

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]).

February 24, 2023

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**Ruling Denying CWM's Request for Leave to Present Rebuttal Testimony**

During the hearing session held on December 19 and 20, 2022, the parties completed the examination of Nicolas Rockler, Ph. D., and Kenneth Acks. Through their testimony and associated exhibits, the witnesses offered information about the potential effects that the construction and operation of the proposed RMU-2 landfill could have on property values in the Towns of Lewiston and Porter. In addition, I ruled whether to receive the exhibits offered during the examination of these witnesses into the evidentiary record.

In a memorandum to the parties dated January 5, 2023, I outlined a schedule for CWM to file a request for leave to present rebuttal testimony, and for the parties to respond, should CWM file a request. Consistent with the schedule, Mr. Kuhn filed a letter dated January 17, 2023, and requested, on behalf of his client, CWM, the opportunity to present a rebuttal case. With the January 17, 2023 request, Mr. Kuhn also provided two exhibits. Exhibit A is a copy of the curriculum vitae of Louis L. Wilde, Ph.D., CWM's proffered expert. Exhibit B is a rebuttal

report, *Statistical Analyses Related to Proposed RMU-2 at the Model City Facility* (Wilde Rebuttal Report), dated December 2022.

With an email dated February 3, 2023, I extended the time for the other full parties to respond to CWM's January 17, 2023 request to Friday, February 17, 2023. With the consent of the parties, I further extended the filing date in an email dated February 15, 2023, to Wednesday, February 22, 2023. The following parties filed timely responses.

With an email dated February 22, 2023, Mr. Abraham filed a letter of the same date, on behalf of the municipalities. The municipalities object to the request for leave for two reasons. First, the municipalities assert that the proposed testimony would be redundant of what was thoroughly explored during the cross-examination of Mr. Acks. Second, the municipalities also assert that the proposed rebuttal testimony would not contribute to the record in a manner that warrants an additional hearing session.

By email dated February 22, 2023, Ms. Witryol filed a letter of the same date, and objects to CWM's request for leave to file rebuttal testimony for several reasons.

With an email dated February 22, 2023, Professor Connolly from the Environmental Advocacy Clinic filed a letter of the same date, on behalf of Residents for Responsible Government, Inc., the Lewiston-Porter Central School District, and the Niagara County Farm Bureau (RRG). RRG opposes CWM's request for leave for the reasons stated in the municipalities' February 22, 2023 letter. In addition, RRG argues that a portion of the proposed rebuttal testimony by Dr. Wilde would be redundant of information offered through Mr. Acks' testimony. RRG states that counsel for CWM cross-examined Mr. Acks extensively about the Cost-Benefit Group report (*i.e.*, Acks Exhibit 4) during the December 19 and 20, 2022 hearing session. RRG observes that CWM and the other parties will have the opportunity to present argument about this topic in closing briefs at the conclusion of the hearing.

### Discussion and Ruling

In the January 17, 2023 request, CWM correctly notes that pursuant to 6 NYCRR 624.8 (b)(1), the presiding ALJ has authority to admit or exclude evidence, to maintain order, and to conduct the hearing in an efficient manner, among other things. CWM notes further that the ALJ has discretion during administrative proceedings to control the presentation of evidence, including authorizing or prohibiting rebuttal testimony on any particular issue (*see Matter of Mario v New York State Div. of Human Rights*, 200 AD3d 1591, 1592 [4th Dept 2021], *lv denied* 38 NY3d 909; *see also* Ruling of the Facility Siting Board dated, December 2, 2022, at 2-3).

In its petition for full party status, RRG proposed a substantive and significant issue about the potential adverse impacts on property values in the Towns of Lewiston and Porter, and upon property tax receipts in these communities, from the construction and operation of the proposed RMU-2 landfill and related modifications to the Model City facility. With respect to this issue, RRG has the burden of proof (*see* Ruling of the Facility Siting Board dated, December 2, 2022, at 3-4).

I deny CWM's request for leave to present rebuttal testimony. During the December 2022 hearing session, CWM took full advantage of the opportunity to cross-examine the witness panel as well as the exhibits associated with the panelists' pre-filed direct testimony. I conclude that the hearing record concerning this topic is fully developed, and that additional evidence is not necessary. As correctly noted by RRG, the parties will have the opportunity, at the conclusion of the hearing, to present argument about this topic in their respective closing briefs.

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

Dated: Albany, New York  
February 24, 2023

To: Service List revised May 27, 2022