

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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

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NEW YORK STATE FACILITY SITING BOARD

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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]).

November 23, 2021

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**Sixth Order regarding Supplemental Discovery**

As scheduled, a discovery conference convened at 1:00 p.m. on November 12, 2021. Representatives for CWM, Department staff, RRG, Ms. Wityrol, the municipalities, as well as the Tuscarora Nation participated. The purpose of the conference was to review the progress of outstanding document demands.

I.     Issues related to Geology and Hydrogeology

During the conference, Mr. Abraham explained that Department staff has provided documents responsive to the municipalities' first discovery requests dated July 26, 2021. However, the municipalities have a concern with respect to document demand No. 9, which requests:

Any analytical results of groundwater level associated with groundwater pumping at Modern Landfill, submitted by or on behalf of Modern Landfill, Inc., located at Pletcher Road, Model City, New York, from 1990 to the present.

The site of CWM's Model City facility is adjacent to the site of the Modern Landfill.

Mr. Abraham said that Department staff would not respond to document demand No. 9 unless the municipalities filed the demand pursuant to the Freedom of Information Law (FOIL). On behalf of the municipalities, Mr. Abraham submitted document demand No. 9 as a request for information pursuant to FOIL.

The municipalities acknowledged that they received responsive information from Department staff pursuant to their FOIL request. However, they object to staff's directive to submit document demand No. 9 as a FOIL request. The municipalities explained that the information they seek is relevant to the captioned proceedings because information about how groundwater flows under adjacent properties, such as the Model City facility, may provide some insight into how groundwater may flow under the Model City facility. During the conference, Mr. Abraham said that the municipalities seek information, for example, about potential connections between the upper and lower aquifers in the vicinity of the two sites.

The municipalities contended that their request was an appropriate discovery demand authorized by 6 NYCRR 624.7. Referring to the regulations, the municipalities noted that any party failing to comply with discovery could suffer preclusion from the hearing of the material demanded. They noted further that a party's failure to comply with discovery would allow the ALJ and the Commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position. (*See* 6 NYCRR 624.7[d][2].)

During the conference, the municipalities asked me to determine whether the document demand No. 9 was an appropriate discovery request. According to the municipalities, an affirmative determination would extend the protections provided by 6 NYCRR 624.7(d)(2) to the information provided in response to document demand No. 9. The municipalities argued that the protections provided by 6 NYCRR 624.7(d)(2) do not extend to information provided pursuant to FOIL.

Department staff opposed the municipalities' request. Because document demand No. 9 concerns the Modern Landfill facility, rather than the Model City facility, staff argued that information responsive to document demand No. 9 is not material and relevant to the geology and hydrogeology issues associated with the proposed RMU-2 landfill.

**Discussion and ruling:** I reserved ruling on the municipalities' request during the November 12, 2021, conference pending the receipt of a copy of the municipalities document demands. As requested, Mr. Abraham provided me with a copy of the municipalities' document demands with an email dated November 12, 2021.

The issue centers on whether the municipalities' document demand No. 9 seeks information relevant to the issues joined here. Because the scope of discovery with respect to the

Department's permit hearings is broad, I find that the municipalities' document demand No. 9 seeks either relevant information, or information that could lead to relevant information, given the proximity of the two landfill facilities, and the complexities of hydrogeology.

II. RRG

Counsel for RRG reported that they expect to transmit responses to CWM's document demands concerning the pre-filed direct testimony of Mr. Acks and Dr. Rockler by the week of November 22, 2021.

During the conference, RRG's counsel clarified the documents that they need from OHMS. I am in the process of collecting them, and will distribute them under separate cover.

III. Ms. Wityrol

Ms. Wityrol is concerned that CWM's responses to her document demands are incomplete. During the conference, I stated that I would provide the parties with some direction about how to proceed.

Accordingly, Ms. Wityrol and CWM's counsel shall confer. When the parties confer, Ms. Wityrol must identify which of the responses to her document demands she feels are incomplete, and explain why. After the parties confer, Ms. Wityrol and CWM's counsel shall advise whether any disputes remain with respect to Ms. Wityrol's document demands. The parties shall provide a list to me, on notice to the other parties, via email by December 7, 2021.

IV. Transportation

In her email dated November 5, 2021, Ms. Wityrol advised that Ms. Bodewes and Mr. Coate will continue to serve as witnesses. During the conference, Ms. Wityrol said that her witnesses are reviewing copies of Mr. Darragh's September 12, 2019 cover letter, and the September 7, 2016 report.

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

In her November 5, 2021 email, Ms. Wityrol said that the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler are interrelated. She explained that she would like to offer the four witnesses as a panel for cross-examination. As a result, a discussion about developing a schedule for cross-examination of these witnesses was postponed pending CWM's receipt of documents from RRG's counsel.

For planning purposes, I offer the following revisions about my availability to convene the hearing to cross-examine these witnesses. I am available during the weeks of January 17,

and 31, 2022, and the weeks of February 7 and 14, 2022. By December 7, 2021, Ms. Witryol shall advise me, on notice to the other parties, when she and the witnesses will be available during the period noted above. I would like to discuss a hearing schedule during the December 9, 2021 conference.

VI. Rebuttal Testimony

The Summary of the May 21, 2021 Conference, and Scheduling Order dated May 25, 2021 (at 4) noted that some parties wanted to present rebuttal testimony. Also, the May 25, 2021 Scheduling Order initially set July 1, 2021 as the date for the parties to disclose their rebuttal witnesses and to provide a brief summary about the scope of the rebuttal testimony. This deadline was suspended indefinitely pending the supplementary discovery process.

Because the parties requested the opportunity to present rebuttal testimony, I will allow it. However, the scope of any party's rebuttal presentation should be very narrow. Therefore, a schedule for pre-filing the rebuttal testimony and exhibits will be developed when the hearing convenes and after the parties complete the cross-examination of those witnesses who have pre-filed direct testimony.<sup>1</sup> During the hearing session, the parties will have the opportunity to ask their respective witnesses questions as part of a re-direct presentation. The other parties will have the opportunity to ask questions as part of recross-examination. Subsequently, the parties will have the opportunity to evaluate the need to present rebuttal testimony. Before a schedule for rebuttal presentations is developed, we will have a conference to identify the witnesses, and to discuss the scope of the rebuttal testimony.

VII. Next Conference

The next discovery conference is scheduled for 1:00 p.m. on Thursday, December 9, 2021. In a separate email, the parties will receive the Webex invitation for the conference.

/s/

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Daniel P. O'Connell  
Administrative Law Judge

Dated: Albany, New York  
November 23, 2021

To: Service List revised July 2, 2021

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<sup>1</sup> The witnesses are Patrick J. Whalen, Ronald J. Rubino, Nicolas O. Rockler, Ph.D., and Timothy Masters; Jim Bittner, and Kenneth Acks; and Jonathon Rizzo, as well as James Berlow and Michael N'dolo.