

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]).

November 10, 2021

**Supplemental Discovery
Ruling Granting CWM's Motion for Protective Order**

With the scheduling order dated May 25, 2021, I granted leave for the parties to serve supplemental discovery demands. The scheduling order directed the parties to serve any discovery demands by June 8, 2021. (*See* Scheduling Order dated May 25, 2021, at 2.)

Ms. Witryol served her first notice to produce dated June 8, 2021, upon CWM, which consisted of 25 document demands. As requested, Ms. Witryol provided me with an electronic copy of her document demands Nos. 8-25, and definitions with an email dated July 6, 2021. The parties and I discussed Ms. Witryol's document demands during the discovery conferences held on July 22, August 5, and September 14, 2021. In part, the purpose of these discussions was to clarify the document demands, and to resolve any disputes related to them.

In the Fourth Order regarding supplemental discovery dated September 15, 2021, I authorized CWM to file a motion for protective order with respect to Ms. Witryol's document demands Nos. 11, 17, 18, 19, and 23. In the event that CWM chose to move for a protective order, I set September 30, 2021, as the due date for the motion, and October 14, 2021, as the due date for Ms. Witryol's response. By email dated October 8, 2021, I granted Ms. Witryol's request of the same date to extend the due date for her response to October 21, 2021.

With an email from Mr. Kuhn dated September 30, 2021, CWM filed its motion for a protective order. CWM seeks a protective order from Ms. Witryol's document demands Nos. 17, 18, 19, and 23. Counsel for CWM reports that CWM has produced documents in response to Ms. Witryol's document demand Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16, 18 (partial response), 20, and 22. With respect to document demand Nos. 2, 11, 15, 21, 24, and 25, CWM's counsel states further that CWM does not have any additional responsive documents in its possession, custody, or control. (*See* CWM motion at 3-4, 12.)

With emails dated October 21, 2021, Ms. Witryol timely filed her response. The response consisted of the following: (1) an answer to CWM Chemical Services, LLC's motion for protective order with respect to Amy H. Witryol's first notice to produce; (2) an affidavit by Ms. Witryol, sworn to October 21, 2021; and (3) five exhibits. Exhibit 1 is a set of CWM/WM community news and ads distributed in the *Lewiston-Porter Sentinel*. Exhibit 2 is a list of current and former CWM employees identified on public websites. Exhibit 3 is a copy of a service agreement. Exhibit 4 is a copy of an affidavit by Michael D. Mahar, sworn to February 20, 2018, and Exhibit 5 is a copy of an affidavit by John S. Skoutelas, sworn to February 19, 2018.

Pursuant to 6 NYCRR 624.7(d)(1), a party against whom discovery is demanded may move for a protective order, in general conformance with CPLR 3103 to deny, limit, condition, or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.

CWM's Motion for Protective Order

1. Discovery Demand No. 17

According to CWM, a protective order is necessary with respect to Ms. Witryol's discovery demand No. 17 because it seeks confidential and irrelevant employment records. Mr. N'dolo's pre-filed direct testimony and the MRB Report state that an average of 81 people were employed at the Model City facility during normal operations from 2004 to 2008. CWM estimates that the same number of people (81) would be employed at the Model City facility during the approximately 30-year lifespan of RMU-2. (*See* Berlow and N'dolo at 10; MRB Report at 2 and 7.) Subsequently, CWM produced the supporting data and backup information in the form of annual headcount reports (*see* CWM-82 to CWM-96). CWM redacted the annual headcount reports to remove the names of the individual employees and other employment information. However, the supporting data and backup information provided the following categories: (1) DBL for employees who went on disability, (2) VLO for those who took a voluntary layoff during the years in question, and (3) WC or Comp for those placed on workers'

compensation. A fourth category, MBU, shows how many employees were included in a market business unit, which CWM explains relates to internal accounting of employment expenses. (*See* CWM motion at 5-6).

Ms. Witryol's document demand No. 17 states, in full:

With respect to Evidence pages CWM-82 through and including CWM-98, concerning Headcount, and Payroll and Benefits, provide any and all documents for each month of each year, 2004 through and including 2020 concerning:

- a. VLO;
- b. WC; and
- c. DBL's; and
- d. MBU.

