

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]).

May 13, 2022

Eleventh Order regarding Supplemental Discovery

As scheduled, the hearing convened on April 11 and 12, 2022, to introduce the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler, and their associated exhibits into the hearing record, and to provide the opportunity for the other parties to cross-examine these witnesses.

One purpose of this order is to schedule the hearing to consider proposed issues related to geology and hydrogeology, and related topics for July 6, and as necessary, July 7 and 8, 2022. Additional topics address in this order include the hearing transcript, the record of compliance issue, and the schedule for responses to CWM's motion to strike, among others.

I. Geology and Hydrogeology

In an email dated April 14, 2022, I inquired about the parties' availability on July 6, 7, and 8, 2022, to reconvene the hearing to consider proposed issues related to geology and hydrogeology. I received timely responses from all the parties' representatives confirming their respective availability and that of their witnesses on these dates. Accordingly, the hearing will reconvene on July 6, 2022, and as necessary will continue on July 7, and 8, 2022. The proceedings will be conducted virtually using as a Webex Event, similar to the April 11 and 12, 2022 session.¹

By June 10, 2022, I request that the parties provide me with an email address for their respective witnesses. Subsequently, the parties and the witnesses will receive invitations, as panelist, for the July 6, 7, and 8, 2022, sessions. There will be a separate invitation for each day. Please accept all three invitations.

I request that Mr. Kuhn reserve a stenographer for the hearings scheduled for July 6, 7, and 8, 2022. Please provide me with the contact information including an email address for the stenographer, when the information becomes available.

II. Department Staff's Witness

With a cover letter dated January 14, 2022, Ms. Mucha provided 13 hard copies of the pre-filed direct testimony and related exhibits of Steven Moeller and James Sacco. In an email dated April 25, 2022, Ms. Mucha advised that Department staff would need to substitute Peter Grasso for James Sacco because Mr. Sacco is retiring from State service. Ms. Mucha advised that any revisions to the pre-filed direct testimony would relate to Mr. Grasso's work credentials and employment status.

Department staff shall provide a revised version of the pre-filed direct testimony, which substitutes Mr. Grasso for Mr. Sacco. Rather than providing 13 hard copies, as previously directed, Department staff may provide me with one electronic copy. I understand that the only exhibit initially filed with Mr. Sacco's pre-filed direct testimony dated January 14, 2022 was a copy of his résumé. I understand further that the forthcoming revision will include a copy of Mr. Grasso's résumé. If my understand of these circumstances is not correct, please advise.

I request that Department staff circulate the revised pre-filed testimony and the related exhibit to the parties and me by Friday, June 10, 2022.

¹ According to the CDC website, COVID-19 Community Levels for Erie and Niagara Counties are "high" (*see* https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html#anchor_82254 [accessed May 13, 2022]).

III. Corrected Pre-filed Testimony for the Stenographer

With an email dated April 15, 2022, I circulated scanned copies of the pre-filed direct testimony of Dr. Rockler, and Messrs. Rubino, Whalen, and Masters to the parties. On these scanned copies, I added the corrections discussed during the testimony of these witnesses at the April 11, 2022, hearing session. In the April 15, 2022 email, I provided until April 21, 2022 for the parties to identify any concerns or objections about the corrections. In addition, the parties had the opportunity to reply to any concerns or objections by April 28, 2022.

I received responses from Mr. Kuhn and Ms. Witryol. As requested, Mr. Kuhn provided the contact information for the stenographer in an email dated April 18, 2022.

In her email dated April 18, 2022, Ms. Witryol noted that my April 15, 2022, did not include any exhibits, other than Dr. Rockler's Exhibit 4B. Ms. Witryol inquired about how exhibit corrections will be addressed. Each witness described the corrections to the exhibits associated with the witness's pre-filed direct testimony, during the April 11, 2022, hearing session. The corrections were not extensive. Therefore, copies of corrected exhibits do not need to be circulated.

