

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 361 (Siting of Industrial Hazardous Waste Facilities) by

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

September 15, 2021

Fourth Order regarding Supplemental Discovery

As scheduled, a discovery conference convened at 1:00 p.m. on September 15, 2021. Representatives for CWM, Department staff, the municipalities, and RRG, as well as Ms. Wityrol participated. The purpose of the conference was to review the status reports that the parties filed on September 8, 2021, concerning the supplemental document demands served in early June 2021. In addition, the discussion included Ms. Wityrol's demands served upon CWM (*i.e.*, Nos. 11, 14, 15, 17, 18, 19, 21, 23, 24, and 25).

I. Issues related to Geology and Hydrogeology

On behalf of the municipalities, Mr. Abraham reported that the municipalities served document demands upon Department staff on July 26, 2021. Ms. Mucha acknowledged receipt of the document demands, and said that staff is collecting responsive documents.

II. RRG

Ms. Connolly and the members of the Environmental Advocacy Clinic explained that they are in the process of scanning documents received from witnesses, and will begin to review the materials for information responsive to CWM's document demands. RRG will be responding to the document demands associated with the pre-filed direct testimony offered by Messrs. Acks and Bittner and, in coordination with Ms. Witryol, Dr. Rockler.

III. Ms. Witryol

Ms. Witryol reported that she has responded to CWM's document demands associated with the pre-filed direct testimony offered by Messrs. Rubino and Masters. She will be coordinating with RRG's counsel to provide responses to the document demands associated with Dr. Rockler's pre-filed direct testimony.

IV. CWM's responses to Ms. Witryol's Document Demands

In an email dated September 8, 2021, Mr. Kuhn reported that CWM provided documents responsive to Ms. Witryol's document demands Nos. 1, 3, 4, 5, 6, 7, 9, 10, 16, 20, and 22. The discussion during the September 14, 2021, conference focused on the following outstanding document demands. They are Nos. 11, 14, 15, 17, 18, 19, 21, 23, 24, and 25.

1. Demand Nos. 14 and 15

During the conference, Mr. Kuhn stated that CWM provided responses to document demand Nos. 14 and 15 on September 13, 2021. Ms. Witryol is reviewing the responses.

2. Demand Nos. 21, 24, and 25

With respect to demand No. 21, I understand that Ms. Wityrol is distinguishing between what Mr. N'dolo reviewed and then, subsequently, relied upon for the preparation of his pre-filed direct testimony. I understand further that Mr. Kuhn agreed to ask Mr. N'dolo if the set of documents that he reviewed was either the same as, or different from, what he relied upon when he subsequently prepared his pre-filed direct testimony. If the set of documents was not the same, Mr. Kuhn said that he would collect any additional documents, and provide them, absent any applicable privilege.

Mr. Kuhn stated that CWM does not have any documents responsive to demand No. 24.

Mr. Kuhn stated that CWM provided all documents responsive to demand No. 25 when CWM provided the backup information to the pre-filed direct testimony on March 16, 2020. Consequently, CWM does not have any additional documents responsive to demand No. 25.

3. Demands Nos. 11, 17, 18, 19, and 23

During the conference, CWM asserted objections to demand Nos. 11, 17, 18, 19, and 23. A summary of these objections follows. With respect to demand No. 11, Mr. Kuhn said that CWM no longer has any invoices responsive to this request. Ms. Witryol stated, however, that the request was not limited to invoices, but included any documents such as data or accounting information.

With respect to demand No. 17, CWM objected to providing the names and other personal information related to those who agreed to voluntary layoffs, were the subject of workers' compensation claims, or became disabled.

Because the information provided on CWM-69 of the backup information projects future construction costs, Mr. Kuhn stated that CWM has no records responsive to demand No. 18. Ms. Witryol requested the information that serves as the basis for these projects, and whether goods and services would be provided by firms located in Niagara County.

According to Mr. Kuhn, the documents sought by demand No. 23 are not relevant. In addition, CWM's participation in the Power for Jobs Program was limited to a three-year period from 2006 to 2008. Ms. Wityrol observed that the program was renamed, and that CWM participated beyond the 2006 to 2008 period. According to Ms. Witryol, this information is related to the "head count," which in turn relates to payroll and potential contributions to the local economy.

Motion for Protective Order

Pursuant to 6 NYCRR 624.7(d)(1), CWM may move for a protective order with respect to demands Nos. 11, 17, 18, 19, and 23. The requirement for a recitation of a good faith effort to resolve the dispute without resort to a motion has been satisfied by the parties' participation in the four discovery conferences held on July 2, and 22, as well as on August 5, and September 14, 2021. If CWM chooses to move for a protective order, the motion must include the other elements outlined at 6 NYCRR 624.7(d)(1) (*see also* 6 NYCRR 624.6[c][1] and [2]). I will accept electronic service of the motion, which will be due by 3:00 p.m. on Thursday, September 30, 2021.

If CWM chooses to file a motion, Ms. Wityrol may respond. The response is due by 3:00 p.m. on Thursday, October 14, 2021. I will accept electronic service of the response.

After the motion and response are filed, no other responsive papers are authorized (*see* 6 NYCRR 624.6[c][3]).

V. Next Conference

The next discovery conference is scheduled for 1:00 p.m. on Friday, October 15, 2021. In a separate email, the parties will receive the Webex invitation for the conference. The purpose of the conference will be to discuss the schedule for providing responses to any outstanding document demands, as well as Ms. Witryol's interrogatories upon CWM (*see* First Order, dated July 2, 2021, at 2).

/s/
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
September 15, 2021

To: Service List revised July 2, 2021