

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]).

August 18, 2021

**Supplemental Discovery
Ruling Granting Department Staff'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. Wityrol served her first notice to produce dated June 8, 2021, upon Department staff. With respect to the first demand, Ms. Wityrol generally seeks updated information from the New York Hazardous Waste Facility Siting Plan, adopted in October 2010 as presented in Table 3-2 (for 2019), Table 5-2 (for 2008), Appendix A1 (for 2015, 2016, 2017, 2018, and 2019), Appendix C 2008 (as specified in the June 8, 2021, demand), and Table 3-6 (as specified in the June 8, 2021, demand).

With respect to the second demand, Ms. Witryol seeks copies of the Facility's monthly on-site monitoring reports from 1994 to 2021, inclusive. With the third demand, Ms. Wityrol seeks documents related to any permit modifications for the Facility from 1994 to 2021, inclusive. With the fourth demand, Ms. Wityrol seeks hazardous waste annual reports for the Facility from 2000 to 2020, inclusive.

After a discussion held during the first discovery conference on July 2, 2021, I limited the date range associated with the second and third demands from 2004 to the present (*see* First Order dated July 2, 2021, at 2).

In the first order (July 2, 2021, at 2), I directed the parties to provide a status report by July 15, 2021. With an email from Ms. Mucha dated July 15, 2021, Department staff provided its status report with respect to Ms. Witryol's June 8, 2021, document requests. With an email dated July 15, 2021, Ms. Witryol provided her status report.

Department Staff's Motion for Protective Order

Subsequently, with an email from Ms. Mucha dated July 20, 2021, staff revised the status report initially provided on July 15, 2021. Staff objected to service of Ms. Witryol's first notice to produce dated June 8, 2021, for the following reasons. Staff noted that the May 25, 2021, order authorizing supplemental discovery limited the scope of discovery to the siting issues identified in the Facility Siting Board's Third Interim Decision. Department staff noted further that staff neither submitted any pre-filed direct testimony, nor proffered any staff members to testify about these siting issues. According to staff, Ms. Witryol explained that the documents sought from the Department are needed to assist in the cross-examination of CWM's public interest panel.

In addition, staff reiterated that Ms. Witryol may obtain the information pertaining to document demand Nos. 1 and 4 from the Department's and EPA's respective websites. Staff stated further that documents responsive to document demand Nos. 2, 3 and 4 may be requested from CWM, and argued that CWM would be the more appropriate entity to respond because CWM has proffered witnesses related to the public interest issues.

During the July 22, 2021, conference, staff confirmed that it seeks a protective order from Ms. Witryol's June 8, 2021, document demands. Ms. Wityrol requested the opportunity to respond in writing to staff's motion for a protective order. I granted this request, and set Wednesday, July 28, 2021, as the due date for Ms. Witryol's response. I authorized staff to file a reply, which was due by Wednesday, August 4, 2021.

With an email dated July 28, 2021, Ms. Witryol timely filed her response. In addition, Ms. Witryol requested the opportunity to respond to Department staff's August 4, 2021, reply. I denied this request in an email dated August 2, 2021 (*see* 6 NYCRR 624.6[c][3]).

Attached to an email from Ms. Mucha dated August 4, 2021, Department staff filed its response. With a cover letter dated August 4, 2021, staff provided a reply brief with two

Exhibits. Exhibit A is an affidavit by Henry Wilkie, sworn to August 3, 2021, with Exhibits 1 through 4.¹ Exhibit B is an affidavit by Antoinette D. Norfleet, sworn to August 2, 2021, with Exhibit 1.²

Discussion and Ruling

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.

With respect to her first demand, Ms. Witryol seeks updated information of the data presented in the New York Hazardous Waste Facility Siting Plan, adopted in October 2010. According to Ms. Witryol, the purpose of the request is to determine how the Department has managed hazardous waste since the closure of RMU-1. With respect to potential economic impacts, Ms. Witryol notes that CWM's public interest panel references hazardous waste from 2004-2008. With respect to potential impacts to climate and transportation, Ms. Witryol notes that CWM's public interest panel references hazardous waste for 2007 and 2012.

