

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]).

June 24, 2022

Twelfth Order after Pre-hearing Conference

As scheduled, a pre- hearing conference convened on June 15, 2022, to develop a schedule concerning the issues related to noise from truck traffic, as well as the SEMMP and radiological surveys. The parties are determining their availability to convene in September 2022 to introduce the pre-filed direct testimony of Messrs. Berlow, N'dolo, and Rizzo, as well as their associated exhibits into the hearing record, and to provide the opportunity for the other parties to cross-examine these witnesses. Every party was represented at the conference.

I. Geology and Hydrogeology

The parties have reserved July 6, 7, and 8, 2022, to reconvene the hearing to consider proposed issues related to geology and hydrogeology. I received the email addresses for the

witnesses, and I sent invitations for the Webex event to the witness in separate emails. Separate invitations were sent for each day. When the hearing reconvenes, the proceedings will commence at 10:00 a.m. and continue from day to day as necessary. The proceedings will be conducted virtually as a Webex Event, similar to the April 11 and 12, 2022, session.

During the conference, the order of witnesses was determined: Department staff (Steven Moeller and Peter Grasso), CWM (Patrick Martin and Alistair MacDonald), and the municipalities (Andrew Michalski). The sponsoring parties and I discussed the possibility of providing an affidavit from each witness outlining any corrections to the witnesses' respective pre-filed direct testimony. If the sponsoring party can file affidavits outlining the corrections, then I would mark the affidavit as an exhibit to the hearing record. If corrections need to be made under oath during the hearing, then we could proceed in that matter as well.

If the parties can use affidavits to correct the pre-filed direct testimony of their respective witness(es), please provide them, on notice to the other parties, by **noon on Friday, July 1, 2022**. The parties may file the affidavits with me via email, but I will need the original hard copy for the hearing record.

II. Order of Events

On July 6, 2022, the parties may offer opening statements, limited to 5 minutes, and focusing on the issues related to Geology and Hydrogeology.

Section V(2) from the Tenth Order regarding Supplemental Discovery, dated March 18, 2022, at 4-5, is incorporated by reference. The order of events will apply to the forthcoming hearing on July 6, 7, and 8, 2022.

III. Municipalities' Motion and the Admission of Additional Documents

By email from Mr. Abraham dated May 27, 2022, the municipalities served a motion to include documents related to the Geology and Hydrogeology issues into the evidentiary record. According to the municipalities, CWM and Department staff circulated some of these documents with their respective papers in support of the pre-filed direct testimony of their witnesses, and as part of discovery.

In separate emails dated June 13, 2022, I received timely responses from Mr. Kuhn, on behalf of CWM, from Ms. Mucha, on behalf of Department staff, and from Ms. Witryol.

During the June 15, 2022, conference, I requested clarification from Mr. Abraham about the municipalities' motion. The municipalities' motion includes an enclosure that lists 15 documents consisting of 25 files. Mr. Abraham's May 27, 2022 cover letter includes a link to the 25 files. With the motion, the municipalities seek a ruling where I receive all 25 files into the evidentiary record of the proceeding.

During the June 15, 2022, conference, I denied the municipalities' motion without prejudice to renew. I said that I would mark the 25 files for identification sequentially after the exhibits offered with Dr. Michalski's pre-filed direct testimony. I stated further that the parties would have the opportunity to state objections to my receipt of these additional documents when we discuss the receipt of the exhibits offered by Dr. Michalski. I explained that the parties could rely on the arguments outlined in their respective responses dated June 13, 2022.

Subsequently, in an email dated June 16, 2022, Mr. Abraham advised that the municipalities would seek to offer into evidence some or all of the backup materials related to Dr. Michalski's pre-filed direct testimony. The email included a link to download 55 files.

Additionally, Mr. Abraham inquired about whether correspondence between the parties and me was part of the evidentiary record. As an example, Mr. Abraham referenced correspondence dated September 19, 2017, from CWM's counsel with attachments. Mr. Abraham inquired whether this correspondence and its attachments, among other correspondence, would be available at the hearing for examination of witnesses and briefing, as appropriate.

In separate emails dated June 16, 2022, counsel for CWM and Department staff responded. In his June 16, 2022, email, Mr. Kuhn said that CWM understood that I requested the parties to provide me with electronic copies of documents that the parties may offer during the forthcoming hearing, and that any such documents would be marked for identification. The receipt of any documents would be determined after the parties had to opportunity to be heard on motions made to receive documents into the evidentiary hearing record. Finally, Mr. Kuhn argued that pursuant to 6 NYCRR 624.12(b), the correspondence referenced in Mr. Abraham's June 16, 2022 email would not be "automatically part of the hearing record." In Department staff's June 16, 2022, email, Ms. Mucha also argued that the correspondence referenced in Mr. Abraham's June 16, 2022, email would not be automatically deemed records for admission into the evidentiary record.

In an email dated June 20, 2022, Mr. Abraham sought to clarify the municipalities' position with respect to the documents identified in the May 27, 2022, motion, the backup materials, and the correspondence exchanged between the parties and me. First, the municipalities anticipate that the documents identified in the May 27, 2022, motion and the backup materials related to Dr. Michalski's pre-filed direct testimony would be marked for identification, and that determinations related to the admission of these materials would be made during the July hearing. In addition, Mr. Abraham distinguished between the correspondence file that Department staff may maintain with respect to these pending permit applications, and the correspondence file maintained by me.

Discussion and ruling: The record of the hearing described in 6 NYCRR 624.12(b) is the administrative file maintained by the Office of Hearings and Mediation Services (OHMS). The administrative file includes, among other things, the correspondence exchanged between the parties and the administrative law judge from the time the matter is referred to OHMS for a hearing until the Commissioner issues a final determination (*see also* State Administrative Procedure Act [SAPA] § 302[1]).

