

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]).

October 18, 2021

Fifth Order regarding Supplemental Discovery

As scheduled, a discovery conference convened at 1:00 p.m. on October 15, 2021. Representatives for CWM, Department staff, RRG, the Tuscarora Nation, as well as Ms. Wityrol participated. The purpose of the conference was to review the progress of outstanding document demands.

I. Issues related to Geology and Hydrogeology

In an email from Ms. Mucha dated October 4, 2021, Department staff requested an extension of time to pre-file the direct testimony related to the geology and hydrogeology issues. Ms. Mucha advised that she had conferred with counsel for CWM and the municipalities, and that these parties agreed on the following schedule. The parties' pre-filed direct testimony and related exhibits will be due by January 14, 2022, and the related supporting data/backup

information will be circulated by January 28, 2022. Ms. Wityrol objected to the revised schedule in an email also dated October 4, 2021. She said that the delay would burden the petitioners without reasonable cause. I granted the request in an email dated October 7, 2021.

Subsequent to the conference, I received an email from Mr. Abraham dated October 15, 2021, on behalf of the municipalities. According to the municipalities, they have not received any information from staff in response to the municipalities' July 26, 2021 document demands. In addition, the municipalities files document requests with CWM with an email dated October 15, 2021.

I encourage the parties to confer among themselves in the event that disputes concerning the exchange of information related to these issues develops. As noted below, a conference has been scheduled for November 12, 2021. At that time, the parties may raise concerns about discovery and the geology and hydrogeology issues.

II. RRG

Professor Connolly and the members of the Environmental Advocacy Clinic explained that they continue to acquire, scan, and review documents associated with the pre-filed direct testimony of Messrs. Bittner and Acks. Counsel is preparing the first set of responses to CWM's document demands, and expects to distribute the first set of responses shortly.

With respect to responses to CWM's document demands related to Dr. Rockler, coordination with Ms. Wityrol continues.

III. Ms. Wityrol

Ms. Wityrol's response to CWM's September 30, 2021, motion for protective order is due by Thursday, October 21, 2021.

By email dated October 15, 2021, Ms. Wityrol raised a concern about a message she received from Mr. Kuhn, on behalf of CWM, concerning CWM's response to her document demand No. 9. During the October 15, 2021, conference, reference was made to Ms. Wityrol's August 5, 2021 email, and the third version of document demand No. 9 attached to the email. I determined that the first sentence of document demand No. 9, as revised, was overly broad. CWM's counsel represented that CWM responded to the first sentence of Ms. Wityrol's August 5, 2021 email, and the second sentence of document demand No. 9 attached to the email. I determined further that the discovery process related to document demand No. 9, as revised on August 5, 2021, is complete.

Subsequent to the conference, Ms. Wityrol filed an email dated October 15, 2021 concerning document demand No. 9. A copy of the email is attached to this order as Appendix A.

CWM and Ms. Wityrol dispute whether CWM's responses to Ms. Wityrol's document demands are complete. I will advise the parties at a later date about how to address this dispute. At this point, no motion practice about this topic is authorized.

IV. Cross-examination of Messrs. Whalen, Rubino, and Masters

I understand there are no outstanding document demands related to the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters. If my understanding is correct, I would like to convene the hearing to provide the opportunity to cross-examine these witnesses. The hearing will be convened remotely using the Webex platform. Therefore, the full parties to this proceeding shall advise me, on notice to all other parties, by **November 5, 2021**, whether they want to cross-examine these witnesses and, if so, provide an estimate of how long the cross-examination of each witness would be.

Except for January 17, 2022 (Martin Luther King, Jr. Day), and the morning of January 26, 2022, I am available during the weeks of January 10, 17, 24, and 31, 2022, to convene the hearing to provide the opportunity to cross-examine Messrs. Whalen, Rubino and Masters. By **November 5, 2021**, Ms. Wityrol shall advise me, on notice to the other parties, when she and these witnesses will be available, during the period noted above. In order to go forward, all witnesses do not need to be available on the same date or dates.

We will develop the hearing schedule during the November 12, 2021 conference.

V. Transportation

Proposed issues related to transportation are discussed in the December 2, 2015, issues ruling at 39-46, and in the February 14, 2019 supplemental rulings at 28-29. Consistent with my directive in the December 2015 issues ruling (at 46), CWM provided a copy of the report dated September 7, 2016, related to the traffic assessments initially presented in Appendix G to the DEIS, under cover of letter from Mr. Darragh dated September 12, 2016. After considering appeals duly taken from the issues rulings and supplemental rulings, the Siting Board determined that Michelle L. Bodewes, P.E. and David Coate could offer testimony about whether the results of the updated noise assessment would show sound pressure increases greater than 6 dB at the relevant receptors and, if so, how any draft permit conditions should be revised to further mitigate potential noise impacts from truck traffic (*see* December 2015 issues ruling at 46; *see also* Interim Decision of the Facility Siting Board dated August 11, 2016, at 19, and Ruling and Third Interim Decision of the Siting Board dated September 10, 2019, at 15 ["Ms. Wityrol should also be allowed to use Michelle Bodewes, P.E. in support of David Coate regarding noise level increases to ambient levels along the truck route and maximum noise level exceedances with respect to the September 7, 2016 Transportation Noise Analysis prepared by Watts Architecture & Engineering for Arcadis and CWM."])).

