

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
 9-2934-00022/00249

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 361 (Siting of Industrial Hazardous Waste Facilities) by

CWM Chemical Services, LLC,

Applicant (RE: Residuals Management Unit - Two [RMU-2]).

RULING AND SECOND INTERIM DECISION

OF

THE FACILITY SITING BOARD

Introduction

On December 22, 2015, Administrative Law Judge (ALJ) Daniel P. O'Connell issued a Ruling on Proposed Issues for Adjudication and Petitions for Full Party Status and Amicus Status (Issues Ruling) in this joint permit and siting certificate matter. ALJ O'Connell granted full party status to Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities); Residents for Responsible Government (RRG), the Lewiston-Porter Central School District (L-PCSD) and the Niagara County Farm Bureau (Farm Bureau); and Amy Witryol (collectively, intervenors). The ALJ's Issues Ruling joined several issues for adjudication including: transportation (limited to noise impacts); impacts on property values, property tax receipts and second home purchases; impacts on economic development; and impacts on marketability of agricultural products.

Appeals were taken from the Issues Ruling by staff of the New York State Department of Environmental Conservation (Department); the Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol. CWM Chemical Services, LLC (CWM) did not oppose the issues joined by the ALJ. Replies to the appeals were filed by CWM; Department staff; the Municipalities; RRG, L-PCSD and Farm Bureau; and Ms. Witryol. The Facility Siting Board (Siting Board), by interim decision issued on August 11, 2016 (Interim Decision), adopted the ALJ's Issues Ruling with respect to the parties' status and determination of those issues within the Siting Board's jurisdiction. The Interim Decision also joined the Municipalities' proposed issue regarding radiological contamination and the RMU-2 project-specific soil excavation monitoring and management plan (SEMMP) for adjudication, and recommended that the Commissioner reject Department staff's arguments on appeal regarding the geological and hydrogeological characterization of the site. The Siting Board rejected the remaining arguments raised on the

appeals within the Siting Board's jurisdiction.

By memorandum dated December 21, 2015, the DEC Commissioner delegated to the Assistant Commissioner for Hearings and Mediation Services decision making authority with respect to the applications for permits subject to the jurisdiction of the Department that have been filed in this matter. As a result of the delegation, decision making functions of the DEC Commissioner relative to the pending motion and DEC permit applications, will be addressed by the Assistant Commissioner. The Assistant Commissioner has not yet issued an interim decision on the permit related appeals from the Issues Ruling.

On January 23, 2017, CWM filed a motion with the ALJ for leave to serve discovery demands on the parties related to three issues CWM identifies as "Siting Board only" issues: impacts on property values, property tax receipts and second home purchases; impacts on economic development; and impacts on marketability of agricultural products. CWM's motion also sought a schedule for filing pre-filed direct testimony related to the three issues identified above as well as CWM's updated traffic noise study, if testimony is to be permitted on that issue.

Intervenors opposed the motion, in its entirety, based on several arguments including the fact that the SPDES and air state facility (ASF) permits have not been referred to the Office of Hearings and Mediation Services (OHMS) and the lack of an interim decision from the Assistant Commissioner on the appeals from the Issues Ruling. Those two arguments are the basis for intervenors' remaining arguments.

By ruling dated April 7, 2017 (April 7, 2017 Ruling), ALJ O'Connell granted CWM's motion and issued a scheduling order for discovery and pre-filed direct testimony as well as providing dates for the adjudicatory hearing on the three economic impact issues and the transportation noise analysis. The ALJ held that based on the Siting Board's Interim Decision,

the parties' objections to CWM's motion were without merit (see April 7, 2017 Ruling at 5).

By correspondence dated April 13, 2017, Ms. Witryol appealed from the April 7, 2017 Ruling without expressly requesting leave to appeal from the Siting Board or Assistant Commissioner. By letters dated April 18, 2017 and April 21, 2017, the Siting Board and Assistant Commissioner, respectively, advised the parties that Ms. Witryol's appeal was being treated as including the required motion for leave to file an expedited appeal and set April 26, 2017 as the deadline for the parties to respond to Ms. Witryol's motion and appeal. CWM and Department staff filed papers opposing the motion and appeal. The Municipalities filed papers in support of the motion and appeal. RRG, L-PCSD and Farm Bureau did not file papers, but advised that they relied on the papers already submitted in opposition to CWM's original motion. See Appendix A attached hereto.

