

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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

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NEW YORK STATE FACILITY SITING BOARD

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In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity pursuant to 6 NYCRR Part 377 (Siting of Industrial Hazardous Waste Facilities) by

CWM Chemical Services, LLC,

Applicant (RE: Residuals Management Unit - Two [RMU-2]).

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RULING ON MOTION FOR RECONSIDERATION

OF

THE FACILITY SITING BOARD

On April 27, 2021, the Facility Siting Board issued a Fourth Interim Decision addressing the appeal of Amy Witryol from Administrative Law Judge (ALJ) Daniel P. O’Connell’s Rulings on Motions to Strike Prefiled Direct Testimony (Rulings on Motions to Strike). In the Fourth Interim Decision, the Facility Siting Board struck portions of the testimony of James Berlow related to capacity assurance but otherwise affirmed the ALJ’s Rulings on Motions to Strike. In particular, the Siting Board considered and rejected Ms. Witryol’s argument that the Siting Board and ALJ erred in not expanding the tourism issue previously joined by the Siting Board. The Siting Board affirmed the ALJ’s ruling striking testimony of Ms. Wityrol’s witnesses that was outside the scope of the issues joined.

On May 5, 2021, Ms. Witryol filed a motion for reconsideration and supporting papers. CWM Chemical Services, LLC filed papers in opposition to the motion and Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities) filed papers in support of the motion. *See* Appendix A attached hereto.

The Facility Siting Board reviews Ms. Witryol’s motion for reconsideration as a motion to reargue pursuant to CPLR 2221(d). In the motion, Ms. Witryol reiterates the arguments made on appeal from the ALJ’s Rulings on Motions to Strike — Ms. Witryol argues that the ALJ’s Supplemental Rulings on Proposed Issues for Adjudication (Supplemental Issues Rulings) and Rulings on Motions to Strike, as well as the Siting Board’s Third and now Fourth Interim Decisions, are based on the ALJ’s error in ruling the Niagara Falls Prospect Survey was untimely for expanding the tourism issue previously joined by the Siting Board. The ALJ and Siting Board concluded in the Supplemental Issues Rulings and Third Interim Decision, respectively, that the issues previously joined would not be expanded. The Siting Board also notes that rather than moving for reconsideration of the Siting Board’s Third Interim Decision in September 2019,

Ms. Witryol ignored the ALJ's Supplemental Issues Ruling and the Facility Siting Board's Third Interim Decision and proffered pre-filed direct testimony that included testimony beyond the scope of the issues joined by the ALJ and Facility Siting Board, namely the expanded tourism issue she was previously denied.

Ms. Witryol does not cite any controlling law in support of her current motion, but continues to argue that the ALJ and Siting Board erred in their conclusions that the Niagara Falls Prospect Survey could be used in support of the issues previously joined, but it could not be used to expand those issues. A "motion for reargument is not a vehicle for raising new facts or legal issues not raised on the prior motion (*see Matter of Grout*, Ruling of the Chief ALJ on Motion for Leave to Reargue, Aug. 14, 2015, at 5 [citing *Simpson v Loehmann*, 21 NY2d 990, 990 (1968)]). Nor is it 'designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted' (*id.* [quoting *Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 (3d Dept 1993)]; *see also Rodriguez v Gutierrez*, 138 AD3d 964 [2d Dept 2016])" (*Matter of Sand Land Corporation*, Ruling of the Chief ALJ on Motion to Renew and Reargue and On Request for Clarification, December 10, 2018, at 5). In other words, reconsideration is not an opportunity to reargue points, as the current motion does, that were already considered and rejected by the Facility Siting Board (*see e.g. Matter of Pete Drown, Inc.*, Second Interim Decision of the Commissioner, April 18, 1994, at 1-2). Rather, a motion for reargument will only be granted upon a showing that matters of fact or law were overlooked or misapprehended by the Siting Board in determining the prior ruling, a showing that Ms. Witryol has not made on this motion (*see CPLR 2221[d]; Matter of Pete Drown, Inc.*, at 1-2).

Based on the papers submitted on the current motion and the prior rulings and interim decisions in this matter, the motion for reconsideration is denied with prejudice.

Facility Siting Board

/s/ Timothy P. Walsh, Designee-Chair for BASIL SEGOS, Commissioner NYS Department of Environmental Conservation	May 27, 2021 DATE
/s/ SARA KOCH, Designee for DR. HOWARD A. ZUCKER, Commissioner NYS Department of Health	June 1, 2021 DATE
/s/ FRANK CIRILLO, Designee for MARIE THERESE DOMINGUEZ, Commissioner NYS Department of Transportation	May 27, 2021 DATE
/s/ LYNN MARINELLI, Designee for ERIC J. GERTLER, Acting Commissioner NYS Department of Economic Development and President & CEO-designate of Empire State Development	June 3, 2021 DATE
/s/ CHRISTOPHER BAUER, Designee for ROSSANA ROSADO, Secretary of State NYS Department of State	May 27, 2021 DATE
/s/ JOHN F. BENOIT, Member	May 29, 2021 DATE
/s/ LEE SIMONSON, Member	May 27, 2021 DATE
/s/ A. SCOTT WEBER, Member	May 27, 2021 DATE

*Appendix A*

*In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity  
pursuant to 6 NYCRR Part 377 (Siting of Industrial Hazardous Waste Facilities) by  
CWM Chemical Services, LLC*

Motion for Reconsideration

1. Motion for reconsideration from Amy Witryol, dated May 5, 2021, attaching Appendix A and B:

Appendix A – Excerpts of Tourism content in 2018 Supplement and Amendment to Pro Se Petition

Appendix B – Summary of Record on Tourism (Witryol)

2. Letter in opposition to the motion for reconsideration from Robert J. Alessi, Esq., dated May 10, 2021
3. Letter in support of the motion for reconsideration from Gary A. Abraham, Esq., dated May 11, 2021