

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]).

August 17, 2023

**Supplemental Discovery
Ruling on Staff's Motion for Protective Order**

I. Proceedings

In the Seventeenth Order after Pre-hearing Conference, dated July 13, 2023 (at 2-3), I granted the municipalities' and Ms. Witryol's joint request to serve document demands upon Department staff concerning information related to staff's radiological survey of the Model City facility in 2015, and documents that the US Department of Energy (DOE) provided to the Department about the Model City facility and the Lake Ontario Ordinance Works (LOOW).¹

¹ See Ms. Witryol's July 13, 2023 email, which provided a correction to the Seventeenth Order with respect to document demand No. 2.

The Seventeenth Order directed service of the document demands by 3:00 p.m. on Monday, July 17, 2023. The Seventeenth Order further directed staff to provide a status report by noon on Friday, July 28, 2023. In addition, the Seventeenth Order provided a schedule for filing motions related to the document demands.

With an email from Mr. Abraham dated Sunday, July 16, 2023, the municipalities and Ms. Witryol (intervenors) served Department staff, the other parties, and me with a joint document demand of the same date. The July 16, 2023 document demand included instructions, definitions, and two requests for documents. With the first document demand, intervenors requested:

Any and all documents, information and communication of any kind regarding radiation detection conducted by DEC staff on CWM property from and including the year 2015 to the present.

In the second, intervenors requested:

Any and all documents, information and communication of any kind between DEC and the U.S. Department of Energy regarding CWM property from and including 2009 to the present.

As directed, Ms. Mucha provided a timely update via email dated July 28, 2023, and advised that staff would be serving a response to the document demands, as well as a motion for protective order by August 1, 2023. With an email from Ms. Mucha dated July 31, 2023, Department staff provided: (1) a cover letter; (2) a response to the document demands; and (3) a motion for a protective order with one exhibit. All attachments are dated July 31, 2023. Exhibit A to staff's July 31, 2023 motion is a copy of Ms. Witryol's July 13, 2023 email (*see note 1 supra*).

The Seventeenth Order authorized responses from the full parties.² With an email dated August 7, 2023, I clarified that the return date for any response was Wednesday, August 9, 2023. With an email from Mr. Abraham dated August 7, 2023, the municipalities objected to any response that CWM may file, and asserted that a response from CWM would prejudice them. In addition, the municipalities noted that staff's July 31, 2023 response to the July 16, 2023 document demands fails to state whether staff has any responsive documents, and asserted that staff is obliged at minimum to state so.

In my August 7, 2023 email clarifying the return date for responses, I also asked the parties whether the representatives for the intervenors and Department staff conferred about the July 16, 2023 document demands before staff filed the motion. Ms. Witryol said in her August 7, 2023 email that she did not participate in any discussions, and was unaware that staff had any objections. Mr. Abraham said the same in his August 7, 2023 email. In her email dated August 7, 2023, Ms. Mucha said that staff did not confer with the intervenors after providing staff's

² By email dated August 5, 2023, Mr. Kuhn noted that the Seventeenth Order, dated July 13, 2023, at 3, states that the response is due by "Wednesday, August 8, 2023," and requested clarification of whether the return date was Tuesday, August 8, 2023 or Wednesday, August 9, 2023.

status report on July 19, 2023. Staff is of the opinion that the document demands seek information related to areas on the site of the Model City facility that are outside the footprint of the proposed RMU-2 landfill, and that such requests are irrelevant because they exceed the scope of the issue joined for adjudication.

Initially, with an email from Mr. Abraham dated August 9, 2023, Ms. Witryol and the municipalities filed a joint response opposing staff's motion for a protective order. With a second email of the same date, the intervenors filed two exhibits referenced in the joint response. Subsequently, in a cover letter dated August 10, 2023, Mr. Abraham stated that the content of the materials filed with the August 10, 2023 email was the same as the contents filed with the two August 9, 2023 emails. The attachment to the August 10, 2023 email consolidated all the documents initially filed on August 9, 2023, into one PDF document.

Attached to an email from Mr. Afzali dated August 9, 2023, CWM provided a letter from Mr. Kuhn of the same date in support of Department staff's motion for a protective order.

RRG did not respond to staff's motion for a protective order.