In an email dated April 21, 2022,² Ms. Witryol said there no changes to the corrections associated with the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters. With respect to Dr. Rockler's pre-filed direct testimony, Ms. Witryol explained that she added some marginal notes to clarify the hand-written corrections.

No other parties objected to Ms. Witryol's proposed changes. Therefore, with respect to Dr. Rockler's pre-filed direct testimony, I adopt the proposed changes at page 5, line 18; page 8, line 2; page 9, line 11; page 10, line 2; page 11, line 29; and page 13, lines 21-22. I decline to adopt the proposed change at page 6, line 36. In the April 21, 2022, email, Ms. Witryol said that none of the notes corrected statements that Dr. Rockler missed during his testimony. However, the note associated with the proposed change on page 6, line 36 expressly states:

The reference was not corrected during the corrections procedure. If corrected, it would read 'Office of the New York State Comptroller.'

With an email dated May 10, 2022, I provided the stenographic firm with the corrected copies of the pre-filed direct testimony of Messrs. Whalen, Rubino, Masters and Dr. Rockler. I will circulate this email to the parties separately.

² In her response to my April 15, 2022, email, Ms. Witryol noted that I had neglected to include Mr. Abraham in the distribution of the original April 15, 2022, email. Fortunately, Ms. Witryol's April 14, 2022, response included Mr. Abraham. I apologize for any confusion this may have created. If Mr. Abraham wishes to comment, he may do so upon receipt of this order.

IV. Rockler Exhibit 4

With an email to the parties dated April 15, 2022, I circulated a marked-up copy of Dr. Rockler's Exhibit 4B based on this witness's testimony at the April 11, 2022, hearing session. In the April 15, 2022, email, I explained that the original would be identified in the hearing record as Exhibit 4B-1. I authorized the witness to prepare a revised document that would be identified as Rockler Exhibit 4B-2, consistent with his testimony of April 11, 2022.

To date, I have not received a revised copy of Dr. Rockler's Exhibit 4B. If Ms. Wityrol wants to have a revised copy of Dr. Rockler's Exhibit 4B in the evidentiary hearing record, please circulate a copy within 10 calendar days from the date of this order. Otherwise, the marked-up copy circulated with the April 15, 2022, email will be identified as Rockler Exhibit 4B-2 in the evidentiary record.

V. Record of Compliance

With an email from Mr. Kuhn dated April 10, 2022, CWM circulated copies of the record of compliance tables described on page 75 of the December 22, 2015, issues ruling.³ During the April 12, 2022, hearing session, I acknowledged receipt of the tables circulated with Mr. Kuhn's April 10, 2022, email. I explained that I wanted to search the file to determine whether, CWM's previous counsel, Daniel Darragh, had submitted anything responsive to the directive in the December 22, 2015, issues ruling. In addition, I said that I wanted to determine the status of any appeals from my rulings with respect to the record of compliance issue.

Upon review of the files, I found an email from Mr. Darragh dated May 13, 2016, which included a set of compliance tables. I will circulate Mr. Darragh's May 13, 2016, email and attachments to the parties via email. Upon review of the May 13, 2016, email and attached documents, CWM's current counsel should advise about the status of the tables circulated with Mr. Kuhn's April 10, 2022, email.

With respect to the status of any appeals, a review of the Deputy Commissioner's First Interim Decision shows that appeals from the December 22, 2015, issues ruling were duly considered. The Deputy Commissioner affirmed the December 22, 2015, rulings related to the record of compliance issue, and denied RRG's appeal, and Ms. Wityrol's appeal (*see* First Interim Decision dated June 23, 2021, at 12-14).

