

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]).

RULING
OF
THE FACILITY SITING BOARD

Introduction

By motion dated November 14, 2022, Amy Witryol requested permission to appeal a ruling by Administrative Law Judge (ALJ) Daniel P. O’Connell during the September 16, 2022 hearing. After approximately two and a half days of cross-examining CWM’s witnesses, James Berlow and Michael N’dolo, Ms. Witryol requested permission to offer rebuttal testimony. The proposed rebuttal testimony would address the validity of Mr. Berlow’s predicted carbon emission reductions related to transportation if RMU-2 was sited. Secondly, the proposed rebuttal would address the assumptions and conclusions contained in Mr. N’dolo’s testimony and the MRB Report. ALJ O’Connell denied the request stating that the record was sufficiently developed regarding public interest testimony. (*See* September 16, 2022, Hearing Transcript at 149-151.)

Ms. Witryol’s motion for permission to appeal offers Dr. Nicholas O. Rockler to testify and offer documents produced by CWM or DEC related to jobs, payroll, gross receipt taxes, state or local operating expenditures, carbon emissions and reuse of pre-existing infrastructure. The proposed rebuttal would largely demonstrate that CWM’s public interest panel testimony is contradicted by CWM’s own documents and application materials. The proposed rebuttal would also dispute the representation that Mr. Berlow is an expert in hazardous waste logistics.

Ms. Witryol claims, “her case would be prejudiced by not having the opportunity to introduce evidence, especially evidence produced by CWM but withheld from its own witnesses.” Ms. Witryol asserts that her proposed rebuttal testimony would lend to efficiency because as a pro se litigant she did not “recognize the extent of detail required to authenticate [evidentiary] sources” when her witnesses testified in April, a shortcoming she would correct

going forward.

By letter dated November 21, 2022, CWM Chemical Services, LLC (CWM) opposes Ms. Witryol's request on several grounds. First, the ALJ has broad authority and discretion to maintain the efficient conduct of the hearing, including whether to allow or prohibit rebuttal testimony. Secondly, CWM argues that the Siting Board has previously held that evidentiary rulings cannot be appealed on an interlocutory or expedited basis. CWM argues that the ALJ's ruling on rebuttal testimony is an evidentiary ruling that does not limit the issues that were joined for adjudication or affect the merits of those issues raised by Ms. Witryol, nor does Ms. Witryol identify a substantial right affected by the ruling. CWM further argues that any claim that the ALJ's ruling is preventing Ms. Witryol from introducing evidence to contradict CWM's witnesses is meritless because Ms. Witryol could have offered the documents during her re-direct of Dr. Rockler in April.

DISCUSSION

The Facility Siting Board previously held, notwithstanding the provision for expedited appeals pursuant to 6 NYCRR 624.8(d)(2), that an evidentiary ruling is not appealable on an expedited or interlocutory basis so long as the ruling does not limit the scope of the issues to be tried and does not affect the merits of the controversy or the substantial rights of a party (*see Matter of CWM Chemical Services, LLC*, Fifth Interim Decision of the Facility Siting Board, August 29, 2022, at 9-10).

The Facility Siting Board does not read the provisions of 6 NYCRR 624.8(d)(2) and the case law related to appeals from evidentiary rulings in isolation from one another. For instance, a demonstration that a ruling limited the scope of issues to be tried and affected the merits of the

controversy or the substantial rights of a party could also support the required regulatory burden to demonstrate that failure to decide the appeal on an interlocutory basis would be unduly prejudicial or result in significant inefficiency in the hearing process. The ALJ's ruling in this instance is an evidentiary ruling that disallows rebuttal testimony to the CWM witness panel's public interest testimony (*see e.g. Matter of Mario v New York State Div. of Human Rights*, 200 AD3d 1591, 1592 [4th Dept 2021]).

In support of her request for permission to appeal, Ms. Witryol argues,

“Were the Board to rely on any CWM testimony for public interest, the undersigned's case would be prejudiced by not having the opportunity to introduce evidence, especially evidence produced by CWM but withheld from its own witnesses. Public interest testimony was filed by parties simultaneously. Each issue designated for adjudication was scoped via the Issues Conference, *except* CWM's public interest case. These facts, alone, create prejudice and moot any argument rebuttal offers could be untimely. Authorizing rebuttal would bring some balance to this inequity.”