II. Staff's Response to the July 16, 2023 Document Demands, and Motion for a Protective Order

In the July 31, 2023 response to the document demands, staff stated the following general objections. First, the definitions of the terms, the instructions, and the document demands seek information that is not relevant, and would not reasonably lead to the discovery of admissible evidence. Second, the requests exceed the scope of discovery authorized by the Civil Practice Law and Rules (CPLR) and 6 NYCRR part 624. Third, the requests are unduly burdensome, overbroad, vague, impose an unreasonable discovery burden, and otherwise cannot be complied with without incurring undue costs. (*See Staff's response at 1-2.*)

Staff asserts that the information sought from DOE is otherwise publicly available, or available to requestors in a more direct and convenient manner. According to staff, Ms. Witryol said that she has been in communication with DOE staff members regarding her open federal Freedom of Information Act (FOIA) requests. (*See Staff's response at 2.*)

Staff expressly objects to the following numbered instructions, which were included with the document demands: 4, 5, 9, 10, 12, and 13. In addition, staff objects to the definitions of the terms *document* and *electronic data* because they are overly broad, include information maintained on databases, and that most of the documents that would be consistent with these definitions are not relevant. (*See Staff's response at 2-3.*)

Department staff objects to document demand No. 1. According to staff, the document demand is overly broad, vague, and unduly burdensome because it seeks information over an approximate 8-year period that is beyond the scope of the permit proceeding. In addition, the term *CWM property* is not defined, and could mean the approximate 710-acre site, which has been in operation since the early 1970s. In contrast, the proposed RMU-2 landfill would occupy

about 43.5 acres of the site. Staff also objects to the term *radiation detection* which is not defined and, therefore, overly broad, vague, and unduly burdensome. (See Staff's response at 4; see also Staff's motion at 6.) Nevertheless, if the scope of document demand No. 1 were limited to the footprint of the proposed RMU-2 landfill, staff states that the Department does not possess responsive documents for the requested period (see Staff's response at 8).

Department staff objects to document demand No. 2. Staff asserts that the document demand is overly broad, vague, and unduly burdensome because it seeks information over an approximate 14-year period that is beyond the scope of the permit proceeding. As noted above, the term *CWM property* is not defined, and could mean the approximate 710-acre site of the Model City facility. In addition, the proposed RMU-2 landfill would occupy about 43.5 acres of the site. Staff also objects because the document demand seeks irrelevant information. According to staff, the intervenors did not provide a nexus between the requested documents and the radiological surveys and SEMMP issue identified for adjudication. Staff said that complying with the document demand would cause unreasonable annoyance, and expense, among other things. (See Staff's response at 5; see also Staff's motion at 6.)

In the motion, staff reiterates the foregoing objections, and requests a protective order from the July 16, 2023 document demands. Staff references Chair Walsh's April 13, 2023 letter, which clarified the scope of the hearing related to the issue concerning radiological surveys and the SEMMP. Chair Walsh states that the Facility Siting Board is only:

concerned with the excavation of potentially contaminated soils associated with the proposed construction of RMU-2 and related facilities and ensuring that any excavation of soil disturbance is performed in a manner that does not endanger residential areas or contiguous properties.

Staff also references my Memorandum and Order, dated May 25, 2023, concerning the intervenors' request for site access and the scope of the survey area. According to staff, the scope of the survey area during the site visit was limited to the footprint of the proposed RMU-2 landfill. (See Staff's motion at 5-6.)

Staff explains that the Department has collected and retained voluminous records related to the Model City facility since operations began in the early 1970s. Documents exist in various formats such as paper and a variety of electronic formats. These documents are stored at the Department's offices in Albany and Buffalo. According to staff, certain records would also be stored at the State Archives pursuant to the Department's record retention policy. In addition, members of Department staff (current, retired, and deceased) may also have records regarding the facility. Staff argues that without clarification about the requested records, Department staff would be required to expend significant time and resources searching, retrieving, and reviewing these voluminous records to "guess" what documents pertain to the vague historical DOE records sought by intervenors' document demand No. 2. (See Staff's motion at 7.)

To support arguments that the materials sought must be relevant and logically obtained for preparation of a hearing, staff cites *Matter of Exxon Mobil, Ruling 2*, September 23, 2002, at 9 (citing *Allen v. Crowell-Collier Publ, Co.*, 21 NY2d 403, 407 [1968]), and *Matter of Brian F.*

Conlon and BCD Tire Chip Manufacturing, Inc., Ruling on Department Staff's Motion for a Protective Order, December 19, 2016, at 3-5 (motion for a protective order granted in part because discovery requests are overly broad, vague, beyond the scope of the enforcement proceeding, and did not seek relevant evidence or information that would lead to any relevant evidence). (See Staff's motion at 7; see also *Matter of Jaral Properties*, Ruling on Motion for Protective Order, dated December 12, 2007, at 6-7.)

