

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]).

January 26, 2022

Eighth Order regarding Supplemental Discovery

As scheduled, a discovery conference convened at 10:00 a.m. on Thursday, January 20, 2022. 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

During the December 9, 2021, conference, the participants and I discussed providing RRG's new counsel with copies of the emails and attachments exchanged among the parties to help the Environmental Advocacy Clinic recreate the file concerning the captioned matters. During today's conference, 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

With respect to outstanding document demands concerning Dr. Rockler, counsel for RRG reported that they are preparing media information related to newspaper articles and the like, and anticipate providing the information to CWM's counsel by the end of January 2022.

With respect to outstanding document demands concerning Mr. Acks, counsel for RRG said that they recently obtained documents responsive to CWM's document demands. Counsel is reviewing the documents, and will prepare responses. I request an update from RRG's counsel about the status of the review and an estimate of production by January 28, 2022. RRG's update must be made on notice to the other parties.¹

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

Because certain document demands remain outstanding, the hearing will not convene on February 9 and 10, 2022. The parties agreed to review their schedules for March 2022. I advised the parties that I am generally available during March except for March 15, 2022. Mr. Abraham advised that he is not available during the weeks of March 7 and 14, 2022.

Ms. Wityrol will inquire about the availability of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler. I request that those parties who wish to cross-examine these witnesses check their availability during March 2022. I will inquire about the availability of the parties' representatives, and the witnesses during the next discovery conference scheduled for 9:30 a.m. on February 17, 2022.

IV. Geology and Hydrogeology

On January 14, 2022, CWM, Department staff, and the municipalities timely filed their respective direct testimony concerning the geology and hydrogeology issues. The parties will exchange the supporting data and backup information by January 28, 2022.

Prior to the February 17, 2022, discovery conference, I request that the parties review the pre-filed direct testimony, associated exhibits, as well as the supporting data and backup information. During the February 17, 2022, discovery conference, I will inquire whether we can schedule the cross-examination of Patrick Martin, Alistair Macdonald, Steven Moeller, James Sacco, and Dr. Andrew Michalski in March 2022.²

¹ See Mr. Kuhn's email dated January 21, 2022, and Ms. Connolly's email dated January 24, 2022.

² See Ms. Wityrol's email dated January 24, 2022.

During the conference, Mr Abraham inquired about the opportunity to pre-file rebuttal testimony with respect to the geology and hydrogeology issues. We can discuss the need for presenting rebuttal testimony during the February 17, 2022, discovery conference, and determine the appropriate course of action.

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

In the Seventh Order dated December 10, 2021, I reported that the disclosure is complete with respect to Ms. Witryol's document demand Nos. 2, 3, 15, and 23.

Based on today's discussion, I understand that Mr. Kuhn and Ms. Wityrol will continue discussions about Document Demand Nos. 1, 4, 6, and 7.

VI. Ms. Witryol's Interrogatories

Ms. Wityrol served an interrogatory and document request, dated December 21, 2021, upon CWM's counsel. In a response dated January 10, 2022, CWM objected to Ms. Witryol's interrogatory and document request. Ms. Witryol may file a written reply, which is due by February 8, 2022. No other responsive documents are authorized at this time. I will advise the parties if I need any additional information.

VII. Hearing Procedures

In response to Ms. Witryol's inquiry during the conference, I explained that when the hearing convenes, I will swear in the witness or witness panel. Through a series of questions, the representative for the party sponsoring the witness will ask whether the witness prepared the pre-filed direct testimony, and whether the witness would adopt the written responses as his testimony if he were asked each question. Subsequently, the representatives for each party would have the opportunity to cross-examine the witness. After the completion of the parties' cross-examination, the representative for the party who sponsored the witness would have the opportunity to ask additional questions referred to as re-direct examination. The scope of re-direct examination is limited to the topics queried during cross-examination. The other parties will have the opportunity to ask questions about the responses that the witness provided during the re-direct-examination. This set of questions is referred to as re-cross-examination. With each round of questions, the scope of the parties' inquiry becomes narrower.

With the presentation of the direct case, a witness may offer exhibits. All exhibits related to the pre-filed direct testimony of a witness should be offered when the party files the pre-filed direct testimony.

During the discovery conference, Ms. Witryol inquired when the "evidence package" would be offered. I understand this term to mean the supporting data and backup information that the parties provided to each other subsequent to the submission of the pre-filed direct

testimony. Consistent with 6 NYCRR 624.8(e), I directed the distribution of this information to avoid, or limit the need for, additional discovery, subsequent to the submission of pre-filed testimony. The supporting data and backup information is not considered part of a party's direct case. That is why I instructed the parties *not* to provide me with the supporting data and backup information. The distribution of the supporting data and backup information was for the benefit of the parties to assist in their review of other parties' pre-filed direct testimony, and to develop questions for cross-examination.

To the extent that Ms. Witryol wishes to present any supporting data and backup information related to the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler concerning issues related to whether the proposed RMU-2 landfill is otherwise necessary of in the public interest pursuant to ELC 27-1105(3)(f) and the October 2010 Siting Plan (*see* December 22, 2015 issues ruling at 92) that was not identified as an exhibit in the pre-filed direct testimony for these witnesses, Ms. Witryol shall provide me, on notice to the other parties, with a list of that information. In addition, I will need a copy of each document, as well as an explanation for which witness will be offering the documents. Ms. Witryol does not need to distribute copies of the documents to the other parties because she should have already done so. The list and the documents may be submitted in electronic format. However, depending on the nature or length of the document, I may request a hard copy of certain documents. This information is due by Monday, February 14, 2022.

VIII. Next Conference

The next discovery conference is scheduled for 9:30 a.m. on Thursday, February 17, 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
January 26, 2022

To: Service List revised July 2, 2021