CWM, Ms. Witryol, and Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau) simultaneously submitted pre-filed direct testimony on March 2, 2020. Thereafter, the parties had over two years to engage in discovery and prepare for the April 11 and 12, 2022 and September 14, 15 and 16, 2022 hearings and examination of the Witryol and CWM public interest panels. The fact that CWM's public interest case was not “scoped” during the issues conference is irrelevant. It is CWM's burden to demonstrate that the siting of its proposed RMU-2 is otherwise necessary or in the public interest (*see Matter of CWM Chemical Services, LLC*, Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status, December 22, 2015, at 25, 81, 92). The parties have the burden of proof on their respective issues and have been afforded the same time to submit their respective pre-filed direct testimony and the opportunity to make corrections to the pre-filed direct testimony and exhibits,

cross-examine witnesses, and conduct re-direct examination of their respective witnesses. Ms. Witryol's assertion that these facts prejudice her position is untenable.

Ms. Witryol was provided ample opportunity to attack the credibility of CWM's witnesses, demonstrate that their testimony is contradicted by the application materials or other documents, and question the qualifications of CWM's witnesses through cross-examination as well as through the witnesses Ms. Witryol sponsored during the April hearings. In addition, Ms. Witryol will have the opportunity to make those arguments in writing, citing to the evidentiary record, after the hearing is concluded. Ms. Witryol's assertion that she now wants additional documents and testimony received into evidence to support her position because she was unable to do so during re-direct examination of her witnesses or cross-examination of CWM's witnesses is similarly unconvincing. Impeachment of witnesses and questioning the credibility of their respective testimony and supporting exhibits fall in the realm of cross-examination. Much of what Ms. Witryol proposes in rebuttal is to contradict, impeach and question the expertise of the CWM witness panel, all things that should have been done in her direct case or while CWM's witnesses were testifying and with CWM provided the opportunity to rehabilitate its witnesses. In short, Ms. Witryol's arguments in support of her motion amount not to a request for leave to appeal the ALJ's ruling, but rather a request for a do-over through rebuttal testimony. Additionally, rebuttal testimony cannot be utilized simply to challenge the credibility of another witness (*see Kaminisky v Segura*, 26 AD3d 188, 189 [1st Dept 2006]).

We have reviewed Ms. Witryol's remaining arguments and find them unpersuasive. As discussed above, we find that the ALJ's ruling on Ms. Witryol's request to offer rebuttal testimony is a ruling on the evidence admissible at trial. We further find that the ALJ's ruling does not limit the scope of the issues to be tried and does not affect the merits of the controversy

or the substantial rights of Ms. Witryol.

CONCLUSION

The Facility Siting Board concludes that Ms. Witryol's motion requesting permission to appeal the ALJ's September 16, 2022 ruling on the request to submit rebuttal testimony is not appealable as of right or by permission. Accordingly, the motion requesting permission to appeal on an expedited basis is denied.

Facility Siting Board

<u> /s/ </u> TIMOTHY P. WALSH, Designee-Chair for BASIL SEGOS, Commissioner NYS Department of Environmental Conservation	<u>December 1, 2022</u> DATE
<u> /s/ </u> SARA KOCH, Designee for MARY T. BASSETT, M.D., M.P.H., Commissioner NYS Department of Health	<u>November 30, 2022</u> DATE
<u> /s/ </u> FRANK CIRILLO, Designee for MARIE THERESE DOMINGUEZ, Commissioner NYS Department of Transportation	<u>November 29, 2022</u> DATE
<u> /s/ </u> LYNN MARINELLI, Designee for HOPE KNIGHT, Commissioner NYS Department of Economic Development and President & CEO of Empire State Development	<u>November 30, 2022</u> DATE
<u> /s/ </u> MATTHEW MARAGLIO, Designee for ROBERT J. RODRIGUEZ, Secretary of State NYS Department of State	<u>December 2, 2022</u> DATE
<u> /s/ </u> JOHN F. BENOIT, Member	<u>December 1, 2022</u> DATE
<u> /s/ </u> LEE SIMONSON, Member	<u>December 2, 2022</u> DATE
<u> /s/ </u> A. SCOTT WEBER, Member	<u>December 2, 2022</u> DATE