In addition, staff cites *Matter of Saddle Mountain Corp. Inc.*, Ruling, dated March 6, 2002, at 8 (motion for a protective order granted in part for the document demands that were overly broad, rendering compliance an unreasonable annoyance for Department staff who would be prejudiced by searching for irrelevant documents), and Supplemental Discovery Ruling Granting CWM's Motion for a Protective Order, dated November 10, 2021 (at 8), which states that the clarity of a document demand rests with the party making the request. (See Staff's motion at 7.)

With respect to document demand No. 2, Department staff argues that it would be disadvantaged, and otherwise prejudiced, among other things, by responding to the improper discovery requests because it would divert staff's limited time and resources away from preparing pre-filed direct testimony and identifying related exhibits concerning the radiological survey and SEMMP issue, which are due by August 30, 2023. Department staff argues further that the intervenors did not explain why they cannot obtain the requested records from DOE under the FOIA request filed by Ms. Witryol. (See Staff's motion at 7-8.)

III. Intervenors' Joint Response

With an email from Mr. Abraham dated August 10, 2023, intervenors provided a cover letter from Mr. Abraham of the same date and a joint "completed" response to staff's motion for a protective order. The response includes two exhibits. Exhibit A is a copy of a scaled drawing from CWM's application materials (B-3) of the facility layout and proposed RMU-2 location prepared by CWM's consulting engineers. Exhibit B is a document from the US Army Corps of Engineers entitled, *Response to the Top Ten Concerns Expressed by U.S. EPA*, dated August 18, 2010. The intervenors oppose the motion, and seek responses to the document demands.

Contrary to staff's assertion, intervenors contend that the two document demands are not difficult to discern. Rather, the requests seek information about staff's radiation detection activity at the Model City facility in or after 2015, and communications from DOE about the site. According to intervenors, staff's response to the document demands and the motion are inconsistent with the directives outlined in the Facility Siting Board's first Interim Decision (dated August 11, 2016, at 17-18), and the April 13, 2023 clarification concerning the issue related to radiological surveys and the SEMMP. (See Intervenors' response at 2-3.)

With respect to the document demand No. 1, intervenors argue that the spatial scope of the issue identified for adjudication is not limited to the footprint of the proposed RMU-2 landfill. To support this argument, the intervenors cite to CWM's transition plan included with its application materials as well as Exhibit A to their response. In addition to the site of the

proposed RMU-2 landfill, other areas located at the Model City facility will be disturbed to construct related features such as a new Fac Pond 5, among other things. (See Intervenors' response at 4-5, and Exhibit A.)

With respect to document demand No. 2, intervenors assert that the requested DOE documents provided to Department staff are relevant and material because the site of the Model City facility is comprised of a set of Vicinity Properties (VP)³ associated with the Niagara Falls Storage Site. According to intervenors, DOE has authority to reopen the vicinity properties. Consequently, the site of Model City facility is simultaneously subject to the jurisdiction of both federal and State authorities. To support their contentions, intervenors refer to Exhibit B. (See Intervenors' response at 5, and Exhibit B.)

With respect to Ms. Witryol's FOIA request, intervenors state that DOE's communications with the Department are not publicly available, as asserted in staff's motion. Pursuant to 5 USC § 552(b)(5), intervenors contend that FOIA protects from disclosure:

inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]

Based on the foregoing, intervenors assert that DOE cannot release the documents or other information, which may be responsive to Ms. Witryol's FOIA request, because DOE previously provided the same information to the Department. (See Intervenors' response at 6.)

Intervenors distinguish the administrative decisions that Department staff cited to support the motion for a protective order. According to intervenors, *Matter of Exxon Mobil*, *Matter of Brian F. Conlon and BCD Tire Chip Manufacturing Inc.*, and *Matter of Saddle Mountain Corp., Inc.* (*supra*) were administrative enforcement matters held pursuant to 6 NYCRR 622, and not permit matters, like the captioned matters, which are subject to different hearing procedures. With respect to *Matter of Jaral Properties* (*supra*), intervenors state that the administrative hearing there concerned an application for a Wild, Scenic and Recreation Rivers System permit pursuant to ECL Article 15, Title 27. Intervenors argue that the ALJ's ruling in that case supports their position because the ALJ determined that a request to identify expert witnesses was appropriately limited by the scope of the hearing. (See Intervenors' response at 6-9.)

