

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]).

March 8, 2022

**Supplemental Discovery
Ruling Granting CWM's Motion for Protective Order
With respect to Ms. Witryol's Document Demand No. 18,
and
CWM's Objections to Ms. Witryol's Interrogatories**

With the scheduling order dated May 25, 2021, I granted leave for the parties to serve supplemental discovery demands. The scheduling order directed the parties to serve any discovery demands by June 8, 2021. (*See* Scheduling Order dated May 25, 2021, at 2.) Ms. Witryol served her first notice to produce dated June 8, 2021, upon CWM, which consisted of 25 document demands.

In the First Order regarding Supplemental Discovery, dated July 2, 2021, (at 2), I denied Ms. Witryol's request for a subpoena and leave to depose a CWM employee, and authorized the use of interrogatories. Ms. Witryol served CWM's counsel with Interrogatory/Document Request to CWM dated December 21, 2021.

This ruling considers the following. The first is CWM's pending request for a protective order with respect to Ms. Witryol's document demand No. 18. The second is CWM's motion to strike Ms. Witryol's interrogatories.

I. Document Demand No. 18

In the Fourth Order regarding supplemental discovery dated September 15, 2021, I authorized CWM to file a motion for protective order with respect to Ms. Witryol's June 8, 2021 document demands. With an email from Mr. Kuhn dated September 30, 2021, CWM moved for a protective order from document demands Nos. 17, 18, 19, and 23. With emails dated October 21, 2021, Ms. Witryol responded. I issued a ruling dated November 10, 2021, which granted, in part, CWM's motion for a protective order.

However, I reserved on CWM's motion with respect to Ms. Witryol's document demand No. 18, pending an in camera review of documents. I noted in the ruling that it was not clear whether CWM had provided all documents in its possession, custody, or control responsive to document demand No. 18, or whether CWM possessed responsive documents, in addition to those already disclosed, that CWM asserted are exempt from disclosure. (*See Ruling Granting CWM's Motion for Protective Order*, dated November 10, 2021 [Ruling], at 6.)

The Ruling (at 6) directed CWM to provide me with a hard copy of any responsive documents not disclosed, and an explanation addressing the applicable factors at 6 NYCRR 616.7(c)(2)(ii-vii). I also directed CWM to identify any additional privileges that may also apply to all or some of the documents that would exclude the disclosure of them (*see e.g.* CPLR 3101[b-d]).

In a letter dated December 24, 2021, CWM outlined the bases for the claim that any additional documents responsive to document demand No. 18, as revised, should be considered *confidential commercial information*, as that term is defined at 6 NYCRR 616.7(c)(2)(i)(b), and should be exempt from disclosure pursuant to the criteria outlined at 6 NYCRR 616.7(c)(2)(ii-vii).

CWM included two exhibits with its December 24, 2021, letter. Exhibit A is a copy of CWM-7231 through CWM-7233, which provides additional information about the information initially provided in CWM-69 (RMU-2 Construction Costs and Associated Facilities). According to CWM, it produced the information identified as Exhibit A in a response made on September 30, 2021.

Exhibit B is a set of documents that it contends is confidential commercial information (*see* 6 NYCRR 616.7[c][2][i][b]). CWM seeks a protective order for the set of documents identified as Exhibit B.

CWM states that the construction of the proposed RMU-2 landfill, and related facilities would generally be subject to a competitive vendor bidding process. CWM, however, has not

commenced the competitive bidding process because approvals are pending before the Siting Board and the Department. Consequently, CWM states further that it does not possess any documents establishing that any particular future goods and services necessary for the construction of the proposed RMU-2 landfill and related facilities would be purchased from any specific business in Niagara County.

According to CWM, the disclosure of the information in Exhibit B would result in expense, disadvantage, and other prejudice to it (*see* 6 NYCRR 624.7[d][1]). CWM states further that Mr. N'Dolo did not review, consider, or rely upon the information in Exhibit B in preparing either the MRB Report or his portion of the pre-filed direct testimony. CWM argues further that the information in Exhibit B is not relevant, and referenced *Arch Ins. Co. v Delric Constr. Co., Inc.* (174 AD3d 560 [2d Dept 2019]) to support its argument.

Discussion and Ruling: Upon review of Exhibit B, I conclude that it includes expense information, which if disclosed would likely cause substantial injury to the competitive position of the subject enterprise (*see* 6 NYCRR 616.7[c][2][i][b]). In addition, the detailed budget and cost projections for the proposed RMU-2 landfill outlined in Exhibit B are not known outside of CWM (*see* 6 NYCRR 616.7[c][2][ii]). The information is only available to specific employees who need this information to perform their job functions (*see* 6 NYCRR 616.7[c][2][iii]). This select group of employees took and continues to take measures to guard the secrecy of this information (*see* 6 NYCRR 616.7[c][2][iv]). The information in Exhibit B has value to CWM because the disclosure of it would result in substantial injury to CWM's competitive position (*see* 6 NYCRR 616.7[c][2][v]). Several hundred work hours by individuals with extensive experience prepared the information in Exhibit B, which demonstrates that CWM expended significant effort and expense to develop this information (*see* 6 NYCRR 616.7[c][2][vi]). Finally, it would be impossible for third parties to acquire or duplicate the information in Exhibit B absent its disclosure (*see* 6 NYCRR 616.7[c][2][vii]). For the foregoing reasons, I grant an exception from disclosure (*see* 6 NYCRR 616.7[c][2]). Given my determination with respect to 6 NYCRR 616.7(c)(2), I also grant CWM's request for a protective order with respect to Exhibit B pursuant to 6 NYCRR 624.7(d)(1).