CWM objects to this document demand, and seeks a protective order for the following reasons. First, document demand No. 17 requests employment records that are confidential and entitled to protection.¹ Second, the requested employment records are not relevant. CWM contends that the 17 years of monthly workers' compensation, disability, voluntary layoff, or market business unit information sought by document demand No. 17 has no bearing on the average number of people employed at the Model City facility from 2004 to 2008. Third, CWM contends further that the production of the requested information would be unduly burdensome. Document demand No. 17 seeks 17 years of monthly CWM employment records from 2004 to 2020, when the pertinent portion of Mr. N'dolo's pre-filed direct testimony only relates to the period from 2004 to 2008. (*See* CWM motion at 6-7.)

In the response, Ms. Witryol argues that CWM did not establish that it is entitled to a protective order with respect to document demand No. 17 because the requested documents are relevant and not confidential. According to Ms. Witryol, the period referenced in document demand No. 17 from 2004 to 2020 is relevant and not overly broad because the pre-filed direct testimony of CWM's public interest panel estimates the number of employees who will work at the Model City facility for the approximate 30-year lifespan of the proposed RMU-2 landfill. According to Ms. Witryol, any accounting of employment that CWM attributes to the Model City facility is relevant. (*See* Witryol response at 5-7.)

With respect to CWM's assertion of confidentiality, Ms. Witryol argues that appropriate legal standard requires a balancing of privacy concerns with the need for disclosure (*see* Witryol response at 7-8 *referencing Van Epps*, 184 Misc.2d 167). According to Ms. Witryol, CWM's reliance on *Van Epps* is misplaced because the matter can be factually distinguished from the captioned matters. Ms. Witryol notes that document demand No. 17 seeks business records that may include "some tangential employment information" (Witryol response at 7). Ms. Witryol asserts that CWM has not attempted to keep the requested employment information confidential. To support this assertion, Ms. Witryol references her Exhibits 1 and 2. Exhibit 1 is a set of

¹ *See e.g. Van Epps v County of Albany*, 184 Misc. 2d 159, 167 (Sup. Ct. Albany County. 2000); *Kozak v Office Depot, Inc.*, No. 16-cv-00943, 2020 WL 5757183, at *4 n.2 (W.D.N.Y. Sept. 28, 2020) ("discovery of personnel records of non-party employees – which records invariably contain sensitive medical, financial and other information of a highly personal nature – is not generally favored").

CWM/WM community news and ads distributed in the *Lewiston-Porter Sentinel*. Based on her review of the newsletters, Ms. Witryol has identified 75 employees from the Model City facility. Exhibit 2 is a list of current and former CWM employees on public websites such as LinkedIn. The website information provides employee names and job functions. (See Witryol response at 7-8; ¶¶ 1 and 2 of Witryol affidavit.)

Ms. Witryol argues further that employee names, as well as their respective job titles and functions are required because the headcount has shifted among the three business unit payrolls (VLO, WC, and DBL). Also, job titles change routinely with promotions and restructuring, according to Ms. Witryol. After the names of employees, their status, and their respective job titles and functions are identified for the period requested, Ms. Witryol said that the corresponding information for wages and local payroll benefit relevant to the proposed RMU-2 landfill can be identified. Ms. Witryol concludes that it is impossible to estimate employment figures that may “result” from “approving” the proposed RMU-2 landfill without the documentation requested in document demand No. 17. (See Witryol response at 8-9.)

Referring to CPLR 3103(a), Ms. Witryol asserts that disclosure of the requested information should not be denied due to confidentiality concerns because I have the authority to issue a confidentiality order to address any privacy concerns (see Witryol response at 9).

Ruling: I grant CWM’s request for a protective order with respect to document demand No. 17. The requested documents consist of 17 years of CWM’s monthly employment records related, in part, to workers’ compensation, disability, and voluntary layoffs. This information is confidential and entitled to protection. In addition, the information sought by document demand No. 17 has no bearing on determining the average number of people employed at the Model City facility. As a result, the information sought is irrelevant. Furthermore, I deny Ms. Witryol’s request for a confidentiality order with respect to the information sought by document demand No. 17.

