

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]).

October 28, 2022

Fourteenth Order after Pre-hearing Conference

A pre-hearing conference convened at 10:00 a.m. on October 17, 2022, to discuss the application materials that should be identified for the hearing record. Except for Buffalo-Niagara Waterkeeper, a representative from each party participated. The parties also discussed a schedule to cross-examine Kenneth Acks and Nicolas Rockler, as well as Jim Bittner. The parties provided an update about the status of discovery related to transportation. Some parties advised that they are discussing a settlement of the issues related to the Soil Excavation Monitoring and Management Plan (SEMMP), revised November 2016.

I. CWM Application Materials

Pursuant to 6 NYCRR 624.12(b), the record of the hearing must include, among other things, the application including the DEIS where applicable. Also, 6 NYCRR 377.3(e)(1 and 2),

require that the certificate application includes the complete applications for all permits required pursuant to the Environmental Conservation Law (ECL) for the proposed facility. In addition to the certificate application filed pursuant to 6 NYCRR Part 377 (formerly Part 361), CWM filed permit applications pursuant to ECL Articles 17 (Water Pollution Control), 19 (Air Pollution Control), 24 (Freshwater Wetlands), and Article 27, Title 9 (Industrial Hazardous Waste Management), and associated implementing regulations at 6 NYCRR Part 201-5 (State Facility Permits), Part 373 (Hazardous Waste Management Facilities), Part 663 (Freshwater Wetlands Permit Requirements), Part 750 (State Pollutant Discharge Elimination System [SPDES] Permits), as well as Section 401 of the federal Clean Water Act (CWA) and 6 NYCRR 608.9 (Water Quality Certifications).

With the pre-filed direct testimony of Jonathon Rizzo, CWM offered two exhibits. The first is a copy of the 6 NYCRR Part 361 Application for the proposed RMU-2 landfill and associated facilities. According to Mr. Rizzo's testimony, CWM filed the Part 361 Application on November 8, 2013. The document incorporates revisions dated December 18, 2013 and January 14, 2014. The second document is the Draft Environmental Impact Statement (DEIS) for the proposed RMU-2 landfill and associated facilities. CWM filed this version of the DEIS on November 8, 2013, and incorporates revisions dated December 18, 2013 and January 14, 2014. During the September 14, 2022 hearing (Tr. at 33-34), I reserved on receiving these two documents into the evidentiary record.

When CWM submitted Mr. Rizzo's pre-filed direct testimony on March 2, 2020, CWM provided hard copies of the Part 361 Application and the DEIS. In addition, CWM included a compact disk (CD) with electronic copies of some additional application materials filed with Department staff prior to March 2020.

During the October 17, 2022 conference, Mr. Kuhn offered to circulate an index of the application materials related to the proposed RMU-2 landfill and associated facilities. With respect to the electronic version, Mr. Kuhn explained that the index would include "live" links to the associated documents located either on the Department's website or CWM's website.

After Mr. Kuhn circulates the index of the application materials, I will provide the parties with the opportunity to review the index and state any objections. Subsequently, I will issue a ruling concerning the receipt of the application materials into the evidentiary record.

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

During the conference, counsel for RRG said that Mr. Acks, Dr. Rockler, and Mr. Bittner will be available for cross-examination during the week of December 19, 2022. The proceedings will be conducted virtually as a Webex Event, similar to previous hearing sessions. As necessary, the hearing will continue each day during the week of December 19, 2022 at 10:00 a.m.

In separate emails, the parties and the witnesses will receive invitations, as panelists, for each day during the week of December 19, 2022. There will be a separate invitation for each day. Please accept all five invitations.

I request that Mr. Kuhn reserve a stenographer for the hearings scheduled for the week of December 19, 2022.

When the hearing reconvenes at 10:00 a.m. on Monday, December 19, 2022, counsel for RRG will have the opportunity to introduce the pre-filed direct testimony of Mr. Acks, and Mr. Bittner, and the associated exhibits into the hearing record. Ms. Witryol's witness, Dr. Rockler, was available for cross-examination during the April 11 and 12, 2022 hearing session. However, a portion of Dr. Rockler's pre-filed direct testimony relates to the information presented in Mr. Acks' pre-filed direct testimony (*see* April 11, 2022, Tr. at 84-90). During the December 19, 2022 hearing session, the full parties will have the opportunity to cross-examine Dr. Rockler with respect to the topics addressed in Mr. Acks' pre-filed direct testimony (*see* Rockler pre-filed direct at 3:29-4:16 (Question No. 6 [portion]); 8:10-13 (Question No. 12); 8:14-10:15 (Question No. 13)).

I understand that Mr. Acks and Dr. Rockler will be available as a panel, and that Mr. Bittner's presentation will be separate from the panel's. Subsequently, the other full parties will have the opportunity to cross-examine the witnesses.

If necessary, counsel for RRG shall file affidavits by Mr. Acks and Mr. Bittner describing any corrections to their respective pre-filed direct testimony and associated exhibits.¹ If filed, these affidavits will be identified as hearing exhibits. The affidavits are due by Monday, **December 5, 2022**. I will accept an electronic copy with one signed, hard copy to follow by regular mail.

1. Opening Statements

When the hearing reconvenes on December 19, 2022, counsel for RRG and Ms. Wityrol may each make an opening statement. It will be made orally, on the record, and limited to five minutes.²

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 scheduled for the week of December 19, 2022.

¹ Corrections to Dr. Rockler's pre-filed direct testimony and exhibits took place on April 11, 2022 (Tr. at 53-78).