IV. CWM's Response

In a letter from Mr. Kuhn dated August 9, 2023, CWM supports Department staff's motion for a protective order. CWM notes that the basis for granting the discovery in the Seventeenth Order, dated July 13, 2023 (at 2-3) was the limited scope proffered at the July 13, 2023 pre-hearing conference by Ms. Witryol. CWM argues that the July 16, 2023 document demands are extremely broad. The document demands seek information that exceeds the scope

³ Among them, all or portions of VP B, C, D, E, E', F, G, and K (*see* DEIS, Figure 3-13).

of the radiological survey and SEMMP issue, as recently clarified by the Facility Siting Board's April 13, 2023 letter. CWM contends that the scope of the issue is limited to the areas of the site of the Model City facility that would be disturbed during the construction of the proposed RMU-2 landfill and associated modifications. Finally, CWM asserts that document demand No. 2 is also overly broad, and argues that this request should have been served by the July 25, 2022 deadline as directed in the Twelfth Order, dated June 24, 2022 (at 5).

V. Discussion and Rulings

In March 2022, the parties and I began discussing discovery related to this topic (*see* Ninth Order, dated March 1, 2022, at 2-3, and Tenth Order, dated March 18, 2022, at 2). Subsequently, the Twelfth Order dated June 24, 2022 (at 5) authorized service of document demands with respect to this topic, and set July 25, 2022, as the date for service of the first round. Intervenors timely served document demands upon CWM's counsel. Intervenors did not serve any document demands upon Department staff.

By ruling dated May 12, 2023, I granted intervenors' request for a site visit. In a Memorandum and Order dated May 25, 2023 (at 2), the scope of the survey area was identified as follows:

the survey area shall be limited to the description provided in the proposed site visit protocol, as well as the inclusion of boreholes Nos. 43 and 63. The survey area includes the areas on the site of the Model City facility that would be disturbed during the construction of the proposed RMU-2 landfill and associated modifications to the site of the Model City facility, such as the new locations for Fac Pond 5, and the Drum Management building.

Among other things, the July 7, 2023 scheduling order set August 30, 2023 as the due date for the parties to pre-file direct testimony from their respective expert witnesses concerning the issue related to radiological surveys and the SEMMP. For the first time in this proceeding Ms. Witryol stated in an email of the same date, that she wanted to serve discovery demands upon Department staff concerning this topic. Ms. Witryol requested a pre-hearing conference, which convened on July 13, 2023.

During the July 13, 2023 conference, the intervenors advised that their respective experts would not be visiting the site. In addition, Ms. Witryol represented the following during the conference and in a subsequent clarifying email. First, Ms. Witryol had information recently provided from a third party that members of Department staff conducted a radiological survey of the site in 2015. Second, staff from DOE recently advised Ms. Witryol that in 2017, DOE provided documents and other information to Department staff concerning radiological issues at the site of the Model City facility and the LOOW. Because Ms. Witryol recently became aware of these circumstances, and given the apparent limited scope of the activities undertaken by Department staff, as well as the exchange between DOE and the Department, I authorized service of the document demands, which are the subject of staff's motion for a protective order. (*See* Seventeenth Order, dated July 13, 2023, at 2-3.)

Intervenors' arguments concerning the inapplicability of the administrative decisions referenced by Department staff are not persuasive. Part 622 of 6 NYCRR outlines the procedures for administrative enforcement hearings, and Part 624 outlines the procedures for administrative permit hearings. The latter regulations apply here. Both, however, provide for discovery or disclosure, although the authorizing language is not identical (*compare* 6 NYCRR 622.7 [Disclosure] *with* 6 NYCRR 624.7 [Discovery]). The regulations in both parts encourage the broad exchange of information, consistent with the CPLR article 31, and both provide for a motion to compel disclosure as well as a motion for protective order (*see* 6 NYCRR 622.7[c] and 624.7[d]). In both sets of regulations, the administrative law judge has the authority to oversee the discovery process, and the discretion to provide the appropriate relief. With respect to the captioned proceedings, this ruling is another in a series of rulings related to discovery.⁴

A. Document Demand No. 1

The full text of document demand No. 1 is provided above. The scope of this demand far exceeds the spatial and temporal representation made at the July 13, 2023 conference. I find it appropriate to limit it as such. Therefore, the spatial limitation applicable to document demand No. 1 will be to the survey area identified in the Memorandum and Order dated May 25, 2023 (at 2) and as further described in the site visit protocol. This survey area is greater than the footprint of the proposed RMU-2 landfill. Also, the request will be limited further to include only records from the year 2015 when, according to Ms. Witryol's representation, staff surveyed portions of the site of the Model City facility. Accordingly, I grant, in part, and deny, in part, Department staff's motion for protective order with respect to intervenors' document demand No. 1.