DISCUSSION

Under the Department's permit hearing regulations (6 NCYRR part 624), subject to some exceptions not applicable here, a party seeking to appeal from an ALJ's ruling on an interlocutory, expedited basis must obtain the permission of the Commissioner or, as in this joint proceeding, the Assistant Commissioner and the Siting Board. Pursuant to 6 NYCRR 624.8(d)(2)(v) and (3), Ms. Witryol's motion must demonstrate that the failure to decide the appeal on an expedited basis "would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process." In her April 13, 2017 letter, Ms. Witryol reasons that the adjudicatory hearing should not go forward because the yet to be referred SPDES and ASF permits may affect the issues that have already been joined for adjudication, which will create inefficiency in the administrative process and require return trips by out-of-town experts

for additional testimony on the same topic. In her March 6, 2017 opposition to CWM's motion, Ms. Witryol also stated that the repeated travel by her experts would create unnecessary duplicative expenses for her.

In addition, Ms. Witryol points out that CWM's SPDES permit application materials include arguments or documentation related to the intervenors' economic impact issues. To allow those issues to be litigated before intervenors are allowed to supplement their respective petitions on the SPDES and ASF permits, she argues, would be prejudicial to the intervenors.

CWM and Department staff argue that Ms. Witryol failed to meet her burden of demonstrating undue prejudice or significant inefficiency in the hearing process. Staff also argues that the ALJ has the power and discretion to determine and adjust the order of events in this proceeding, and that no legal basis supports the conclusion that a phased approach to the hearing process causes undue prejudice or significant inefficiency.

In support of Ms. Witryol's motion and appeal, the Municipalities argue that issues presented by the SPDES and ASF permits are likely to affect property values, property taxes and economic development, as well as marketability of farm products. These are all issues scheduled for adjudication and will likely need to be re-litigated based on issues raised in new or amended petitions. The Municipalities further argue that piecemeal adjudication would be unfair to the parties because they would need to bring their experts on noise and economic impacts back to revisit those issues.

With respect to the threshold question, the Siting Board concludes that Ms. Witryol has demonstrated that the failure to decide her appeal on an expedited basis would be unduly prejudicial or would result in significant inefficiency in the hearing process. Accordingly, Ms. Witryol's motion for leave to appeal from the April 7, 2017 Ruling is granted.

Turning to the merits of the appeal, the ALJ generally possesses the broad authority to determine and adjust the order of events in this proceeding (see 6 NYCRR 624.8[a]). However, circumstances unique to this joint proceeding warrant modification of the schedule set by the ALJ.

This matter combines several permits and a siting certificate into a joint hearing process (see 6 NYCRR 361.4[b], [d] and [e]; see also 6 NYCRR 624.8[e]). The alternative to moving forward on discovery, pre-filed testimony and a hearing on each of the economic and noise issues is to allow the long awaited SPDES and ASF permits to catch up with the administrative process; thus, providing the parties the opportunity to supplement their petitions if they wish to raise potential issues regarding the SPDES and ASF draft permits.¹ Ms. Witryol and the Municipalities argue that issues that have already been joined for adjudication may also need to be supplemented as part of the intervenors' review of the SPDES and ASF draft permits. If supplemental petitions are filed with the ALJ, then an issues conference may be convened, followed by a ruling on issues raised and potential appeals from any ruling. As the SPDES and ASF draft permits have not been referred to OHMS, the Siting Board cannot speculate when those permits will reach the procedural posture of the other permit and siting certificate applications.²

The April 7, 2017 Ruling, however, makes it clear that neither the SPDES or ASF permit will move forward until after the ordered discovery, pre-filed direct testimony and adjudicatory hearing are completed (see April 7, 2017 Ruling at 7). Following the April 7, 2017 Ruling's

¹ The ALJ recognized that the parties may need to revise or supplement their petitions related to the SPDES and ASF permits, and reserved ruling on proposed issues related to those two permits (see Issues Ruling at 142 and 150).

