

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 1, 2022

Ninth Order regarding Supplemental Discovery

As scheduled, a discovery conference convened at 9:30 a.m. on Thursday, February 17, 2022. Representatives for CWM, Department staff, RRG, Ms. Wityrol, the municipalities, and the Tuscarora Nation participated. The purpose of the conference was to review the progress of outstanding document demands. The parties discussed a tentative hearing schedule.

I. RRG

The parties discussed the status of RRG's responses to CWM's outstanding document demands. I set Friday, March 4, 2020, as the date for RRG's counsel to respond to CWM's document demands. No further extensions will be provided. If, upon review of the forthcoming response, CWM moves for any relief, I advised that I will set a schedule for the parties to file replies.

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

The hearing to introduce the pre-filed direct testimony of Messrs. Whalen, Rubino, and Masters, as well as Dr. Rockler and associated exhibits into the hearing record, and to provide the opportunity for the other parties to cross-examine this witness panel will convene at **10:00 a.m. on Monday, April 11, 2022**, and continue, if necessary, at 10:00 a.m. on Tuesday, April 12, 2022. The hearing will be held virtually using the Webex audiovisual conference platform. Additional information to participate, and instructions for the hearing will follow.

III. Geology and Hydrogeology

Mr. Abraham advised that he and the municipalities' expert are reviewing the pre-filed direct testimony offered by CWM's experts and Department staff related to the geology and hydrogeology issues and associated supporting materials. I reserved on the municipalities' request to pre-file rebuttal testimony pending the ongoing review.

In the meantime, parties who pre-filed direct testimony about these issues will confer with their respective witnesses to determine their availability for cross-examination during the weeks of May 9 and 16, 2022.

Ms. Witryol advised that she wishes to cross-examine these witnesses. Given the amount of information associated with these issues, Ms. Witryol requested that the schedule for the cross-examination of the witnesses concerning these issues be set for June 2022.

IV. Technical Conferences

CWM expressed an interest in moving forward with the other issues identified for adjudication. These relate to the following topics.

1. Potential Noise Impacts from Truck Traffic

In the Fifth Order regarding Supplemental Discover dated October 18, 2021 (at 3), the parties discussed the issue related to potential noise impacts from truck traffic. The December 22, 2015 issues ruling (at 46) directed CWM to update the 1993 Normandeau Assessment and the June 2002 BBL supplement (*see* DEIS, Appendix G) using the most recent version of TNM, and in a manner consistent with the guidance outlined in the Department's *Assessing and Mitigation Noise Impacts* (DEP-00-1). This directive was based on the identification of David Coate as Ms. Witryol's proposed expert and the related offers of proof. Subsequently, under cover of letter from Mr. Darragh dated September 12, 2016, CWM provided the parties and me with a copy of the report dated September 7, 2016.

After considering appeals duly taken from the issues rulings and supplemental rulings, the Siting Board determined that David Coate as well as Michelle L. Bodewes, P.E. 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. Witryol 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”]). The Deputy Commissioner concurred with the Siting Board’s determinations with respect to this issue (*see* First Interim Decision of the Deputy Commissioner dated June 23, 2021, at 7, 13-14).

In an email dated November 5, 2021, Ms. Witryol confirmed that Ms. Bodewes and Mr. Coate will continue to serve as witnesses. During the November 12, 2021, conference, Ms. Witryol said that her consultants were reviewing the September 7, 2016 report (*see* Sixth Order regarding Supplemental Discovery dated November 23, 2021, at 3).

2. Radiological Surveys, and the Soil Excavation Monitoring and Management Plan (SEMP)

The interim decision of the Facility Siting Board dated August 11, 2016 (at 14-18) determined that the sufficiency of the radiological surveys and the adequacy of the soil excavation monitoring and management plan (SEMMP) were issues to be adjudicated (*see also* Ruling and Third Interim Decision of the Facility Siting Board, dated September 10, 2019, at 5). The Deputy Commissioner concurred with the Siting Board’s determinations with respect to this issue, and noted that CWM had submitted a revised project-specific SEMMP with a cover letter dated November 18, 2016 letter, which should be considered during the adjudication of the issue. (*See* First Interim Decision of the Deputy Commissioner dated June 23, 2021, at 17-18).

For this issue, the municipalities proffered the expert testimony of Marvin Rresnikoff, Ph.D. (Radioactive Waste Management Associates [Brooklyn, New York]). In her supplemental petition dated May 2, 2018 (at 74-77, and Appendices N1, N2, N3, N4, and N5), Ms. Wityrol proffered the expert testimony of Sean C. Chapel and Karen K. Barcal, Ph.D. (International Radiation Safety Consulting, Inc. [Stoughton, Massachusetts]).

3. Meteorological Data

A topic discussed during the July 10, 2018 issues conference was CWM’s compliance with the guidance outlined in Division of Air Resources (DAR)-10, dated May 9, 2006, titled, *NYSDEC Guidelines on Dispersion Modeling Procedures of Air Quality Impact Analysis* (*see* Supplemental Rulings, dated February 14, 2019, at 19-20). Upon review of appeals duly taken from the February 14, 2019 ruling, the Siting Board expressed concern that the terms and conditions of the draft Air State Facility (ASF) permit were not consistent with the guidance outlined in DAR-10. As a result, the Siting Board concluded that the record needed further

development regarding the use of meteorological data from Niagara Falls International Airport rather than on-site meteorological data. (See Ruling and Third Interim Decision of the Facility Siting Board, dated September 10, 2019, at 8-9, *see also* 6 NYCRR 377.7[b][10][i] and [ii].)

The Siting Board directed CWM and Department staff to present direct testimony and evidence, subject to cross-examination by the intervening parties, about to the meteorological data provided in support of the Part 361 Certificate Application and the meteorological data provided in support of the air dispersion modeling for the ASF draft permit. The Siting Board directed further that the testimony and evidence should discuss and compare the data associated with atmospheric stability, prevailing wind direction and wind speed as used in the respective certificate and air permit applications. (See Ruling and Third Interim Decision of the Facility Siting Board, dated September 10, 2019, at 10.)¹

During the February 17, 2022 conference, the parties discussed the possibility of having the parties' respective witnesses participate in technical conferences. The purpose of the technical conferences would be for the experts to confer and, if necessary, identify the additional information that the parties may need to obtain through discovery before preparing their respective pre-filed direct testimony. Subsequent to the technical conferences, each parties' respective experts would help the parties' representatives draft document demands.

I encourage the parties to allow their respective experts to participate in technical conferences. I recommend that the parties' representatives exchange the contact information for their respective experts. The experts can then make the arrangements for the meetings.

V. Next Conference

The next discovery conference is scheduled for 10:00 a.m. on Wednesday, March 16, 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
March 1, 2022

To: Service List revised July 2, 2021

¹ The Deputy Commissioner's First Interim Decision does not address appeals from the February 14, 2019 supplemental issues rulings. Appeals from the supplemental rulings will be addressed in a second interim decision. (See First Interim Decision of the Deputy Commissioner dated June 23, 2021, n 2, at 2.)