

Preliminary Statement

By e-mail dated February 24, 2016, Ms. Witryol requested the opportunity to submit new information allegedly related to two issues addressed in the December 22, 2015 Issues Ruling. Ms. Witryol indicated that the basis for her motion to reconvene the RMU-2 Issues Conference is new information that was not available at the time of the Issues Conference. *See* ALJ O’Connell’s February 26, 2016 e-mail. In the February 26, 2016 e-mail, Ms. Witryol was advised to file a motion containing an offer of proof including a concise narrative describing each new document, who prepared it, when it was prepared, when it was released, how it was released, when Ms. Witryol requested the document, when the document was obtained, and the identity of any proposed witness who would testify regarding the new information, including the information specified in 6 NYCRR 624.5(b)(2)(ii). Ms. Witryol’s motion to reconvene the Issues Conference was filed on April 21, 2016.

CWM Chemical Services, LLC (“CWM”), submits this response in opposition to the motion by Ms. Witryol to reconvene the RMU-2 Issues Conference to consider alleged “new” information not previously presented. Two of the proposed issues in the motion relate to legacy radiological contamination associated with the Niagara Falls Storage Site (“NFSS”) and the Lake Ontario Ordinance Works (“LOOW”). In addition, the motion purports to assert an environmental justice issue on behalf of the Tuscarora Indian Nation. Finally, the motion makes certain assertions related to the fact that RMU-1 was out of disposal capacity as of November 2015.

The motion identifies the following documents/information as not available as of the time of the April 28-30, 2015 RMU-2 Issues Conference:

1. The December 2015 U.S. Army Corps of Engineers Proposed Plan for remediation of the Interim Waste Containment Structure (“IWCS”) located on the NFSS property south of the CWM property;
2. Two September 22, 2014 U.S. Department of Energy (“DOE”) letters to the Corps to refer Vicinity Properties H’ (on CWM property) and X (not on CWM property) for response actions under the FUSRAP Program. Ms. Witryol claims that these letters did not become available until March 2016;
3. The October 19, 2015 Tuscarora Nation Chief Leo Henry’s letter to EPA and DEC; and
4. RMU-1’s capacity was exhausted as of November 2015.

For the following reasons, the motion should be denied.

1. The NFSS Issues

The motion to reopen references the Corps’ December 2015 proposed remedial plan for the NFSS IWCS. The motion asserts that the draft plan raises additional SEQRA issues.

The proposed remedial plan was issued for public comment. Thereafter, in an estimated 2 years, the COE will issue a record of decision (“ROD”), which could modify the proposed plan based upon any significant comments received. Then, the Corps will seek to obtain the necessary funding. Once funding is obtained, there will be a two (2) year design phase before any work begins. That will include preparing a detailed construction work plan. That work plan will determine how the proposed remedial action will be conducted including measures to protect workers and the public from any potential contaminant exposures.

The motion does not include a specific offer of proof identifying any proposed witnesses, their qualifications, or what would be the subject of their proposed testimony and/or how that testimony would add to what Ms. Witryol previously submitted regarding the NFSS. Contrary to

Ms. Witryol's suggestion, it is not CWM's responsibility to advise the Corps how to design its work plan and/or how best to safeguard its workers and the public.

The motion asserts that: (1) potential pumping associated with RMU-2 would impact the IWCS groundwater monitoring;¹ (2) the IWCS proposed plan does not contain a cumulative health risk assessment for the IWCS remedial construction activities; and (3) there has been no evaluation of any potential surface water discharges that might occur during the IWCS remedial construction work. The motion asserts that CWM should assess the health risks associated with the proposed IWCS remedial work, and that CWM should assess the potential impacts associated with any surface water discharges during the IWCS remedial work. Until the Corps completes its remedial action work plan, in an estimated four (4) years, any such assessments would be pure speculation.

NFSS related SEQRA issues were addressed in the Issues Ruling at 133. The Ruling concluded that the alleged groundwater pumping issue was not substantive.² There is nothing in the proposed IWCS Plan or the motion to reopen that would support a change in that determination.

With regard to activities that might occur at the IWCS and any impacts associated therewith, the Ruling properly determined that consideration of issues related to the NFSS property are not relevant to this proceeding.

The IWCS work is being done pursuant to CERCLA protocols. As a result, the worst case scenario health risk assessment results, referenced by Ms. Witryol, are clearly not relevant to the pending RMU-2 proposal and not relevant to any risks associated with conducting the proposed IWCS remedy in accordance with a yet to be prepared work plan. CERCLA requires

¹ The same claim is part of Ms. Witryol's pending interim appeal to the Commissioner.

² The Ruling did identify several Site hydrogeologic issues for an adjudicatory hearing.

that all remedial actions be designed to meet permit equivalent standards. Thus, the Corps needs to design the remedial construction work plan to meet relevant and appropriate requirements, including any air emission standards. *See* 42 U.S.C. § 9621.

Moreover, any RMU-2 surface water discharges will be regulated by the Model City Facility's SPDES permit. Since the IWCS work will be done in accordance with CERCLA, any construction related surface water discharges will need to meet federal and New York SPDES permit equivalency requirements.

The motion to consider the 2015 IWCS remedial plan should be denied.

