

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]).

April 4, 2023

Sixteenth Order after Pre-hearing Conference

A pre-hearing conference convened at 10:00 a.m. on April 3, 2023. Except for the Tuscarora Nation, a representative from each party participated. The parties discussed the consolidated transcripts, the schedule for proposing transcript corrections, the exhibit chart, additional discovery concerning transportation, and the hearing schedule to examine Jim Bittner, as well as David E. Coate, Michelle Bodewes, and Justin Kellogg.

I. Consolidated Transcripts and Exhibit Chart

With an email dated March 24, 2023, I attached two documents. The first was a memorandum of the same date, which discussed the consolidated transcripts. The second document was a copy of the exhibit chart. The March 24, 2023 email advised the parties that they would be receiving an email from the Department's file transfer service (FTS) to download

copies of the consolidated transcripts for the thirteen hearing sessions held to date. Additional details about the consolidated transcripts were provided in the March 24, 2023 memorandum.

During the conference, Ms. Mucha said that she did not receive the FTS link. After the conference, I sent the link to Ms. Mucha. I understand that Ms. Mucha received my March 24, 2023 email with the two attachments.

I will periodically update the exhibit chart, and circulate revisions. In addition, I will circulate a consolidated version of the transcript for the upcoming sessions, as they become available.

In an email dated March 24, 2023, Ms. Witryol inquired when the parties would have the opportunity to propose corrections to the hearing transcript. During the conference, I said that I will provide a schedule after the hearing is complete.

II. Additional Discovery Concerning Transportation

Consistent with the November 10, 2022 scheduling order, Ms. Witryol timely submitted the pre-filed direct testimony of David E. Coate and Michelle Bodewes, and the associated exhibits. In a similar manner, Mr. Kuhn, on behalf of CWM, timely submitted the pre-filed direct testimony of Justin Kellogg and the associated exhibits. In addition, the parties circulated the backup materials by February 13, 2023.

In an email dated March 24, 2023, Ms. Witryol inquired about the parameters of any additional discovery concerning Mr. Kellogg's pre-filed direct testimony and associated exhibits. We discussed this topic during the conference. I understand that Ms. Witryol is concerned about the possibility of having a document introduced when the hearing reconvenes for the cross-examination of the transportation witnesses that was responsive to Ms. Witryol's July 25, 2022 document demands, but that CWM did not previously disclose.

I said that under such circumstances, Ms. Witryol should object to the document, and identify to which of her July 25, 2022 document demands the proffered document relates. I said further that after conducting an on-record discussion, I would rule about the document and the related questions posed to the witness or witnesses.

During the conference, I asked Ms. Witryol to provide me with a copy of her July 25, 2022 document demands by April 24, 2023. However, after reviewing emails, I see that I previously requested a copy of these document demands. Ms. Witryol provided them to me, on notice to the other parties, via email dated November 7, 2022. Therefore, I do not need an additional copy of Ms. Witryol's July 25, 2022 document demands.

III. Examination of Jim Bittner and the Transportation Witnesses

During the conference, the parties and I discussed dates to schedule the examination of Jim Bittner, as well as David E. Coate, Michelle Bodewes, and Justin Kellogg.

The hearing will reconvene on at 10:00 a.m. on Wednesday, May 10, 2023, for the examination of Jim Bittner and his associated exhibits. If necessary, the hearing will continue at 10:00 a.m. on Thursday, May 11, 2023. The proceedings will be conducted virtually via Webex, similar to previous hearing sessions. In separate emails, the parties will receive invitations to the webinar.

With respect to the examination of David E. Coate, Michelle Bodewes, and Justin Kellogg and their associated exhibits, the hearing will reconvene at 1:00 p.m. on Tuesday, June 27, 2023. As necessary, the hearing will continue as follows at: (1) 10:00 a.m. on Wednesday, June 28, 2023; (2) 1:00 p.m. on Thursday, June 29, 2023; and (4) 11:00 a.m. on Friday, June 30, 2023. By convening at 1:00 p.m. on Tuesday, June 27 and Thursday, June 29, the proceedings will *not* be adjourned for a lunch break. The proceedings will be conducted virtually via Webex, similar to previous hearing sessions. In separate emails, the parties will receive invitations to the webinar.

I request that Mr. Kuhn retain a stenographer for the dates and times reserved above. I request that the parties provide me with the email addresses of their respective witnesses, by April 26, 2023, so that my office can include the witnesses in the Webex invitations.

When the hearing reconvenes at 10:00 a.m. on Wednesday, May 10, 2023, counsel for RRG will have the opportunity to introduce the pre-filed direct testimony of Mr. Bittner, and the associated exhibits into the hearing record.¹ During the May 10, 2023 hearing session, the full parties will have the opportunity to cross-examine Mr. Bittner with respect to the topics addressed in his pre-filed direct testimony and associated exhibits.