2. Discovery Demand No. 18

CWM seeks a protective order with respect to Ms. Witryol’s revised document demand No. 18 because it seeks disclosure of specific projected construction costs, which are confidential, and the disclosure of which would place CWM at a commercial disadvantage. CWM explains that Mr. N’dolo’s pre-filed direct testimony and the MRB Report state that CWM estimates spending approximately \$60.2 million to construct the proposed RMU-2 landfill (see Berlow and N’dolo at 10; MRB Report at 8). Subsequently, CWM produced supporting data and backup information identifying several categories of estimated construction and associated facility costs as the bases for the \$60.2 million projection (see CWM-69).

Ms. Witryol’s original document demand No. 18 stated, in full:

With respect to “local expenditures” identified on Evidence page CWM-69 provide any and all documents concerning:

- a. the costs and locations where goods purchased for the Facility during 2004, through and including 2008, were produced; and

- b. the costs and locations of service providers for services that were purchased for the Facility during 2004, through and including 2008.

Although CWM provided a breakdown of projected future construction costs for the proposed RMU-2 landfill, CWM notes that it did not identify any “goods” or “services” purchased from 2004 through 2008 on CWM-69. According to CWM, no documents exist that are responsive to document demand No. 18 as originally written. (*See* CWM motion at 8.)

To the extent that Ms. Witryol revised document demand No. 18 during the September 14, 2021, discovery conference to request information about the bases for the projected construction costs, and whether goods and services would be provided by firms located in Niagara County, CWM seeks a protective order. According to CWM, the disclosure of that level of confidential commercial information would place CWM at a commercial disadvantage. To support this argument, CWM cites 6 NYCRR 624.7(d)(1), which authorizes a protective order to prevent disadvantage (*see also* 6 NYCRR 616.7[c][2][i][b] [defining the term, *confidential commercial information*, to include “expense ... information ... that is not published or divulged and which if disclosed would likely cause substantial injury to the competitive position of the subject enterprise”). (*See* CWM motion at 8-9.)

Referring to Paragraph 9 of her affidavit, Ms. Witryol states that document demand No. 18, as originally drafted, sought information related to the locations of goods or services purchased by CWM from 2004 to 2008 for the categories identified in CWM-69. However, based on the discussion held during the September 14, 2021, conference, Ms. Witryol explains further that she now seeks information that serves as the bases for the projections presented on CWM-69, and is responsive to the question of whether goods and services would be provided by firms located in Niagara County. In contrast to CWM’s argument that the breakdown of its costs cannot include the location of specific vendors because the goods and services included in the projections have not yet been purchased, Ms. Witryol contends that if CWM has sufficient information to support the projections reported on CWM-69, then CWM possesses some documentation regardless of where CWM would purchase the goods and services from. (*See* Witryol response at 11-12.)

With respect to CWM’s claim to confidentiality, Ms. Witryol argues the following. First, CWM does not explain how 6 NYCRR part 616 relates to the protective order sought pursuant to 6 NYCRR 624.7(d)(1). Second, CWM does not address all the factors outlined at 6 NYCRR 616.7(c)(2)(ii-vii) in order to obtain a determination to grant or continue an exemption from disclosure. Finally, Ms. Witryol reiterates her assertion that disclosure of the requested information should not be denied due to confidentiality concerns because I have the authority to issue a confidentiality order to prevent the disadvantage claimed by CWM that may result from the disclosure. (*See* Witryol response at 12-15.)

Discussion and ruling: As revised during the September 14, 2021, conference, the current version of document demand No. 18 requests information that serves as the bases for the projected construction costs of the proposed RMU-2 landfill (*see* CWM-69), and is responsive to the question of whether goods and services associated with these construction costs would be provided by firms located in Niagara County. According to its motion papers (at 8-9), CWM

provided documents on September 30, 2021, responsive to the revised document demand. With the disclosure, CWM explains that a more refined breakdown does not include the locations of specific vendors because the goods and services associated with the projections have not yet been purchased. However, CWM explains further that it cannot provide projected costs for each line item identified on CWM-69 because doing so would put CWM at a commercial disadvantage when negotiating with vendors for the purchase of those goods or services (*see* CWM motion at 9).