² The decision makers in this joint process have no control over the SPDES and ASF permits until those permits are referred to OHMS and become subject to the provisions of 6 NYCRR parts 624 and 361.

schedule, the adjudicatory hearings will not close until the end of October 2017. As a result, it appears unlikely that a ruling on SPDES and ASF draft permit issues would be available within the next twelve months. That would place additional adjudicatory hearings well into 2018 and beyond. In this joint proceeding, where the Siting Board is authorized and expects to participate in the hearing process (see ECL 27-1105[3][e] and 6 NYCRR 361.4 [d]), such a lengthy delay between adjudicatory hearings is unacceptable.³

On the appeals from the Issues Ruling, CWM did not challenge the issues joined by the ALJ's Issues Ruling. That, however, does not lead to the conclusion that some of the issues joined should be shepherded through the adjudicatory hearing process at this time to the exclusion of other issues and without all draft permits submitted to this joint process. Nor does the Siting Board's Interim Decision express or imply that "Siting Board only issues" should be scheduled before the draft SPDES and ASF permits have reached the procedural posture of the part 373 and part 361 applications. The Siting Board concludes that it would be significantly inefficient to engage in discovery, file pre-filed direct testimony and convene an adjudicatory hearing on any issues before the SPDES and ASF draft permits are current with the other draft permits in the administrative process. Otherwise, adjudicatory hearing sessions in this joint proceeding may be scheduled more than a year apart. As the Siting Board noted in the Interim Decision, some permit issues are intertwined with certificate issues, siting criteria and the DEIS (see Interim Decision at 17). To move forward on any issues without the two outstanding permits even part of the process is contrary to the joint hearing provisions cited above.

As the Siting Board previously noted, the Department's review under the State

³ In addition, the longer the period between the adjudicatory hearings and a final decision in this joint proceeding, the greater likelihood that the composition of the Siting Board will change during that time.

Environmental Quality Review Act (ECL article 8, [SEQRA]) requires evaluation of the total project impact to determine whether adverse environmental effects will be minimized or avoided taking into account social, economic and other relevant considerations (see Interim Decision at 8). Pursuant to SEQRA, the Siting Board will issue a Findings Statement in support of its final decision in this joint matter. Without the SPDES and ASF permits, the total project impact is not before the ALJ, Assistant Commissioner or Siting Board.

The Siting Board concludes that engaging in discovery, filing pre-filed direct testimony and scheduling an adjudicatory hearing are premature at this time and should not be scheduled until the SPDES and ASF draft permits have reached the procedural posture of the part 373 and part 361 applications in this joint administrative process. In that manner, these joint proceedings will provide a more cohesive and comprehensive hearing process for the participation of the parties, Siting Board and Assistant Commissioner. At that time, the parties will be expected to proceed without further delay.

CONCLUSION

Ms. Witryol's motion for leave to appeal is granted and the April 7, 2017 Ruling in this matter is vacated for the reasons stated above.

Appendix A

*In the Matter of an Application for a Certificate of Environmental Safety and Public Necessity
pursuant to 6 NYCRR Part 361 (Siting of Industrial Hazardous Waste Facilities) by
CWM Chemical Services, LLC*

Appeal from April 7, 2017 Ruling

1. CWM Motion for leave to serve discovery demands related to Siting Board only and SEQRA issues identified for adjudication by evidentiary hearing, dated January 23, 2017.
2. Email from Amy Witryol to ALJ O'Connell, dated January 30, 2017 with cover letter and two-page memo attached.
3. DEC staff's response to CWM's motion, dated March 3, 2017.
4. Municipal stakeholders' response to CWM's motion, dated March 6, 2017.
5. RRG, LPCSD and Farm Bureau's response to CWM's motion, dated March 6, 2017.
6. Cover letter from Amy Witryol, dated March 6, 2017 with Witryol response to CWM's motion attached.
7. ALJ O'Connell's Ruling on CWM's motion, dated April 7, 2017.
8. Witryol Appeal from ALJ O'Connell's April 7, 2017 Ruling.
9. Correspondence from Paul D'Amato, Facility Siting Board Chair, dated April 18, 2017, to parties, advising parties of receipt of appeal and time to respond.
10. Correspondence from Louis Alexander, Assistant Commissioner, dated April 21, 2017, to parties, advising parties of receipt of appeal and time to respond.
11. CWM's response to Witryol appeal, dated April 26, 2017.
12. Email response to Witryol appeal from RRG, LPCSD and Farm Bureau, dated April 26, 2017.
13. Municipal stakeholders' response to Witryol appeal, dated April 26, 2017.
14. DEC staff response to Witryol appeal, dated April 26, 2017.