As noted above, Department staff states in the motion that:

[i]f a ruling is issued to narrow Document Demand number 1 to the RMU-2 Footprint, the Department does not possess documents responsive for the period provided in that request (Staff's motion at 8).

Based on the foregoing, staff shall clarify whether the response provided in the motion (at 8) is consistent with the applicable spatial limitation described above. If necessary, staff shall revise the response accordingly, and disclose any responsive documents.

⁴ *See* Summary of the May 21, 2021 Conference, and Scheduling Order, dated May 25, 2021; First Order, dated July 2, 2021, at 1; Second Order, dated July 22, 2021 at 1-4; Supplemental Discovery – Ruling Granting Department staff's Motion for Protective Order, dated August 18, 2021; Fourth Order, dated September 15, at 2-4; Supplemental Discovery Ruling Granting CWM's Motion for Protective Order, dated November 10, 2021; Supplemental Discover – Ruling Granting CWM's Motion for Protective Order with respect to Ms. Witryol's Document Demand No. 18, and CWM's objections to Ms. Witryol's Interrogatories, dated March 8, 2022.

B. Document Demand No. 2

The full text of document demand No. 2 is provided above. As discussed further below, I agree with Department staff that the scope of this demand is overly broad, vague, unduly burdensome, and seeks documents beyond the scope of the proceeding. First, the potential scope, as described in Ms. Witryol's July 13, 2023 clarification email, includes documents related to the LOOW. In the 1940s, the LOOW occupied about 7,500 acres of Niagara County, and included the present day site of the Model City facility. The captioned matters concern CWM's Model City facility, which is about 710 acres of the original LOOW.

Moreover, intervenors did not provide sufficient information in their response to staff's motion for me to evaluate their assertions concerning the interplay among: (1) the documents that DOE has periodically provided to the Department about the LOOW, in general, and the site of the Model City facility, in particular; (2) Ms. Witryol's request(s) for documents filed with DOE, pursuant to FOIA; (3) DOE's response(s) to Ms. Witryol's FOIA request(s); and (4) the applicability of 5 USC §522(b) to the documents that DOE has provided to the Department and, apparently, cannot provide to Ms. Witryol.

My first concern is about the nature of DOE's practice to provide the Department with information about the LOOW and the site of the Model City facility, and the nature of those documents provided.⁵ For example, is DOE's practice similar to that by the US Army Corps of Engineers with respect to the Corps' review of CWM's federal TSCA permit application? (*See Municipalities' Motion to Admit Documents (Geology and Hydrogeology)*, dated July 22, 2022, *affirmed* Fifth Interim Decision of the Facility Siting Board, dated August 29, 2022, at 14.)

My second concern is about the document request(s) filed by Ms. Witryol with DOE pursuant to FOIA. Generally, Ms. Witryol would not be required to disclose any FOIA request(s) to the parties and me. However, within the context of this document demand, and intervenors' response to staff's motion, it would be helpful to know when and how many FOIA requests Ms. Witryol filed with DOE, as well as the scope of each request.

Subsequently, it would be helpful to know how DOE responded to each request. If DOE provided documents to Ms. Witryol, what was provided? When DOE denied access to documents, pursuant to 5 USC § 522(b)(5) or otherwise, did DOE provide a brief description of the withheld documents? The descriptions of any documents provided as well as those withheld by DOE would have assisted Department staff search for the documents that DOE may have provided to the Department, but did not disclose pursuant to provisions of FOIA, assuming the documents were relevant to this proceeding, or could lead to relevant information.

⁵ I accept intervenors' statement that the site of Model City facility is simultaneously subject to the jurisdiction of both federal and State authorities. However, the scope of this proceeding is limited to the certificate and permit applications pending before the Facility Siting Board and the Department pursuant to the Environmental Conservation Law.

Based on the foregoing reasons, I grant Department staff's motion for a protective order with respect to document demand No. 2. Service of any additional document demands related to this topic are not authorized.

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

Dated: Albany, New York
August 17, 2023

To: Service List revised May 27, 2022