The February 14, 2019, Supplemental Rulings (at 27) also considered the record of compliance issue, but did not modify the ruling as originally framed in the December 22, 2015, issues ruling. The Facility Siting Board duly considered appeals from the February 14, 2019, supplemental rulings in the Ruling and Third Interim Decision dated September 4, 2019. In the First Interim Decision dated June 23, 2021 (at 2, n. 2), the Deputy Commissioner states,

³ *See also* Supplemental Rulings dated February 14, 2019, at 27.

however, that appeals from the February 14, 2019, supplemental rulings will be considered in the second interim decision, which is pending.

Nevertheless, a review of the appeals filed by the intervening parties shows that no party appealed from the rulings that addressed Section 6 of Ms. Witryol's supplemental petition dated May 2, 2018 (at 34-40).⁴ With no appeal pending from the February 14, 2019 supplemental rulings (at 27), the scope of the record of compliance issue, as originally framed in the December 2015 ruling (at 73-76, 80-81) is not at issue. Given these circumstances, CWM may finalize the record of compliance tables described on page 75 of the December 22, 2015, issues ruling. Subsequently, the parties will have the opportunity to develop the hearing record about this topic consistent with the procedure outlined in the December 22, 2015, issues ruling at pages 76, and 80-81.

VI. CWM's Motion to Strike

With a cover letter from Mr. Kuhn dated May 6, 2022,⁵ CWM moved to strike the February 24, 2020, pre-filed direct testimony of Kenneth Acks, and related portions of Dr. Rockler's February 27, 2020, pre-filed direct testimony. CWM's motion papers consist of the following: (1) CWM's motion to strike dated May 6, 2022; (2) an affirmation by Mr. Kuhn dated May 6, 2022, with Exhibits A through C; and (3) an affidavit by Louis L. Wilde, Ph.D., sworn to May 6, 2022, with Exhibits A through D.

Exhibit A to Mr. Kuhn's May 6, 2022 affirmation is a copy of CWM's document demands dated June 8, 2021, served upon counsel for RRG. Exhibit B is a copy of a cover letter dated February 10, 2022, from RRG's counsel, and RRG's amended responses to CWM's June 8, 2021, document demands. Exhibit C is a copy of a cover letter dated March 4, 2022, from RRG's counsel, and additional responses to CWM document demands Nos. 2-32 (Acks) and 34-42 (Rockler).

Exhibit A to Dr. Wilde's May 6, 2022, affidavit is a copy of his résumé. Exhibit B a copy of a map of northwestern New York. Exhibit C is a copy of a map titled, *MIS-Located Data Points – Example Area*. Exhibit D is a copy of a map titled, *MIS-Located Data Points – In Canada*. Exhibit E a three page table titled, *80 Records in 18 Groups with Identical Map Coordinates*.

After inquiring how much time RRG and Ms. Witryol would need to respond to CWM's motion, RRG's counsel advised by email dated May 12, 2022, that RRG and Ms. Wityrol would file responses by Friday, August 12, 2022.

⁴ See Appeal of Buffalo Niagara Waterkeeper, filed March 29, 2019 with errata filed April 8, 2019; Appeal of Residents for Responsible Government, the Lewiston-Porter Central School District, and the Niagara County Farm Bureau, dated April 3, 2019; Appeal of Niagara County, the Town and Village of Lewiston, and the Village of Youngstown, dated April 4, 2019; and Appeal of Amy Witryol, dated April 5, 2019 with errata filed April 12, 2019.

⁵ With an email dated May 6, 2022, Mr. Kuhn circulated electronic copies of CWM's motion papers. OHMS received a hard copy on May 10, 2022.

Accordingly, responses will be due, in three months, by August 12, 2022. Any party, including the amicus parties, may respond to CWM's motion. I will accept electronic copies of any response with one hard copy to follow by regular mail. No further responsive pleadings are allowed (*see* 6 NYCRR 624.6[c][3]).

VII. Next Conference

I have not scheduled any conferences with the parties prior to the July 6, 2022, hearing session. However, I am available to convene a conference, if necessary, upon request.

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

Dated: Albany, New York
May 13, 2022

To: Service List revised April 14, 2022