In the November 10, 2021, Ruling (at 6), I reserved on Ms. Witryol's request for a confidentiality order with respect to the information sought by document demand No. 18. In her initial papers, Ms. Witryol argued that I have authority, pursuant to CPLR 3103(a), to issue a confidentiality order to prevent the disadvantage claimed by CWM that may result from the disclosure (*see* Witryol response, dated October 21, 2021, at 12-15.) I deny Ms. Witryol's request for a confidentiality order with respect to the information sought by document demand No. 18.

II. Interrogatories

Ms. Witryol served CWM's counsel with Interrogatory/Document Request to CWM dated December 21, 2021. On the cover page Ms. Witryol sought responses from Julie Ann Bigaj-Hill, an employee of CWM. The interrogatory/document request consists of forty-seven numbered interrogatories and some items include subparts.

In its January 10, 2022 response, CWM's counsel objects. According to CWM the December 21, 2021, interrogatories are oppressive, overly broad, and unduly burdensome. CWM states that the interrogatories consist of at least 80 separate requests and questions. Given these circumstances, CWM argues that the remedy is to reject the interrogatories in their entirety rather than attempt to sort them out.¹ CWM objects further because the interrogatories are largely comprised of supplemental document requests, which the ALJ did not authorize.

As noted on the cover page, the interrogatories are directed to Ms. Bigaj-Hill. CWM argues that it is improper to direct them to Ms. Bigaj-Hill because she is a non-party. Referencing CPLR 3130(1), CWM contends that interrogatories may only be made upon a party to the action. To support this argument, CWM cites *Carp v Marcus*, 11 A.D.2d 854, 856 (3d Dept 1986).

Finally, CWM objects because the interrogatories inquire about the discovery process rather than to the substantive merits of the matter. As an example, CWM references interrogatory No. 7, which seeks information about Ms. Bigaj-Hill's role in obtaining, preparing, or producing documents for discovery purposes. According to CWM this and other similar requests are not permissible pursuant to CPCL 3101(a). In addition, CWM asserted that the information sought is protected from disclosure under the attorney-client privilege and attorney work-product doctrine.

Ms. Witryol's response is dated February 8, 2022, and includes Appendices A through F. Appendix A is titled, *Relevance and Proportionality of Interrogatories*. The discussion provided in Appendix A references Appendices B through F, which include excerpts from the backup information and data that CWM provided with the pre-filed direct testimony from CWM's public interest panel.

With respect to CWM's objection that the interrogatories are oppressive and unduly burdensome, among other things, Ms. Witryol refers to Appendix A. The discussion in Appendix A explains how each interrogatory is relevant and proportional. Ms. Witryol argues further that CWM's objection might have grounds if it operated a hot dog cart. Ms. Witryol notes, however, that CWM is part of an \$18 billion corporation with 48,000 employees. Ms. Witryol contends that CWM's objection to her interrogatories is not proportional to CWM's public interest case. Ms. Witryol contends that CWM has asserted that the construction and operation the proposed RMU-2 landfill would create an economic benefit worth \$831,000,000 over 29 years. According to Ms. Witryol, half of the proposed economic benefits would not manifest themselves for 20 years. (See Witryol response at 7-8.)

To CWM's objection that the interrogatories include numerous subparts and multiple questions, which together include at least 80 separate requests and questions, Ms. Witryol notes that the scope of CWM's public interest testimony includes dozens of categories that span

¹ See *Editel, New York v Liberty Studios, Inc.*, 162 A.D.3d 345, 346 (1st Dept 1990); *Bohlen Capital Holdings, A.A. v Standard Coal Co.*, 90 A.D.2d 476, 476 (1st Dept 1982) (parties are not required to "wade through an unduly prolix and oppressive set of interrogatories to determine the propriety of each").

dozens of years. In addition, Ms. Witryol notes that the ALJ did not expressly limit the number of interrogatories to twenty-five questions. (*See* Witryol response at 8.)