When the hearing reconvenes at 1:00 p.m. on Tuesday, June 27, 2023, counsel for CWM will have the opportunity to introduce the pre-filed direct testimony of Mr. Kellogg, and the associated exhibits into the hearing record.² In addition, Ms. Witryol will have the opportunity to introduce the pre-filed direct testimony of Mr. Coate and Ms. Bodewes, and their respective, associated exhibits into the hearing record. During the hearing session that commences on Tuesday, June 27, 2023, the full parties will have the opportunity to cross-examine Mr. Kellogg, Mr. Coate, and Ms. Bodewes with respect to the topics addressed in their respective pre-filed direct testimony and associated exhibits.

¹ With an email from Professor Connolly dated December 18, 2022, RRG file an updated résumé for Mr. Bittner.

² When the hearing reconvenes on Tuesday, June 27, 2023, the order of witnesses will be Mr. Kellogg then Mr. Coate and Ms. Bodewes. I understand that Mr. Coate and Ms. Bodewes will testify as a panel. By agreement, the parties may change the order of the witnesses.

If necessary, the parties' representatives shall file affidavits by the witnesses describing any corrections to their respective pre-filed direct testimony and associated exhibits. If filed, these affidavits will be identified as hearing exhibits. Mr. Bittner's affidavit is due by noon on Wednesday, April 26, 2023. The affidavits by the transportation witnesses will be due by Tuesday, June 13, 2023. I will accept an electronic copy with one signed, hard copy to follow by regular mail postmarked on the respective due date.

1. Opening Statements

On December 19, 2022, counsel for RRG presented an opening statement related to the scope of Mr. Bittner's testimony (*see* Bates No. 2357:20-2360:2). Therefore, no additional time will be provided for opening statements on May 10, 2023. When the hearing reconvenes on June 27, 2023, counsel for CWM and Ms. Wityrol may each make an opening statement with respect to the transportation issue. The opening statements will be made orally, on the record, and limited to five minutes.

2. Order of Events

Section V(2) from the Tenth Order regarding Supplemental Discovery, dated March 18, 2022, at 4-5, is incorporated by reference. The order of events will apply to the forthcoming hearing sessions scheduled for May 10 and June 27, 2023. After the full parties are provided with the opportunity to cross-examine the witness or witnesses, the sponsoring parties will have the opportunity to ask questions on re-direct. If re-direct examination occurs, then all full parties will have the opportunity to conduct re-cross examination. The scope of re-cross examination will be limited to the topics discussed during re-direct examination.

IV. Acks Exhibit 16

On December 20, 2022, counsel for CWM cross-examined Mr. Acks about the regression analyses presented in the document identified as Acks Exhibit 16. Mr. Kuhn represented that RRG provided CWM with this document in response to CWM's discovery request. Mr. Acks responded to many questions. (*See* Bates No. 2728:3-2744:2.) The parties discussed whether the document should be included in the evidentiary record. Based on the discussion, I ruled that the document would not be received, but remain marked for identification only. (*See* Bates No. 2799:13-2801:9.)

During the conference, counsel for RRG moved to include Acks Exhibit 16 in the evidentiary record of the hearing. I explained that after the parties complete the examination of Mr. Bittner on either May 10, or May 11, we will have an on-record discussion about this document.

I attached an electronic copy of Acks Exhibit 16 to the circulating email. I request that RRG confirm that the appropriate document has been identified so that the parties and I are

prepared for the discussion. Counsel for RRG shall provide the confirmation via email, on notice to the parties, by noon on Wednesday, April 26, 2023.

V. Appeals presented in Closing Briefs

During the conference, Ms. Witryol inquired about the scope of rulings made during the hearing that could be appealed in the closing brief. A brief explanation follows. If additional questions remain, we can discuss this topic further.

Pursuant to 6 NYCRR 624.8(d)(1), any ruling by the ALJ may be appealed to the commissioner³ after the completion of all testimony as part of a party's final brief. The regulations provide a short list of ALJ rulings that may be appealed during the course of the hearing, on an expedited bases. They are: (1) rulings to include or exclude any issue for adjudication; (2) rulings addressing the merits of any legal issue made as part of an issues ruling; (3) rulings affecting party status; and (4) any ruling in which the ALJ has denied a motion for recusal. In addition, the regulation provides that a party may seek leave to file an expedited appeal when it has been demonstrated that the failure to decide the appeal would be unduly prejudicial, or would result in significant inefficiency in the hearing process. (*See* 6 NYCRR 624.8[d][2]; *see also* 6 NYCRR 624.6[e].) The Facility Siting Board provided guidance about when it will consider requests for leave to file expedited appeals in the Fifth Interim Decision dated August 29, 2022, and in the Ruling dated December 2, 2022.

VI. Next Conference

No conference is scheduled before the hearing reconvenes on May 10, 2023. However, upon the request of a party, I can schedule a conference before that date.

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

Dated: Albany, New York
April 4, 2023

To: Service List revised May 27, 2022

³ Because a joint hearing concerning the siting certificate is being conducted, appeals may be made to the Facility Siting Board, consistent with the scope of the Board's jurisdiction.