

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]).

December 5, 2022

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**Fifteenth Order after Pre-hearing Conference**

As scheduled, a pre-hearing conference convened at 10:00 a.m. on December 1, 2022. Representatives for each full party and amicus party participated. During the conference, the parties discussed the upcoming hearing concerning the examination of Kenneth Acks, Nicolas O. Rockler, and James Bittner. The parties discussed the application materials that should be identified for the hearing record, and the scope of the issue related to the Soil Excavation Monitoring and Management Plan (SEMMP), among other things.

I.       Examination of Kenneth Acks, Nicolas Rockler, and Jim Bittner

Counsel for RRG advised that Mr. Acks will be available on December 19, 2022, and that Mr. Bittner will be available later in the week. Ms. Witryol and counsel for RRG will confer about whether to have Mr. Acks and Dr. Rockler testify as a panel, and will advise the parties and me by **December 13, 2022**.

If Dr. Rockler and Mr. Acks testify as a panel, counsel for the municipalities, Department staff, and CWM will have the opportunity to cross-examine the panel members. Subsequently, Mr. Witryol will have the opportunity to ask Dr. Rockler questions on re-direct examination, and counsel for RRG will have the opportunity to ask Mr. Acks questions on re-direct examination. If re-direct examination occurs of either witness or both witnesses, counsel for the municipalities, Department staff, and CWM will have the opportunity to re-cross the panel members. The scope of re-cross is limited to the topics discussed during the re-direct examination.

In the alternative, the parties' witnesses may testify separately. If so, counsel for RRG will have the opportunity to cross-examine Dr. Rockler, and Ms. Wityrol will have the opportunity to cross-examine Mr. Acks. However, as previously noted, friendly cross-examination is not permitted.<sup>1</sup> Subsequently, counsel for the municipalities, Department staff, and CWM will have the opportunity to cross-examine the witnesses.

During the conference, the parties' representatives acknowledged receipt of the Webex invitations for December 19 - 23, 2022. Counsel for RRG will provide me with email addresses for Mr. Acks and Mr. Bittner. My office will send these witnesses the Webex invitations. Professor Connolly advised that Messrs. Acks and Bittner are planning to be at the Law School for the hearing. However, if inclement weather occurs, and travel becomes difficult, the witnesses will be able to participate from their respective locations.

Additional instructions for the hearing are outlined in the Fourteenth Order, dated October 28, 2022 (at 2-4), and are incorporated herein by reference. For example, affidavits concerning corrections to the pre-filed direct testimony are due by Monday, **December 5, 2022**.

By email filed subsequent to the pre-hearing conference, Ms. Witryol inquired about the following: (1) a date to submit proposed exhibits that may be discussed during cross-examination, and (2) the names of any potential rebuttal witnesses.<sup>2</sup>

Electronic copies of any proposed exhibits that may be discussed during cross-examination are due by **December 13, 2022**. Copies shall be sent via email to all parties.

By **December 13, 2022**, CWM's counsel shall confirm whether its potential rebuttal witness with respect to this topic would be Louis L. Wilde, Ph.D.,<sup>3</sup> and identify any other potential witnesses. I note that at this point in the proceeding, I have not authorized any party to present a rebuttal case with respect to the potential impact to real property values associated with the construction and operation of the proposed RMU-2 landfill. Before doing so, the party seeking to present a rebuttal case must make an offer of proof, and identify the scope of the proposed rebuttal case.

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<sup>1</sup> See Tenth Order regarding Supplemental Discovery, dated March 18, 2022, at 5.

<sup>2</sup> Ms. Witryol's other inquiries outlined in her December 1, 2022 email, concerning the application materials, are addressed below.

<sup>3</sup> With its motion to strike, CWM included an affidavit by Dr. Wilde, sworn to on May 6, 2022.

## II. CWM Application Materials

As requested, CWM's counsel provided the parties and me with an index of the application materials with an email from Mr. Kuhn dated November 11, 2022. In emails dated November 15, 18, and 30, 2022, Ms. Wityrol provided comments. Ms. Witryol provided attachments to her November 15 and 18, 2022 emails. Mr. Abraham, on behalf of the municipalities, also filed comments via email dated November 30, 2022.

