

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 361 (Siting of Industrial Hazardous Waste Facilities) by

CWM Chemical Services, LLC,  
Applicant (RE: Residuals Management Unit - Two [RMU-2]).

March 18, 2022

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**Tenth Order regarding Supplemental Discovery**

As scheduled, a discovery conference convened at 10:00 a.m. on Wednesday, March 16, 2022. Representatives for CWM, Department staff, RRG, Ms. Wityrol, and the municipalities participated. The purpose of the conference was to review the progress of outstanding document demands. The parties discussed the hearing schedule related to Ms. Wityrol's public interest panel and to the witnesses proffered for the geology and hydrogeology issues.

I.     RRG

Consistent with the schedule provided in the ninth order (March 1, 2022, at 1), RRG's counsel responded to CWM's document demands concerning the pre-filed direct testimony of Mr. Acks. CWM is reviewing the responses.

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

To prepare for the April 11, 2022 hearing, I scheduled a practice session at 1:30 p.m. on April 6, 2022. In a separate email, the parties' representatives will receive an invitation to be a panelist for the April 6, 2022 practice session. When you receive the invitation, please complete the registration for the practice session by confirming your email address.

For the April 11, 2022, hearing, I explained that members of the public will have the opportunity to watch the proceedings via computer, or listen to the proceedings via telephone. I will provide the parties with the log in information. In addition, a notice about the April 11, 2022, hearing will be published in the Department's *Environmental Notice Bulletin*. I will provide the parties will additional information.

I request that Mr. Kuhn reserve a stenographer for the hearings scheduled for April 11 and 12, 2022. Please provide me with the contact information including an email address for the stenographer when it becomes available.

Please see Section V, below for the order of events at the April 11, 2022, hearing.

III. Geology and Hydrogeology

After discussing the availability of the parties' representatives and the witnesses, I asked the parties to reserve May 16, 17, and 18, 2022, to introduce the prefiled direct testimony of Patrick T. Martin and Alistair Macdonald, Andrew Michalski, as well as James A. Sacco and Steven M. Moeller, and associated exhibits into the hearing record, and to provide the opportunity for the other parties to cross-examine these witnesses.

Ms. Witryol advised that she has an upcoming meeting with her consultant about reviewing the pre-filed direct testimony, exhibits, as well as the backup information and data associated with these witnesses. After conferring with her consultant, Ms. Witryol said that she will advise how much time she will need to prepare for the cross-examination of these witnesses. As noted in her email dated March 9, 2022, Ms. Wityrol said that she does not know when she would be ready because her consultant has not yet reviewed the materials.

IV. Technical Conferences

The parties have exchanged some the contact information for their respective expert witnesses so that they can schedule technical conferences. I encourage the parties to have their respective consultants participate in technical conferences to facilitate the discovery process.

During the conference, I mentioned the following administrative case: *Matter of Consolidated Edison Company of New York, Inc. (East River)*, Commissioner's Interim

Decision, dated June 4, 2001.<sup>1</sup> In this matter, the Commissioner determined (at 6-7) that applicant cannot propose adjudication of an issue that it seeks to exclude from adjudication in an appeal pending before the Commissioner, while preserving a right to reverse course and strike testimony and portions of the record relevant to that issue as if it never existed should the Commissioner rule in applicant's favor.

In the Third Interim Decision, dated September 10, 2019 (at 8-9), the Siting Board addressed 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). The Siting Board directed 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). However, an appeal about this proposed issue is pending before the Deputy Commissioner.<sup>2</sup>

Given the appeals pending before the Deputy Commissioner, I wanted to alert the parties to the Commissioner's determination in the *Consolidated Edison* matter before the parties agree to begin discovery about the issue related to meteorological data.

## V. Opening Statements and Order of Events

### 1. Opening Statements

Ms. Wityrol inquired about the opportunity to present an opening statement. During the conference, Ms. Wityrol stated that she would be prepared to present her opening statement orally on April 11, 2022. Some parties would also like to make opening statements and other do not.

Opening statements are authorized pursuant to 6 NYCRR 624.8(a)(3). Opening statements are considered unsworn argument, and not evidence. I note that all proposed issues have been discussed at the issues conference sessions, and have been the subject of rulings dated December 22, 2015 and February 14, 2019. After appeals duly taken from these rulings, the Siting Board subsequently issued four interim decisions and, to date, the Deputy Commissioner issued one interim decision. The interim decisions have identified the issues for adjudication, framed them and, in some cases, given direction about what information is expected from the parties about the identified issues. The purpose and scope of the hearing is well defined.