A subset of the administrative file is the evidentiary record of the hearing. Pursuant to SAPA § 302(3), findings of fact must be based on the evidentiary record. Unless admitted to the record, or received into evidence, by the ALJ during the hearing, the correspondence in the administrative file is not evidence per se and, accordingly, could not serve as the basis for any findings of fact.

Therefore, to the extent that any party wishes to have any correspondence and its related enclosures or attachments included into the evidentiary record, the party must first identify the document or documents. Generally, documents are sponsored by a witness. Then, I will mark the document or documents for identification. Subsequently, the parties may comment about requests to admit such documents into the evidentiary record. Whereupon, I will determine whether to receive the document or documents.

With respect to the Geology and Hydrogeology issues, any party wishing to have any correspondence and its related enclosures or attachments included into the evidentiary record, shall identify the documents by **noon on Friday, July 1, 2022**.

IV. Potential Noise from Truck Traffic

For background information about this issue, I refer the parties to the following: Fifth Order regarding Supplemental Discovery dated October 18, 2021, at 3-4 (V. Transportation); Sixth Order dated November 23, 2021, at 3 (IV. Transportation); and Ninth Order dated March 1, 2022, at 2-3 (IV[1] Potential Noise Impacts from Truck Traffic).

Ms. Wityrol requested leave to file discovery demands before her witnesses prepare their pre-filed direct testimony. CWM advised that it may need to serve discovery demands after reviewing the pre-filed direct testimony offered by Ms. Wityrol's witnesses. The other parties expressed interest in this issue, and may need an opportunity to serve discovery demands. For the time being, the other parties anticipate that their participation will be limited to cross-examining the witnesses offered by CWM and Ms. Wityrol. Ms. Wityrol inquired about the sequence of events, and whether CWM would have the opportunity to pre-file direct testimony about this issue.

I explained that, generally, documents are offered through the testimony of a witness before the documents are received into the evidentiary record. With respect to the report prepared by CWM's consultant (*see* December 22, 2015 issues ruling at 46), I said that I would anticipate that CWM would offer a witness to sponsor the Watts Report (September 7, 2016), unless the parties stipulated to the receipt of the document. Therefore, CWM would need to pre-file direct testimony in order to introduce the September 7, 2016 Watts Report into the hearing record. Then, Ms. Wityrol would have the opportunity to pre-filed direct testimony in which her witnesses would evaluate the Watts Report.¹

¹ The Facility Siting Board authorized Ms. Wityrol to offer testimony from Michelle Bodewes, P.E., as part of the adjudication of this issue (*see* Ruling and Third Interim Decision, dated September 4, 2019, at 15).

During the conference, I set **Monday, July 25, 2022** as the due date for Ms. Witryol to serve her first round of document demands upon CWM.

V. SEMMP and Radiological Surveys

In the August 11, 2016, Interim Decision (at 17-18), the Facility Siting Board determined that the sufficiency of the radiological surveys and the adequacy of the SEMMP are substantive and significant issues for adjudication. Subsequently, Ms. Witryol offered two witnesses, Sean C. Chapel and Karen K. Barcal, to testify regarding the sufficiency of radiological surveys relied upon in developing the SEMMP (*see* ALJ Supplemental Ruling, dated February 14, 2019, at 28). In the First Interim Decision (at 18-19), the Deputy Commissioner agreed with the determination by the Facility Siting Board to adjudicate these issues.

Mr. Abraham requested leave on behalf of the municipalities to serve document demands upon CWM prior to filing the pre-filed direct testimony. I granted this request. To the extent that the other parties wish to obtain documents related to these issues, the parties may exchange document demands. The parties must serve the first round of document demands by **Monday, July 25, 2022**.

Ms. Wityrol said that her previously identified witnesses, Sean C. Chapel and Karen K. Barcal, are no longer available. However, Ms. Wityrol identified Paul R. Steinmeyer, and J. Stewart Bland as substitute witnesses. As directed, Ms. Wityrol circulated copies of Messrs. Steinmeyer and Bland's résumés with an email dated June 21, 2022. Mr. Steinmeyer works for Radiation Safety Associated, Inc. (Hebron, Connecticut). Mr. Bland is a Principal with Chesapeake Nuclear Services, Inc. (Annapolis, Maryland).

VI. Record of Compliance

A discussion of the record of compliance issue is outlined in the Eleventh Order dated May 13, 2022, at 4-5. During the June 15, 2022, pre-hearing conference, Mr. Kuhn explained that CWM is reviewing the tables circulated with the April 10, 2022, email, and comparing them to the tables attached to Mr. Darragh's May 13, 2016, email. CWM will advise the parties and me after it has completed the review of the two sets of tables.

VII. Additional Hearing Dates

The members of the Facility Siting Board advised that they are available on September 14, 15 and 16, 2022. On these dates, I would like to convene the hearing to introduce the pre-filed direct testimony of Messrs. Berlow, N'dolo, and Rizzo, as well as their associated exhibits into the hearing record, and to provide the opportunity for the other parties to cross-examine these witnesses. I request that CWM check on the availability of these witnesses on September 14, 15, and 16, 2022. I request further that the parties' representatives review their respective schedules for their availability on these dates. By **Monday, July 25, 2022**, please advise me, on

notice to the other parties, whether the witnesses are available, and whether the parties' representatives are available to reconvene the hearing in September 2022.

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

Dated: Albany, New York
June 24, 2022

To: Service List revised May 27, 2022