According to Ms. Witryol, the responsive information that is publicly available is "often inaccurate or not practicable." Ms. Witryol states that the manifest system does not house "Primary vs. Remedial waste data," which are found in annual reports stored on the formax system. Because staff is a party to the proceeding and has access to the requested information, Ms. Witryol argues that staff should be required to provide information in discovery if it is relevant to the pre-filed direct testimony.

Department staff argues the following. First, staff notes that the discovery at this part of the proceeding is limited to the witnesses' pre-filed direct testimony, exhibits and related backup documentation concerning the public interest issues. Because staff did not submit any pre-filed direct testimony about the public interest issues, staff argues that it is not appropriate for the Department to be served with discovery demands related to those issues.

Second, staff argues that Ms. Witryol's discovery demands are overly broad and unduly burdensome. According to Department staff, responding to the demands would result in the expenditure of significant time and resources and that the information is available from more appropriate sources. Staff argues further that the recipient of discovery demands is not required

¹ Exhibit 1 is a copy of Table 3-2, which is entitled *Hazardous Waste Managed On-Site in New York in 2008* (see Wilkie Aff. ¶ 7). Exhibit 2 is a copy of Table 5-2, which is entitled *Management Methods of Commercial TSO Facilities in 2008 by Department Region* (see Wilkie Aff. ¶ 8). Exhibit 3 is a copy of Table 3-6, which was created by reviewing the number of cleanup actions performed during the years 2001-2008, and breaks those out by those sites from which over 1,000 tons of remedial hazardous waste were shipped and those that shipped less than 1,000 tons of remedial hazardous waste off-site (see Wilkie Aff. ¶ 11). Exhibit 4 is a copy of the instruction sheet that staff provided to members of the public who requested hazardous waste manifest data with respect to a different facility (see Wilkie Aff. ¶ 22).

² Exhibit 1 to Ms. Norfleet's affidavit is a copy of a letter dated February 24, 2021, from Jill A. Banaszak, CWM, to Ms. Norfleet (see Norfleet Aff. ¶ 13).

to generate reports but only required to provide documents currently in possession. To support these arguments, Department staff refers to Exhibits A and B, which are the affidavits prepared by Henry Wilkie and Antoinette D. Norfleet, respectively.

According to Mr. Wilkie, the information sought in the document demands may be obtained from the Department's and EPA's website. In addition, document demand No. 1 would require staff to re-create tables and appendices developed for the New York State Hazardous Waste Facility Siting Plan, adopted in October 2010. The tables and appendices have not been updated subsequently, and are not part of the annual review of the Siting Plan. (*See Wilkie Aff.* ¶¶ 12, 13.) Mr. Wilkie also states that the preparation of the statewide analysis of the information presented in the 2015 annual hazardous waste reports was a one-time project. According to Mr. Wilkie, staff is not required by statute or regulation to annually prepare a statewide analysis of hazardous waste reports filed for every year since 2015, and has not done so. (*See Wilkie Aff.* ¶¶ 27, 29.)

Ms. Norfleet explains that the Department does not possess CWM's hazardous waste reports from 2000 to 2020. According to Ms. Norfleet, the Department sent all annual reports received prior to January 1, 2021, to a third-party vendor, who performed the data entry onto the publicly available database. Although hard copies of these reports from the requested period no longer exist, the information and data initially reported are available electronically at <http://my.formax.us>. Since January 1, 2021, generators will file their annual reports electronically with EPA for entry into EPA's publicly available website. Although staff could generate a report through the Department's internal non-public database, the process would take significant time and resources to do so. (*See Norfleet Aff.* ¶¶ 6, 7, 8, 9, 11; *see also Wilkie Aff.* ¶¶ 17, 19, 20, 23.)

The affidavits provided by Mr. Wilkie and Ms. Norfleet demonstrate that the information sought by Ms. Witryol in her demands dated June 8, 2021, either is no longer in the Department's possession, or does not exist in the form or manner requested. Department staff correctly notes that the recipient of discovery demands is not required to generate reports but only required to provide documents currently in its possession. Therefore, I grant Department staff's motion for a protective order.

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

Dated: Albany, New York
August 18, 2021

To: Service List revised July 2, 2021