I want the parties to begin preparations for the adjudication of this issue. During the October 15, 2021 conference, I inquired whether Ms. Wityrol has been in contact with her witnesses. In addition, the parties will need to refamiliarize themselves with this issue.

Electronic copies of Mr. Darragh's September 12, 2019 cover letter, and the September 7, 2016 report will be distributed with the electronic version of this order.

Ms. Wityrol shall confer with Ms. Bodewes and Mr. Coate to determine whether they will continue to serve as her witnesses. By **November 5, 2021**, Ms. Wityrol shall advise me, on notice to the other parties, whether Ms. Bodewes and Mr. Coate will serve as her witnesses. If so, Ms. Wityrol shall forward a copy of the attached report dated September 7, 2016 to the witnesses for their review, if she has not already done so. If Ms. Bodewes and Mr. Coate can no longer serve as Ms. Wityrol's witnesses, we will discuss how Ms. Wityrol wants to proceed with the adjudication of this issue during the November 12, 2021 conference.

VI. Next Conference

The next discovery conference is scheduled for 1:00 p.m. on Friday, November 12, 2021. In a separate email, the parties will receive the Webex invitation for the conference. The purpose of the conference will be to obtain an update from RRG's counsel about the status of responses to CWM's document demands. In addition, we will discuss the dispute between CWM and Ms. Wityrol about CWM's responses to Ms. Wityrol's document demands. We will develop a hearing schedule to provide the opportunity to cross-examine the pre-filed direct testimony of Messrs. Whalen, Bittner, and Masters. Finally, we will discuss topics related to the transportation issue, as noted above.

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

Appendix A: Ms. Wityrol's email dated October 15, 2021

Attachments: Daniel Darragh cover letter dated September 12, 2019;
September 7, 2016 Transportation Noise Analysis
(circulated with electronic version only)

Dated: Albany, New York
October 18, 2021

To: Service List revised July 2, 2021

record of conferences - No. 9

Appendix A

Amy Witryol <amyville@roadrunner.com>

Fri 10/15/2021 3:36 PM

To: O'Connell, Daniel P (DEC) <daniel.oconnell@dec.ny.gov>

Cc: 'Gary Abraham' <gabraham44@eznet.net>; 'Kuhn, Jeffrey' <jeffrey.kuhn@dlapiper.com>; 'Robert J. Alessi Esq.' <robert.alessi@dlapiper.com>; Stever, David (DEC) <david.stever@dec.ny.gov>; kimconno@buffalo.edu <kimconno@buffalo.edu>; 'UB Environmental Advocacy Clinic' <law-environmentalclinic@buffalo.edu>; 'Jenna Macaulay Esq.' <macaulay.jenna@gmail.com>; 'Margaux J. Valenti, Esq.' <mvalenti@bnwaterkeeper.org>; Mucha, Teresa J (DEC) <teresa.mucha@dec.ny.gov>

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Dear Judge O'Connell,

I write to ask that today's conference summary more fully reflect RFP No.9's 2nd modification. The Aug 5th Order from Your Honor was silent (IV.) as to the discussion of its content.

I understand Your Honor's position that CWM's reply to No.9 as modified was its reply. I just request that the facts considered for inclusion in today's conference memo clarify that Your Honor did not narrow or otherwise rule on the language of the 2nd modification, and, that CWM never objected to the 2nd modification. (CWM's reply to me this morning took the position that Your Honor narrowed the 2nd RFP modification to the total of all sales taxes, to the exclusion of any documents whatsoever for transportation-related amounts, therein. However, I did not find any such record of Your Honor doing so.)

Note: The prior conference discussion focused squarely on rewriting No.9 to seek Transportation-related sale tax data during the operation of RMU-1, forming the basis of the MRB forecast to 2020, and then for RMU-2, thereafter. During that conference I clearly recall Your Honor asking me how I knew that not all sales tax could be attributed to RMU-2; I reiterated that competitors replaced any CWM sales tax paid on waste transported from NY since RMU-1 closed - the tax would be paid to NY whether CWM arranged (booked) the transportation or not. At the time, I also referred to my having addressed state tax policy for this issue in my Motion to Strike.

Thank you for any consideration.

Sincerely,
Amy Witryol