Nevertheless, Ms. Wityrol may make on opening statement on April 11, 2022. It will be made orally, on the record, and limited to five minutes.

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<sup>1</sup> The link on the Department's website is: <https://www.dec.ny.gov/hearings/11112.html>. A PDF copy will be circulated via email with this Order.

<sup>2</sup> 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.)

Each party will have the opportunity to make one opening statement at the beginning of future hearing sessions. When subsequent hearing sessions are scheduled, the remaining parties who wish to make an opening statement shall advise when they will make their opening statement. Those opening statements will be made orally, on the record, and limited to five minutes. In lieu of making an oral opening statement, a party may file one written opening statement.

## 2. Order of Events

The pre-filed direct testimony and the associated exhibits have been circulated in advance of the hearing. Each witness shall have a hard copy of the witness's pre-filed direct testimony and associated exhibits with the witness. If witnesses are testifying as a panel, the witnesses may have a copy of the pre-filed direct testimony and exhibits being offered by the other witnesses participating in the panel. Except as described above, the witness shall not access any other information during the examination. Members of a witness panel may confer before answering a question.

After the opportunity to make an opening statement is provided, each witness will be sworn in. The representative for each party shall ask each witness:

1. Please state your name and occupation for the record.
2. Do you have a copy of your pre-filed direct testimony dated \_\_\_\_\_, in front of you?
3. Did you prepare this pre-filed direct testimony or directly supervise its preparation?
4. Do you have any corrections or changes to make to this document?

[If a witness needs to make corrections or changes to the pre-filed testimony, the witness should make the corrections by hand on the hard copy, identifying for the record the changes that are being made to the document. The ALJ will also make corrections, based on the description provided by the witness, and provide a corrected copy to the stenographer to include in the transcript of the hearing.]

5. Do you have any changes to make to the exhibits offered with your pre-filed direct testimony?

[In the manner described for correcting the pre-filed direct testimony, the process will be repeated for each exhibit, as necessary.]

6. If I were to ask you each question, would your responses be the same as the written responses provided in the pre-filed direct testimony, as corrected?

The party's representative will move to have the pre-filed direct testimony of     name of witness     admitted into the hearing record.

The ALJ will admit the pre-filed direct testimony, and provide instructions to the stenographer. When a panel of witnesses is offered, the process will be repeated for each witness.

Whereupon, the party's representative will state that the witness or witness panel is available for cross-examination.

The ALJ will inquire which other parties have questions for cross-examination. The ALJ will set the order, and provide the other parties with the opportunity to cross-examine the witness or witness panel.

During cross-examination, the questioner should first identify the page and line of the pre-filed direct testimony and, when appropriate, the exhibit, with the necessary reference, before posing the question. The questions asked during cross-examination are limited to the topics presented in the witness's prefiled testimony and exhibits. Repetitive questioning should be avoided. If one party's representative has asked a witness a particular question, there is no need for another party to ask the same question.

Cross-examination is not an opportunity for a party with interests that may be similar to the interests of another party whose witness is testifying to ask questions that allow the witness or witness panel to bolster the testimony. This practice is known as "friendly" cross-examination, and is not permitted.

After the cross-examination of each witness or the witness panel is complete, the ALJ and members of the Siting Board may have questions.

Subsequently, the representative for the sponsoring party will have the opportunity to ask additional questions referred to as re-direct examination. Re-direct examination provides an opportunity for the party sponsoring the witness or witness panel to ask follow-up questions about the responses provided during the cross-examination of the witness or witness panel. The scope of the re-direct is limited to the topics queried during the cross-examination.

After re-direct, the other parties will have the opportunity to ask questions about the topics discussed during the re-direct examination. This is referred to as the re-cross.

When the parties have completed the examination of the witness or witness panel, the party's representative should move to have the exhibits associated with testimony received into the evidentiary record. The ALJ will consider any objections or comments that the parties have about the admission of the exhibits, and provide a ruling about which exhibits will be received into the evidentiary record, and which will not be received.

VI. Next Conferences

The next conference will be the practice session scheduled for 1:30 p.m. on Wednesday, April 6, 2022. In a separate email, the parties will receive the Webex invitation for the practice session.

Because the parties have reserved two days (April 11 and 12, 2022) for the examination of Ms. Witryol's public interest panel, the parties will be receiving two invitations. One will be for the session scheduled for April 11, 2022, and the second will be for session scheduled for April 12, 2022. If the parties complete the examination of the witnesses in one day, the April 12, 2022 session will be cancelled.

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

Dated: Albany, New York  
March 18, 2022

To: Service List revised March 8, 2022