From its motion papers, it is not clear whether CWM has provided all documents in its possession, custody, or control responsive to document demand No. 18, or whether CWM may possess responsive documents, in addition to those already disclosed, that CWM asserts are exempt from disclosure.

Therefore, I reserve on CWM's request for a protective order with respect to revised document demand No. 18 until I have the following information. CWM shall advise whether it possesses documents, aside from those already produced on September 30, 2021, that are responsive to revised document demand No. 18. If so, CWM shall advise whether it claims that these documents are protected from disclosure as confidential commercial information, as that term is defined at 6 NYCRR 616.7(c)(2)(i)(a). Subsequently, CWM shall provide me with a hard copy of the documents for an *in camera* review. To the extent that CWM claims that the documents should be considered confidential commercial information, CWM shall provide an explanation addressing the applicable factors at 6 NYCRR 616.7(c)(2)(ii-vii). CWM's explanation should include any additional privileges that may also apply to all or some of these documents that would preclude their disclosure (*see e.g.* CPLR 3101[b-d]). In the meantime, I also reserve on Ms. Witryol's request for a confidentiality order with respect to the information sought by document demand No. 18.

I request that CWM provide any applicable documents, as described above, for an *in camera* review, and the explanation of all claims that may preclude the disclosure of the documents before December 17, 2021. After reviewing the documents and CWM's explanation, I will determine whether to issue the requested protective order with respect to revised document demand No. 18. If necessary, the forthcoming ruling will also address Ms. Witryol's request for a confidentiality order.

3. Document Demand No. 19

CWM requests a protective order with respect to Ms. Witryol's document demand No. 19. CWM argues that the document demand seeks voluminous, publicly available documents (*see* CWM's motion at 9). Document demand No. 19 states, in full:

- Any and all documents concerning the selection of the Consumer Price Index as the basis for inflation or Aggregate Escalation Figures in the MRB Report for:
- a. Gross Receipts Tax; and
 - b. Operating Expenditures.

CWM notes that Mr. N’dolo did not rely on the consumer price index as the basis for the aggregate escalation factor used in the MRB Report (*see* MRB Report at 8, 13, and 16). CWM states that it does not have any documents in its possession, custody, or control responsive to the “erroneous portion” of document demand No. 19 (CWM motion at 9).

CWM offers two bases for its request for a protective order with respect to that portion of document demand No. 19 that seeks “any and all documents concerning the selection of the Consumer Price Index as the basis for inflation” in the MRB Report (CWM motion at 10). First, CWM observes that the consumer price index and information about the index are accessible from publicly available sources including, the US Bureau of Labor Statistics and the US Bureau of Economic Analysis. Second, the request is unduly burdensome because it seeks production of voluminous publicly available documents. To support the second basis, CWM cites *Abony v TLC Caser Eye Ctr. Inc.*, 44 A.D.3d 553, and *Penn Palace Operating v Two Penn Plaza Assoc.*, 215 A.D.2d 231. (*See* CWM’s motion at 10.)

Ms. Witryol objects to CWM’s request for a protective order with respect to document demand No. 19. In the response, Ms. Witryol argues that CWM has misinterpreted the request, and offers several alternative interpretations. First, Ms. Witryol contends that document demand No. 19 seeks:

‘Any and all documents concerning the selection of . . .Aggregate Escalation Figures in the MRB Report . . .’ Stated another way, RFP No. 19 seeks the documents that CWM has to support its Consumer Price Index and/or Aggregate Escalation Figures in the MRB Report for Gross Receipts Tax and Operating Expenditures. (Witryol response at 16.)

As a third interpretation, Ms. Witryol references an email dated June 25, 2021, to CWM counsel in which she states:

Do you have any documents evidencing whether reliance on CPI is inappropriate to apply to the 2004-2008 Bonadio Report average Wages & Benefits from 2008-2020? and for the purported RMU-2 forecasted operational period of c.2021-2050?

