

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]).

July 13, 2023

Seventeenth Order after Pre-hearing Conference

As requested by Ms. Witryol, a pre-hearing conference convened today at 10:00 a.m. Except for the Tuscarora Nation and the Buffalo-Niagara Waterkeeper, a representative from each party participated. The parties and I discussed the topics identified in Ms. Witryol's July 7, 2023 email concerning the scheduling order of the same date.

I. Witnesses

During the conference, Ms. Witryol explained that she had conferred with Mr. Abraham, and developed the following agreement. The municipalities agreed to retain J. Stewart Bland as their expert witness. Ms. Witryol will not submit pre-filed direct testimony from Paul Steinmeyer. Based on this agreement, Ms. Witryol withdrew her request for a reconsideration of the October hearing dates identified in the July 7, 2023 scheduling order.

II. Site Visit

In a supplemental discovery ruling dated May 12, 2023, I granted the intervenors' requests for site access. With a memorandum and order dated May 25, 2023, I issued an amendment to the May 12, 2023 ruling, and attached the site visit protocol revised May 24, 2023. Today, the intervening parties advised that the site visit to the Model City facility will not occur.¹

III. Discovery concerning issues related to radiological surveys and the SEMMP

As stated in her July 7, 2023 email, Ms. Witryol renewed her request during today's conference for leave to serve document demands upon Department staff concerning issues related to the radiological surveys and the Soil Excavation Management and Monitoring Plan (SEMMP). Ms. Witryol said that, within the last one to three weeks, she obtained information from a neighbor to the site of the Model City facility that members of Department staff from the Bureau of Hazardous Waste and Radiation Management visited the facility in 2015. Ms. Witryol also obtained information from the US Department of Energy (DOE) about a site visit that DOE staff conducted in 2017. According to Ms. Witryol, DOE provided information to Department staff about the 2017 site visit. Subsequent to today's conference, Ms. Witryol stated in an email that she could serve her document demands by Monday, July 17, 2023, if leave is granted.

The municipalities support the request for leave. Mr. Abraham noted there is time to conduct this discovery before the due date for pre-filing the direct testimony and the October hearing dates. If authorized, Mr. Abraham said that the municipalities would co-sponsor the discovery demands. RRG also supports the request for leave.

CWM opposes the request.² Mr. Kuhn argued that the request is untimely. Mr. Kuhn also observed that, in the event leave is granted, Ms. Witryol and the municipalities did not request a modification to the July 7, 2023 scheduling order.

Department staff opposes the request as untimely. Ms. Mucha said that Department staff has not yet determined whether a member of staff will submit any pre-filed direct testimony about this topic. Ms. Mucha also said that staff would oppose any requests for irrelevant information, if leave is granted to serve document demands.

Discussion and Ruling: With the Twelfth Order, dated June 24, 2022, I authorized service of document demands with respect to this topic: Although the municipalities made the initial request, the authorization extended to all parties:

To the extent that the other parties wish to obtain documents relate to these issues, the parties may exchange document demands. The parties must serve the first

¹ In a letter dated June 7, 2023 from Mr. Abraham, the municipalities objected to the revised site visit protocol as attached to the May 25, 2023 memorandum and order, among other things.

² See Mr. Kuhn's July 10, 2023 email.

round of document demands by **Monday, July 25, 2022** (Twelfth Order, dated June 24, 2022, at 5).

Counsel for the municipalities and Ms. Witryol timely served their respective document demands upon CWM's counsel. However, during today's conference, I learned that neither the municipalities nor Ms. Witryol served document demands about this topic upon Department staff. In March 2022, some 16 months ago, the parties and I began discussing discovery related to this topic.³ Nevertheless, Ms. Witryol's July 7, 2023 email is the first time that she expressed an interest in seeking discovery from Department staff about this topic.

Though untimely, but given the anticipated limited scope, I grant the request for leave to serve document demands upon Department staff. Ms. Witryol and Mr. Abraham must serve the joint document demands upon Department staff by 3:00 p.m. on Monday, July 17, 2023. They must also serve copies of the demands upon all other parties (full and amicus), and the ALJ at the same time.⁴ I will accept electronic service.

By noon on Friday, July 28, 2023, Department staff shall provide, via email to the parties and me, an estimate of when staff will respond. If staff wishes to move for a protective order, the motion will be due by Tuesday, August 1, 2023 (*see* 6 NYCRR 624.7[d]). If staff moves for a protective order, the full parties may respond. Any response is due by 3:00 p.m. on Wednesday, August 8, 2023 (*see* 6 NYCRR 624.6[c][3]). I will accept service of all motion papers by email, with one hard copy to follow via regular mail.

IV. July 7, 2023 Scheduling Order

This order makes no changes or amendments to the July 7, 2023 scheduling order.

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

Dated: Albany, New York
July 13, 2023

To: Service List revised May 27, 2022

³ In the Ninth Order, dated March 1, 2022 (at 2-3) and the Tenth Order, dated March 18, 2022 (at 2), I encouraged the parties' experts to participate in technical conferences to facilitate the discovery process. Among other things, I requested an update from the municipalities' counsel by November 14, 2022, about the status of Dr. Resnikoff's review of the documents that CWM provided in response to the municipalities' document demands (*see* Fourteenth Order, dated October 28, 2022, at 4-5). *See also* Fifteenth Order, dated December 5, 2022, at 3-4.

⁴ I recognize that providing the ALJ with copies of the document demands when served upon Department staff is a *departure* from past practice in these proceedings. However, in the event that a dispute arises, I will already have a copy of the document demands, thereby obviating the need to subsequently request a copy of them.