I understand that the parties conferred among themselves before the December 1, 2022 pre-hearing conference, and a lengthy discussion took place during the pre-hearing conference. Generally, the intervening parties are concerned about whether the index provided by CWM is sufficiently comprehensive. In her December 1, 2022 email, Ms. Witryol provided additional comments related to this topic.

During the conference, I explained that after the December 2022 hearing session, I will provide the parties with a schedule to respond to CWM's proposed index of the application materials, and identify any additional documents that should be included. Before ruling on what application documents will be included in the record of the hearing, the parties will have the opportunity to state any objections on the record, and the party seeking to include the additional document(s) will have the opportunity to respond to any objections. Until the foregoing process takes place, I reserve ruling on the proposed index related to the application materials.

In her December 1, 2022 email, Ms. Witryol inquired about appealing from the Fourteenth Order, dated October 28, 2022. The inclusion or exclusion from the hearing record of the contents on the CD filed with Mr. Rizzo's pre-filed testimony was not discussed during the September 14, 2022 hearing session. In addition, the Fourteenth Order (at 2) makes no ruling about the status of the CD filed with Mr. Rizzo's pre-filed direct testimony. As noted above, and as I stated at the September 14, 2022 hearing session (Tr. at 33-34), I have reserved on determining what application materials will be included in the hearing record. In the absence of a ruling, no appeal is available.

## III. SEMMP and Radiological Surveys

Counsel for the municipalities and CWM have exchanged information about this topic.<sup>4</sup> As requested, with an email dated November 4, 2022, Ms. Wityrol confirmed that she provided her witnesses with a copy of the November 2016 SEMMP, and advised that their review would be completed in about 60 days. Ms. Witryol noted further that the applicability of the guidance outlined in the multi-agency radiation survey and site investigation manual (MARSSIM) at the site would require more than a review of the November 2016 SEMMP. In addition, I received a timely status report from Mr. Kuhn via email dated November 14, 2022.

During the conference, the parties and I discussed the scope of the issue as outlined in the Interim Decision of the Facility Siting Board, dated August 11, 2016, at 12-18 (*see also*, First

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<sup>4</sup> See Fourteenth Order, dated October 28, 2022, at 4-5.

Interim Decision of the Deputy Commissioner, dated June 23, 2021, at 16-18). The parties do not agree about the scope of the issue. I advised that I would provide a written interpretation of the Facility Siting Board's determination next month.

IV. Transportation

I issued a scheduling order, dated November 10, 2022, concerning this issue.<sup>5</sup> In her November 30, 2022 email, Ms. Wityrol argued that she is prejudiced by the simultaneous submission of the witnesses' pre-filed direct testimony.

During the December 1, 2022, pre-hearing conference, I stated the following. The deadlines in the November 10, 2022 order remain in place. Pursuant to the order, the parties will circulate the backup information relied upon in the preparation of the pre-filed direct testimony by February 13, 2022. Upon review of the pre-filed direct testimony and the backup information, the parties may request leave to supplement the pre-filed direct testimony.

V. Hearing Procedures

Reference is made to item No. 5 of Ms. Wityrol's December 1, 2022 email. It states, in full, that:

If Your Honor could explain, or, provide me with a citation for regulation on re-direct and re-cross ground rules given Mr. Kuhn's broader definition that includes any rebuttal (in its recent obj. to Siting Board), that would be appreciated.

The administrative joint hearing concerning the captioned matters has been conducted pursuant to the requirements outlined in the State Administrative Procedure Act (SAPA) Article 3 (Adjudicatory Hearings), Environmental Conservation Law (ECL) § 70-0119 (Public Hearings), and its implementing regulations, 6 NYCRR Part 624 (Permit Hearing Procedures).

In addition, the procedures for conducting re-direct examination, and re-cross examination are outlined in the Tenth Order, dated March 18, 2022, at 5. These procedures are consistent with the practice authorized by the above referenced statutes and regulations.

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

Dated: Albany, New York  
December 5, 2022

To: Service List revised May 27, 2022

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<sup>5</sup> See also Fourteenth Order, dated October 28, 2022, at 4.