Ms. Witryol asserts that CWM's reliance on *Editel, New York* (162 A.D.3d at 346) and *Bohlen Capital Holdings* (90 A.D.2d at 476) is misplaced, and notes that CWM does not explain the reason for citing these cases. According to Ms. Witryol, CWM has not claimed, as in *Editel, New York*, that "it has 'vast amounts' of material supporting its testimony but which is extensively braided with irrelevant or un-redactable material" (Witryol response at 8). In addition, Ms. Witryol argues that the number of question and subparts associated with her interrogatories are "a fraction" of those propounded in *Bohlen Capital Holdings*. Ms. Witryol notes that the period in question concerning the captioned matters is from 2004 to 2020, and the interrogatories are crafted accordingly. Ms. Witryol notes further that she is attempting to test the bases for CWM's claims concerning the proposed benefits that would result from the construction and operation of the proposed RMU-2 landfill and related facilities. (*See* Witryol response at 8-9.)

As noted above, CWM objects because the interrogatories are supplemental document requests not authorized by the ALJ. However, with reference to CPLR 3131, Ms. Witryol contends that interrogatories may require the disclosure of documents. In addition, Ms. Witryol states that the ALJ encouraged her to incorporate discovery problems into the interrogatories where possible for efficiency. (*See* Witryol response at 9.)

To CWM's objection that service of the interrogatories upon Ms. Bigaj-Hill is improper because she is a non-party, Ms. Witryol contends that interrogatories, like depositions, may be served to a named individual in a company. To support this contention, Ms. Witryol cites CPLR 3106. Ms. Witryol notes that Ms. Bigaj-Hill's name appears on many of the documents provided with the backup information and data, and argues that Ms. Bigaj-Hill has specialized knowledge given her work experiences at CWM. (*See* Witryol response at 9-10.)

Finally, Ms. Witryol states that she is not seeking privileged information. Rather, the interrogatories seek metadata, such as the date a document was created or last edited. According to Ms. Witryol, CPLR 3120 requires the production of metadata. (*See* Witryol response at 10.)

Discussion and Ruling: As noted above, I denied Ms. Witryol's request for a subpoena and leave to depose a CWM employee, and authorized the use of interrogatories (*see* First Order regarding Supplemental Discover, dated July 2, 2021, at 2). As a pro se intervenor, Ms. Witryol has no prior experience with conducting depositions.

The Department's permit hearing regulations authorize the use of interrogatories as a discovery device that requires leave of the ALJ (*see* 6 NYCRR 624.7[c][2]). With leave, Ms. Witryol served CWM's counsel with an interrogatory/document request dated December 21, 2021. Ms. Witryol's December 21, 2021 interrogatories consist of forty-seven numbered items, and some items include subparts.

Interrogatory Nos. 8, 9, 10, 11.A, 11.B, 12.A, 12.B, 18.C, 19.B, 19.C, 20.A, 20.B, 21, 24, 26, 35.A, 40, 41, and 45 either request or inquire about the existence of documents. Although

responses to interrogatories may include documentary information (*see* CPLR 3131), the requests for documentary information with these interrogatories are inappropriate. Prior to service of the interrogatories, Ms. Witryol served document demands upon CWM. Significant resources were devoted to understanding the document demands and responding to them.² To continue this process with this set of interrogatories would be burdensome.

Ms. Witryol's reliance on Rule 3106 as a basis to direct the interrogatories to Ms. Bigaj-Hill is misplaced. Rule 3106 pertains to depositions. Depositions are distinct from interrogatories.

Contrary to Ms. Witryol's contention, CWM did provide a reason for citing *Editel, New York* (162 A.D.3d at 346) and *Bohlen Capital Holdings* (90 A.D.2d at 476). According to these two cases, when a portion of the interrogatories is inappropriate, the court may reject the entire set of interrogatories rather than attempt to sort them out. Because document demands have already been used in this proceeding, the explicit requests for documents in the interrogatories identified above are inappropriate. Based on the precedent in *Editel, New York* (162 A.D.3d at 346) and *Bohlen Capital Holdings* (90 A.D.2d at 476), I grant CWM's motion to strike the December 21, 2021 set of interrogatories. I note that the court in *Editel, New York* (162 A.D.3d at 346) and *Bohlen Capital Holdings* (90 A.D.2d at 476) granted the respective motions to strike without prejudice to serve a proper set of interrogatories. In this case, however, the relief I grant is with prejudice. We have devoted significant time and resources to the discovery process related to the public interest topic. Accordingly, Ms. Witryol may not serve any additional interrogatories.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
March 8, 2022

To: Service List revised March 8, 2022

² See First Order regarding Supplemental Discovery, dated July 2, 2021; Second Order regarding Supplemental Discovery, dated July 22, 2021; Third Order regarding Supplemental Discovery, dated August 5, 2021; Fourth Order regarding Supplemental Discovery, dated September 15, 2021; Fifth Order regarding Supplemental Discovery, dated October 18, 2021; Sixth Order regarding Supplemental Discovery, dated November 23, 2021; Seventh Order regarding Supplemental Discovery, dated December 10, 2021; Eighth Order regarding Supplemental Discovery, dated January 26, 2022; and Ninth Order regarding Supplemental Discovery, dated March 1, 2022.