Do you have any documents evidencing whether reliance on CPI is inappropriate to apply to the 2006 Bonadio mid-point for Gross Receipts taxes through 2020? and for the purported RMU-2 forecasted operational period of c.2021-2050? (Witryol response at 16.)

Finally, Ms. Witryol states that document demand No. 19 does not seek all available knowledge about the use of the consumer price index as a measure of inflation. Rather, Ms. Witryol asserts that document demand No. 19 requests the documents related to the selection of the consumer price index or aggregate escalation factors for CWM’s forecasts in the MRB Report. According to Ms. Witryol, CWM misinterprets document demand No. 19 as a request for all documents concerning the validity of the consumer price index, rather than its applicability to the MRB Report’s growth estimates over 45 years. (*See* Witryol response at 17.)

Ruling and discussion: I grant CWM’s request for a protective order with respect to document demand No. 19. The clarity of any document demand rests with the party making the request. Here, the information sought is not clearly identified. In her response, Ms. Witryol offers several different interpretations of document demand No. 19, which demonstrates its ambiguity. The presentation in the response does nothing to resolve the ambiguity.

4. Document Demand No. 23

With respect to document demand No. 23, CWM seeks a protective order because it seeks documents unrelated to historic employment levels at the Model City facility (*see* CWM’s motion at 11). Document demand No. 23 states in full:

Any and all documents concerning communications between CWM and the New York Power Authority during 2003 through 2016, including but not limited to CWM applications for subsidies, credits or rebates of any kind, concerning the Facility.

During the September 14, 2021, discovery conference, CWM’s counsel explained that the pre-filed direct testimony of Mr. Rizzo, as well as Messrs. Berlow and N’dolo, and the associated exhibits do not refer to the New York Power Authority (NYPA) or any related subsidies, credits, or rebates. CWM states, however, that it will produce communications between CWM and NYPA relating to the historical number of persons employed at the Model City facility. In addition, CWM observes that NYPA’s “Power for Jobs” program expired in 2012,² and concludes that communications after June 2012 are not relevant to the future economic and fiscal benefits of the proposed RMU-2 landfill. Therefore, CWM objects to producing communications between CWM and NYPA that are unrelated to the historical number of persons employed at the Model City facility. Except as qualified above, CWM moves for a protective order because any other communications sought by document demand No. 23 are not relevant to CWM’s pre-filed testimony concerning the public interest issue, or any other adjudicable issue. (*See* CWM’s motion at 11-12, *see also Arch Ins. Co. v Delric Constr. Co., Inc.* 174 A.D.3d 560, 561.)

Ms. Witryol objects to CWM limiting the response to information concerning employment figures. According to Ms. Witryol, documents concerning subsidies, credits, or rebates, as outlined in the document demand No. 23, are relevant to the captioned matters because they may relate to “costs to the state,” as discussed in the Siting Plan. Ms. Witryol contends that CWM’s assertion that NYPA subsidies are not significant is without merit, and cannot serve as the basis for the requested protective order. (*See* Witryol response at 17.)

Referring to her affidavit (¶¶ 7 and 8, *see also* Exhibits 6 and 7), Ms. Witryol states that NYPA has publicized information about rebates and subsidies, hourly vs. salaried payroll, and

² *See* New York State Office of the Comptroller, *Selected Management and Operations Practices – New York Power Authority*, dated August 2016, at 15 (“The [Power for Jobs] and ECSB programs expired on June 30, 2012.”) <https://www.osc.state.ny.us/files/audits/2018-01/sga-2016-15s20.pdf>.

the segregation of dollar wages from dollar benefits. Ms. Witryol seeks the disclosure of the information outlined in document demand No. 23. (*See* Witryol response at 18.)

Ruling and discussion: I grant CWM’s request for a protective order with respect to document demand No. 23. Other than providing information related to the historical number of persons employed at the Model City facility, document demand No. 23 seeks irrelevant information. Ms. Witryol has not provided a nexus between CWM applications to NYPA for subsidies, credits or rebates, and the “costs to the state.” Accordingly, the demand is overly broad.

/s/

Daniel P. O’Connell
Administrative Law Judge

Dated: Albany, New York
November 10, 2021

To: Service List revised July 2, 2021