2. The LOOW Issue

With regard to legacy radiological contamination associated with the parts of the LOOW that comprise the CWM Model City property, Ms. Witryol contends that, in January 2016, she first became aware of the DOE's September 22, 2014 referral letters regarding Vicinity Properties H' (not in the RMU-2 foot print) and X (not part of CWM's property). Ms. Witryol contends that the need for further investigation on these 2 Vicinity Properties provides a basis to reopen the issues related to the adequacy of the historic site radiological surveys of the entire CWM facility, the adequacy of the DEC/DOH approved SEMMP to address any remaining radiological contamination during excavation activities related to the RMU-2 project, and the closure of Fac Pond 8 in accordance with its approved closure plan in the 2013 site-wide permit. Those issues were addressed at length in the Issues Ruling at 116-137 concluding that CWM should not be required to conduct a further radiological survey before beginning any RMU-2 construction; that the challenges to the SEMMP did not raise a substantive issue; and that the 2013 site-wide Part 373 permit specifies the Fac Pond 8 closure requirements, and claims related to those closure requirements are beyond the scope of this proceeding. Essentially the same

arguments relating to the adequacy of the radiological surveys are contained in Ms. Witryol's pending interim appeal to the Commissioner.

While the motion references a number of reports, with dates ranging from 1951 to 2014, there is no claim that any of those documents were unavailable to Ms. Witryol prior to the time of the Issues Conference. Instead, the motion states that the Corps "did not publicize" the letters until January 2016. There is no specific offer of proof to support the motion to reopen. The motion is predicated on speculation, not new documented information.

Notwithstanding the Fac Pond 8 closure requirements in the 2013 site-wide Part 373 permit, and DEC Staff's interpretation that the permit and the regulations require that Fac Pond 8 be closed by mid-August 2016, Ms. Witryol makes the entirely baseless claim that:

If not for RMU-2, CWM would wait to close Fac Pond 8 until the Corps came in to remediate it. There would be no reason other than RMU-2 that could compel a publicly held company to justify what would otherwise be unnecessary.

In fact, CWM proposed a closure date extension beyond the August 2016 deadline. The DEC indicated that the federal RCRA regulations required closure of Fac Pond 8 by August of this year.

It will cost CWM approximately \$1 million to close Fac Pond 8, including the need to obtain approximately 75,000 yards of off-site fill in order to complete the work. CWM is closing Fac Pond 8 because it has a legal obligation to do so.

The adequacy of the radiological investigation surveys and the adequacy of the SEMMP are issues that were raised by the Municipalities, and those issues are the subject of the Municipalities' pending interim appeal to the Commissioner. The motion simply seeks to rehash the same issues and the same arguments addressed in the Issues Ruling and further addressed in the pending interim appeals to the Commissioner. The motion should be denied.

3. The Tuscarora Nation

Based solely on Chief Henry's belated October 19, 2015 letter to EPA and DEC, Ms. Witryol contends that the Issues Conference should be reopened to consider whether the Tuscarora Nation is an environmental justice community affected by the RMU-2 application. That issue is addressed in the DEIS. Ms. Witryol's motion fails to note that Neil Patterson, a member of the Tuscarora Indian Nation, appeared at the July 26, 2006, 6:30 p.m. RMU-2 DEIS public scoping hearing. His statement in opposition to RMU-2 is contained in the hearing transcript at pp. 32-35. He spoke immediately before Ms. Witryol.

In August 2013, DEC provided CWM with the then current mailing list for the quarterly notifications regarding facility permit modifications. Ms. Renee Rickard, Tuscarora Environmental Program, 2045 Upper Mountain Road, Tuscarora Nation via Sanborn, NY 14132-9236, is on that mailing list.

The April 10, 2015 EPA letter from John Filipelli to Chief Leo Henry refers to a March 24-25, 2015 Tuscarora Nation Environmental Task Force meeting with EPA where the Tuscarora Nation raised its concerns related to proposed RMU-2.

The December 22, 2015 Issues Ruling, at p. 62, n.11, noted the receipt of Chief Leo Henry's October 19, 2015 letter commenting on the accuracy of certain statements in the RMU-2 DEIS.³ There is nothing in that letter that explains the delayed timing of its submission in light of the notices published regarding the RMU-2 application, the public comment period, and the issues conference. The record shows that the Tuscarora Nation had been aware of the project long before its October 2015 letter. The Tuscarora Nation has been aware of the RMU-2 application since at least July 2006, and the Tuscarora Nation has been on the facility mailing list

³ The letter relating to the DEIS was the subject of a news report in the Tuscarora Nation's publication "Skaru: Re? Monthly," October 2015.

since at least 2013. Ms. Witryol provides no explanation as to why Chief Henry waited until October 2015 to write his first and only letter to DEC related to RMU-2.

Ms. Wityrol's motion should be denied for the reasons set forth in the Issues Ruling at 63-64. Moreover, to the extent that Ms. Witryol is purporting to act as a representative of the Tuscarora Nation, there is no showing that she has the authority to do so or that she is qualified to do so. Ms. Witryol has no standing to assert an environmental justice claim on behalf of the Tuscarora Nation.

4. RMU-1 Was Out of Capacity as of November 2015

At the Issues Conference, it was well known that RMU-1 would be out of capacity by the end of 2015. The fact that capacity was exhausted in November 2015 is not new information.

The fact that RMU-1 is out of capacity has no impact on the protocols to be used for conducting the updated traffic noise study in accordance with the directive in the Issues Ruling. The baseline assumes no CWM related truck traffic.⁴

Notwithstanding RMU-1's lack of capacity, per the definitions in the DEC regulations, 6 NYCRR § 370.2, the Model City Facility remains an active facility. RMU-1 has not been finally closed in accordance with the approved closure plan, and the RMU-2 application is pending.

Conclusion

For all of the foregoing reasons, Ms. Witryol's motion to reopen the RMU-2 Issues Conference should be denied.

⁴ The Modern Landfill is authorized to dispose of 815,000 tons of solid waste per year. The Modern bound waste trucks use part of the route used by the CWM bound trucks. Thus, the baseline will include Modern bound trucks.

DATED: April 29, 2016



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DATED: April 29, 2016

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