

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 377 (Siting of Industrial Hazardous Waste Facilities) by

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

May 12, 2023

**Supplemental Discovery
Ruling Granting Intervenors' Request for Site Access**

By email dated May 1, 2023, to CWM's counsel, Ms. Witryol requested permission for one of her radiation consultants to access the site of the Model City facility. Mr. Kuhn denied this request on behalf of his client, and referenced Civil Practice Law and Rules (CPLR) 3120(1)(ii) and 6 NYCRR 624.7(b)(3), as the bases for the denial.

Subsequently, in a later email also dated May 1, 2023, Ms. Witryol brought the matter to my attention. In an email dated May 2, 2023, the municipalities' counsel, Mr. Abraham, joined in Ms. Witryol's request, and also sought permission to have Marvin Resnikoff, Ph. D., visit the site. If site access is granted, Mr. Abraham said that Dr. Resnikoff would like to use a radiation detector during the site visit.

Mr. Kuhn advised in an email dated May 2, 2023, that CWM would provide a substantive response to the intervenors' requests. In an email dated May 3, 2023, Mr. Kuhn outlined

CWM's objections. Referencing the Twelfth Order, dated June 24, 2022 (at 5), CWM notes that I authorized the parties to serve document demands related to radiological surveys and the soil excavation monitoring and management plan (SEMMP) by July 25, 2022. CWM notes further that I authorized the parties to serve document demands concerning this topic upon Ms. Witryol by October 11, 2022 (*see* Memorandum dated September 6, 2022). The municipalities timely served their document demands upon CWM, who responded with about 30,000 pages on September 16 and 28, 2022.

CWM argues that the intervenors' respective requests dated May 1 and 2, 2023, are untimely, pursuant to 6 NYCRR 624.7(c)(4), because the parties should have requested site access when I authorized service of document demands by July 25, 2022. CWM objects further because Ms. Witryol's May 1, 2023 request does not provide proper notice as required by CLPR 3120(1)(ii). With respect to the municipalities' request, CWM argues that Dr. Resnikoff does not require an inspection or need to survey the site of the Model City facility to prepare his testimony because the municipalities' request for site access followed from Ms. Witryol's.

According to CWM, neither intervenor explained why their respective request for site access was untimely. CWM observes that the municipalities retained Dr. Resnikoff some time prior to when he prepared a report dated March 2009, which the municipalities' included in their petition for full party status. Also, Ms. Witryol identified Paul R. Steinmeyer, RRPT, and J. Stewart Bland, CHP, as her substitute witnesses during the June 15, 2022 pre-hearing conference.¹

CWM observes that Ms. Witryol refers to the Facility Siting Board's April 13, 2023 letter clarifying the issues related to radiological surveys and the SEMMP to address the time constraint imposed by 6 NYCRR 624.7(c)(4). CWM asserts, however, that the Facility Siting Board clarified that pre-hearing inspections and surveys of the site are not necessary. CWM asserts further that Dr. Resnikoff should not be allowed to conduct a radiological survey before the adjudicatory hearing as part of discovery, based on the recently provided clarification by the Facility Siting Board.

In closing, CWM expresses concern that a site visit, at this time, would unnecessarily delay the adjudication of the issues related to the radiological surveys and the SEMMP. CWM anticipates that the parties would be required to pre-file their respective direct testimony by the summer, and that the hearing would reconvene within 30 to 60 days thereafter.

Mr. Abraham responded on behalf of his clients with an email dated May 3, 2023. The municipalities argue that the April 13, 2023 clarification provided by the Facility Siting Board directs the parties to develop a record that would help to determine whether additional radiological surveys are necessary. Mr. Abraham explains that the municipalities requested information about prior subsurface soil borings collected from 2008-2009 at the April 2015 issues conference, and notes that CWM did not preserve the data related to these soil borings and, since the issues conference, has not analyzed any new borings.² The municipalities argue

¹ *See* Twelfth Order, dated June 24, 2022, at 5.

² *See also* Issues Ruling, dated December 22, 2015, at 19.

that this lack of information, which was part of an investigative work plan approved by Department staff, justifies their request for site access now. The municipalities argue further that the hearing schedule has not been finalized.

In an email to the parties dated May 4, 2023, I allowed the parties to file any additional comments or requests concerning this topic by noon on Monday, May 8, 2023.³ On May 8, 2023, I received emails from Ms. Mucha, on behalf of Department staff (11:56 a.m.); Mr. Abraham, on behalf of the municipalities (12:03 p.m.); Mr. Kuhn, on behalf of CWM (12:18 p.m.); and Ms. Witryol (1:01 p.m.). Each email is summarized briefly below.

Department staff acknowledges that site visits may be authorized with leave from the ALJ pursuant to 6 NYCRR 624.7(c)(4).⁴ Staff maintains, however, that any request for access must be relevant to the issues identified for adjudication. In their current forms, staff argues that the intervenors' requests are vague and overly broad. According to staff, visiting areas of the site outside the footprint of the proposed RMU-2 landfill would not be relevant to the proceeding. In addition, staff argues that the municipalities' request should have provided additional details about Dr. Resnikoff's use of the radiation detector during the site visit. Ms. Mucha said that a member of Department staff would like to participate if I authorize the site visit.

Mr. Abraham said that the municipalities' expert, Dr. Resnikoff, is currently out of the country, and will return on May 11, 2023. The municipalities requested until May 18, 2023, to provide additional details.

Mr. Kuhn reiterated CWM's objection to the intervenors' request as untimely. Furthermore, CWM objects to the municipalities' request for an extension of time until May 18, 2023, to provide additional details. CWM argues that the question of whether to grant intervenors' request for a site visit does not require the full disclosure of the details.