² *See* Tenth Order, dated March 18, 2022, at 3-4.

After the full parties are provided with the opportunity to cross-examine the 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.

I will consider requests for leave to present rebuttal testimony after the parties have cross-examined and, as appropriate, re-cross examined the witnesses. If granted, rebuttal presentations will be presented orally. The party proposing to present a rebuttal case must be prepared to proceed during the week of December 19, 2022.

III. Transportation

With respect to transportation, the inquiry at the hearing is whether the results of the updated noise assessment would show sound pressure increases greater than 6 dB at the relevant receptors and, if so, how any draft permit conditions should be revised to further mitigate potential noise impacts from truck traffic (*see* December 2015 Issues Ruling, at 46; *see also* Interim Decision of the Facility Siting Board dated August 11, 2016, at 19, and Ruling and Third Interim Decision of the Facility Siting Board dated September 10, 2019, at 15).³ The Twelfth Order dated June 24, 2022 (at 4-5), provided Ms. Wityrol with the opportunity to serve discovery demands upon CWM by July 25, 2022.

During the October 17, 2022 conference, Ms. Wityrol said that CWM has not fully responded to her discovery demands, and responses remain pending. CWM asserted that some of the information should be withheld because it is privileged. I directed Ms. Wityrol to provide me with a copy of her discovery demands. In addition, I directed Mr. Kuhn to provide me with a copy of the materials that CWM is withholding in response to the pending discovery demands, as well as an explanation for the privilege, or privileges, that may apply. As of the date of this order, I have received neither a copy of Ms. Wityrol's discovery demands, nor copies of the withheld documents and related explanation from CWM.

Upon receipt of this information from Ms. Wityrol and CWM's counsel, I will conduct an *in camera* review, and issue a ruling.

IV. SEMMP and Radiological Surveys

I understand that counsel for the municipalities and CWM have exchanged information about this topic.⁴ Mr. Abraham reported that the municipalities' expert, Marvin Resnikoff, Ph.D., is in the process of reviewing the documents provided by CWM in response to the

³ *See* Fifth Order dated October 18, 2012, at 3-4; Sixth Order dated November 23, 2021, at 3; Ninth Order dated March 1, 2022, at 2-3; and Twelfth Order dated June 24, 2022, at 4-5.

⁴ I authorized the parties to serve the first round of document demands by July 25, 2022 (*see* Twelfth Order dated June 24, 2022, at 5; *see also* Memorandum dated September 6, 2022).

municipalities' document demands. The parties agreed to provide a report via email about the status of the review by **November 14, 2022**.

As noted in the Memorandum dated September 6, 2022, the intervening parties are considering whether to begin discussions with CWM about resolving this issue if the intervening parties find that the revised project-specific SEMMP, circulated with a cover letter dated November 18, 2016, would resolve these issues. Section IV and Appendix 1 to the November 2016 SEMMP provide details about conducting radiological scans related to excavations. During the October 17, 2022 conference, Ms. Wityrol inquired whether she should be included in any settlement discussions, and I said yes.

If she has not already done so, I direct Ms. Wityrol to provide her witnesses, Paul R. Steinmeyer, and J. Stewart Bland, with copies of the revised project-specific SEMMP dated November 2016 within 5 business days from the date of this order, and confirm transmission of same to Messrs. Steinmeyer and Bland. With the confirmation of transmission, Ms. Wityrol shall advise how long her consultants will need to complete their review of the November 2016 SEMMP.

V. Record of Compliance

Reference is made to the discussion in the Thirteenth Order dated July 12, 2022 (at 1-2) concerning this topic.⁵ The record of compliance tables circulated with Mr. Kuhn's April 10, 2022 email are current.

The parties, including amicus parties, will have the opportunity to present written argument about the significance of CWM's record of compliance as outlined in the two above referenced tables. Subsequently, CWM will have the opportunity to reply. Upon review of the parties' submissions, I will advise the parties whether any oral argument or further written submissions are necessary.

I direct the intervening parties and amicus parties to confer and, by **December 5, 2022**, propose a date to submit their respective initial filings. CWM's filing date will be determined after its counsel has reviewed the initial submissions.

I request that Department staff advise whether staff would prefer to submit either an initial filing with the intervening parties, or a response after reviewing the initial filings.

VI. Transcripts

In an email dated October 20, 2022, Ms. Wityrol inquired about setting a schedule for the parties to propose corrections to the hearing transcripts. The parties will be provided the opportunity to propose corrections to the hearing transcripts after the receipt of the transcripts

⁵ See also December 2015 Issues Ruling at 73-76; Interim Decision of the Facility Siting Board, dated August 11, 2016, at 18-19; First Interim Decision of the Deputy Commissioner, dated June 23, 2021, at 12-14.

from the December 19, 2022 hearing sessions. Subsequently, the parties will have the opportunity to file objections to any proposed corrections.

VII. Next Conference

I would like to schedule a conference with the parties prior to the December 19, 2022 hearing session. I am available during the weeks of November 28, and December 5, 2022. On December 7, 2022, I will be available after 1:00 p.m.

By noon on **November 4, 2022**, the parties shall advise me of their availability for the conference. After reviewing the parties' availability, I will schedule the conference. The purpose of the conference will be to review the preparations for the December 19, 2022 hearing session, as well as any outstanding discovery issues related to the transportation and SEMMP issues.

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

Dated: Albany, New York
October 28, 2022

To: Service List revised May 27, 2022