudication (*id.*). For the sake of judicial economy, and to the extent that intervenor's request is a motion made to the Siting Board, that motion is denied with prejudice.

- Current operations

On their appeal, RRG, L-PCSD and the Farm Bureau challenge the ALJ's failure to address, in the Supplemental Ruling, RRG's contention that the current operations at CWM (treatment and storage) are not authorized by the existing permits and certificate. Pursuant to former 6 NYCRR 361.6(a)(4) and (b), the previous certificate and any conditions thereon merged and become part of the Department's permit. This is not an issue regarding the proposed siting of RMU-2 because it relates to existing facilities and ongoing operations. This proposed issue is not an issue related to the current siting certificate application before the Siting Board. As framed by intervenors, the proposed issue relates to what is authorized by the existing permit. The Board concludes that the proposed issue is not properly before the Siting Board and that portion of the appeal is dismissed.

After considering the remaining appeals of RRG, L-PCSD and Farm Bureau within the Siting Board's jurisdiction, the Siting Board agrees with the conclusions of the ALJ that those proposed issues are not substantive and significant. Accordingly, the appeals of RRG, L-PCSD

and Farm Bureau lack merit, the ALJ's Supplemental Issues Ruling is affirmed, in part, and the record will not be further developed on those issues.

Other Appeals of Amy Witryol

In Ms. Witryol appeal from the ALJ's Supplemental Ruling, she raises several additional issues including transportation; municipal effects – public revenue, expense tradeoffs; record of compliance; public participation; risk to residential areas and contiguous populations; the Niagara Falls Storage Site; worst-case scenario and contingency; legacy contamination and project-specific excavations; surface and storm water; air impacts; preservation of endangered, threatened and indigenous species; and consistency with the siting plan. After considering Ms. Witryol's appeals within the Siting Board's jurisdiction, the Siting Board agrees with the conclusions of the ALJ that those issues are not substantive and significant. Accordingly, Ms. Witryol's appeals, including appeals not specifically addressed herein, are rejected, the ALJ's Supplemental Issues Ruling is affirmed, in part, and the record will not be further developed on those issues.

Ms. Witryol also argues on appeal that many of her proposed issues were not ruled upon by the ALJ or the Siting Board. The Siting Board concludes that Ms. Witryol has not demonstrated that those issues are substantive and significant. Accordingly, her appeals of those issues are rejected, the ALJ's Supplemental Issues Ruling is affirmed, in part, and the record will not be further developed on those issues.

Ms. Witryol also moves in her appeal to have dialogue stricken from the record. As opined above, such a motion should first be made to the ALJ. After the ALJ rules on the motion,

a party may appeal from the ruling. For the sake of judicial economy, and to the extent that intervenor's request is a motion made to the Siting Board, that motion is denied with prejudice.

The Siting Board concludes, however, that Ms. Witryol should be allowed to engage additional experts identified in her supplemental petition. As discussed above, the ALJ has already permitted her to use Patrick Whalen to testify regarding the *Niagara Falls Prospect Survey* and the effect of the proposed project on property values, municipal and school property tax receipts, and potential effects on second home purchases as a measure of tourism spending; Nicholas Rockler, PhD in place of or in addition to Daniel J. Barufaldi regarding impacts on other economic development; and Sean C. Chapel and Karen K. Barcal regarding the sufficiency of radiological surveys that CWM would rely upon in developing and implementing the SEMMP.

Although the Board agrees with the ALJ, that the issues already joined for adjudication will not be expanded, the Board concludes that Ms. Witryol should also be allowed to use Michelle Bodewes, P.E. in support of David Coate regarding noise level increases to ambient levels along the truck route and maximum noise level exceedances with respect to the September 7, 2016 Transportation Noise Analysis prepared by Watts Architecture & Engineering for Arcadis and CWM. In addition, Ms. Witryol should also be allowed to use Anthony Girasole, MAI, SRA, Real Estate Appraiser in support of Daniel Barufaldi regarding impacts on other economic development as described and joined in ALJ O'Connell's December 15, 2015 Ruling at page 92. Accordingly, the ALJ's Supplemental Issues Ruling is modified, in part, as discussed above.

CONCLUSION

That portion of the Supplemental Issues Ruling regarding the use of on-site meteorological data for air dispersion modeling is modified as discussed and limited above. That portion of the Supplemental Issues Ruling regarding the proposed testimony of Michelle Bodewes and Anthony Girasole in support of issues that the ALJ joined for adjudication in the 2015 Issues Ruling is modified as discussed and limited above. Those portions of the appeals that are beyond the Siting Board's jurisdiction are dismissed. The Supplemental Issues Ruling is otherwise affirmed. The remaining motions within the Siting Board's jurisdiction, including any motion not specifically addressed herein, are denied.

Although the Deputy Commissioner has not issued an interim decision on the appeals before the Commissioner, the Siting Board hereby directs ALJ O'Connell to schedule discovery, and pre-filed direct testimony for the following siting certificate related issues and witnesses:

1. Property values and tax receipts (RRG, L-PCSD [Acks, Vanduse and Henderson]);
2. Second home purchases (Witryol [Rosenwasser and Whalen]);
3. Impacts on other economic development (Witryol [Barufaldi, Rockler and Girasole];
and
4. Impacts on marketability of agricultural products (Farm Bureau [Tower and Freck]).

As previously stated by the Siting Board, the parties are expected to proceed, as directed by the ALJ, without further delay.

Appendix A

In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR Part 361 (Siting of Industrial Hazardous Waste Facilities) by CWM Chemical Services, LLC

Appeals from February 14, 2019 Supplemental Rulings on Proposed Issues for Adjudication

Appeals

- Appeal of Buffalo Niagara Waterkeeper, filed March 29, 2019 with errata filed April 8, 2019
- Appeal of Residents for Responsible Government, the Lewiston-Porter Central School District and the Niagara County Farm Bureau, dated April 3, 2019
- Appeal of Niagara County, the Town and Village of Lewiston, and the Village of Youngstown, dated April 4, 2019
- Appeal of Amy Witryol, dated April 5, 2019 with errata filed April 12, 2019

Replies

- Reply of Amy Witryol, dated May 10, 2019
- Reply of CWM Chemical Services, LLC, dated May 10, 2019
- Reply of New York State Department of Environmental Conservation, dated May 10, 2019