According to Ms. Witryol, the disclosure of details related to the site visit is not necessary to determine whether I should grant leave to access the site. Nevertheless, Ms. Witryol does not object to extending the time for the parties to provide more details about their respective requests until after the May 10 and 11, 2023, hearing session. I understand that Ms. Witryol asserts that her presentation at the hearing about this topic would be prejudiced if I prescribe the details of Dr. Resnikoff's activities for the site visit in this ruling.

Discussion and Ruling

The hearing regulations authorize discovery (*see* 6 NYCRR 624.7) and, depending on the stage of the proceeding, set limitations that include the need to obtain permission from the ALJ.

³ Due to their untimely receipt, I did not consider the arguments presented in Ms. Witryol's May 8, 2023 email received at 5:08 p.m., and Mr. Abraham's May 8, 2023 email received at 5:27 p.m.

⁴ *See e.g. Matter of Town of Northumberland v Serman*, 246 AD2d, 729, 732 (3rd Dept 1998), *lv. denied* 92 NY2d 801.

The first set of limitations applicable here are those following the issues conference (*see* 6 NYCRR 624.7[b] and [c]).

Without the ALJ's permission, any party may commence discovery upon another, pursuant to 6 NYCRR 624.7(b), within 10 days after service of the final designation of the issues. The discovery authorized by the conditions outlined at 6 NYCRR 624.7(b) include, among others, document demands, and property inspections with notice as provided by CPLR 3120(1)(ii).⁵

However, with the ALJ's permission, a party may access real property in the custody or control of another to conduct sampling or testing, among other things. In such instance, all parties must have notice of such activities, and must be allowed to observe and take split samples or use other specified verification methods. (*See* 6 NYCRR 624.7[c][4].)

The timeliness of the intervenors' requests dated May 1 and 2, 2023, pursuant to 6 NYCRR 624.7(b), is not relevant now because intervenors have requested permission from me. Rather, the conditions outlined in 6 NYCRR 624.7(c) apply.

Subject to the conditions outlined below, I grant Ms. Witryol's request to have J. Stewart Bland⁶ access the site of the Model City facility, as well as the municipalities' request to have Marvin Resnikoff, Ph.D., access the site. I grant Department staff's request, and a staff member may participate in the site visit. I deny the municipalities' request to extend the time to provide additional details about activities their expert would undertake during the site visit.

Order

- I. Pursuant to 6 NYCRR 624.7(c)(4), I authorize access to the site of the Model City facility, subject to the terms and conditions outlined below. The site visit must occur before Saturday, **June 23, 2023**.
- II. Access shall be coordinated and supervised by the site manager for the Model City facility. To the extent that CWM has retained a radiological expert, that person may attend the site visit with Mr. Bland and Dr. Resnikoff. A member of Department staff may attend the site visit.
- III. By noon on Monday, **May 15, 2023**, Mr. Kuhn must provide Ms. Mucha, Ms. Witryol and Mr. Abraham with the contact information for the facility's site manager.
- IV. By noon on Tuesday, **May 16, 2023**, Mr. Bland, Dr. Resnikoff, and the member of Department staff who will be participating in the site visit must contact the facility's site

⁵ The CPLR reference in 6 NYCRR 624.7(b)(3) is to CPLR 3120(a)(1)(ii) [sic]; however, the correct reference is CPLR 3120(1)(ii).

⁶ Ms. Witryol identified Mr. Bland in her email dated May 1, 2023 (4:49 p.m.).

manager to arrange for a meeting, or set of meetings, to develop the protocol for the site visit (*see* ¶ VI below).

- V. This order does not provide the parties' attorneys and Ms. Witryol⁷ with access to the site. I note that a site visit took place in May 2015. At that time, the parties' representatives had the opportunity to tour the site extensively with the members of the Facility Siting Board, as well as ALJ Caruso and me.
- VI. The facility's site manager and the parties' experts shall confer, and develop a protocol for the site visit, which must be consistent with established operational protocols.⁸ The participants must develop the protocol for the site visit by 3:00 p.m. on **Friday, May 19, 2023**. The parties' representatives must advise me accordingly, on notice to the other parties. If the participants cannot reach an agreement about the protocol by the established deadline, then I will schedule a conference, via Webex, with the participants and the parties' representatives at 11:00 a.m. on either **Monday, May 22, 2023**, or Tuesday, **May 24, 2023**, to finalize the protocol.
- VII. During the site visit, drilling and collecting soil samples are prohibited. Dr. Resnikoff, and the other participants, as identified above (*see* ¶ II above), may bring radiation detectors to the site. The conditions for its use, including the locations where it may be used, must be incorporated into the required protocol. A copy of any and all readings collected from the operation of any radiation detector, or detectors, brought to the site by any participating expert, or experts, must be provided to the parties' representatives within 30 calendar days from the site visit. Do *not* provide the ALJ with a copy of this data.
- VIII. Within 15 calendar days from the date of the site visit, if it occurs, counsel for CWM shall provide me with a report, via email, on notice to the other parties. The report must include the date and time of the site visit, who attended, and the area, or areas, of the site visited.

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

Dated: Albany, New York
May 12, 2023

To: Service List revised May 27, 2022

⁷ I deny Ms. Witryol's May 1, 2023 request to access the site with Mr. Bland.

⁸ If members of Department staff and personnel at the Model City facility currently use a protocol when staff inspects the facility, then such a protocol may serve as a guide for the protocol needed for the upcoming site visit.