

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]).

December 10, 2021

Seventh Order regarding Supplemental Discovery

As scheduled, a discovery conference convened at 1:00 p.m. on Thursday, December 9, 2021. Representatives for CWM, Department staff, RRG, Ms. Wityrol, and the municipalities participated. The purpose of the conference was to review the progress of outstanding document demands. The parties discussed a tentative hearing schedule.

I. File Transfer Service

With an email dated October 26, 2021, Kyle Teeter explained that, as newly retained counsel for RRG, the Buffalo School of Law Environmental Advocacy Clinic was attempting to recreate the file. This request was discussed during the November 12, 2021 discovery conference. In an email from me dated December 8, 2021, which I forwarded to the other parties' representatives, I explained that I had uploaded a PDF file to the Department's File

Transfer Service (FTS) that consisted of the emails exchanged among the parties and me from January 1, 2015 to June 30, 2015. Documents attached to the emails were also included in the upload.

During today's conference, RRG's counsel said that the transfer was successful. I explained that I would be uploading the remainder of the emails to the Department's FTS by year from 2014 to 2021. I will make the files available to the parties on the July 2, 2021 service list. The parties will receive email notifications after I upload the files.

II. RRG

Counsel for RRG reported that they responded to CWM's document demands concerning the pre-filed direct testimony of Mr. Acks and Dr. Rockler. Some media information related to newspaper articles, and the like, will be provided shortly. The remaining information relates to Dr. Rockler's pre-filed direct testimony.

During the conference, CWM's counsel expressed concern about the scope and nature of the information provided with respect to Mr. Acks. For example, Mr. Kuhn said that he had anticipated more detailed information about the statistical analyses undertaken by Mr. Acks as outlined in his pre-filed direct testimony and associated exhibits.

I encourage counsel for CWM and RRG to confer about what information is available that is responsive to CWM's document demands. I understand that counsel will endeavor to have a resolution by January 28, 2022.

III. Cross-examination of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler

As requested, Ms. Wityrol stated in an email dated December 8, 2021, that Messrs. Whalen, Rubino, and Masters, and Dr. Rockler are available for cross-examination on February 9 and 10, 2022. Ms. Wityrol explained further that Dr. Rockler's pre-filed direct testimony addresses two topics. The first is economic development, and the second is real estate, which is related in part, to the pre-filed direct testimony and associated exhibits offered by Mr. Acks. Ms. Wityrol said that Dr. Rockler would be available for cross-examination with respect to economic development along with the other members of the panel (*i.e.*, Messrs. Whalen, Rubino, and Masters). After the discovery related to Mr. Acks' pre-filed direct testimony is resolved, Ms. Wityrol said that Dr. Rockler would be available for cross-examination with Mr. Acks.

Please reserve February 9 and 10, 2022, for the adjudicatory hearing to cross-examine Messrs. Whalen, Rubino, and Masters, and that portion of Dr. Rockler's pre-filed direct testimony related to economic development. In the meantime, counsel for CWM and RRG can discuss issues related to the disclosure of information associated with Mr. Acks' pre-filed direct testimony.

IV. Issues related to Geology and Hydrogeology

Presently, the schedule for pre-filing direct testimony, as well as the distribution of the supporting data and backup information related to the geology and hydrogeology issues remains on track. The pre-filed direct testimony is due by January 14, 2021, and the distribution of the supporting data and backup information is due by January 28, 2021.

V. Ms. Wityrol's Document Demand Nos. 1, 2, 3, 4, 6, 7, 15, and 23

In separate emails dated December 7, 2021, Ms. Wityrol and CWM's counsel provided me with updates about Ms. Wityrol's document demands. With respect to document demand Nos. 2, 3, 15, and 23, the disclosure is complete. I understand that Mr. Kuhn and Ms. Wityrol will continue to discuss Document Demand Nos. 1, 4, 6, and 7.

Ms. Wityrol expects to serve interrogatories by next week. I authorized the use of interrogatories in the First Order regarding Supplemental Discovery, dated July 2, 2021 (at 2). I request that Ms. Wityrol advise if she is *not* able to serve the interrogatories by Monday, December 20, 2021.

VI. Next Conference

The next discovery conference is scheduled for 10:00 a.m. on Thursday, January 20, 2022. In a separate email, the parties will receive the Webex invitation for the conference.

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

Dated: Albany, New York
December 10, 2021

To: Service List revised July 2, 2021