

Introduction

On September 10, 2019, the Facility Siting Board (Siting Board) issued a ruling and third interim decision (Third Interim Decision) addressing appeals from Administrative Law Judge (ALJ) Daniel P. O'Connell's February 14, 2019, Supplemental Rulings on Proposed Issues for Adjudication (Supplemental Rulings). The Third Interim Decision discusses the procedural history of the above captioned matter, which will not be repeated here.

In the Third Interim Decision, the Siting Board directed ALJ O'Connell to schedule discovery and prefiled direct testimony on the issues joined by the ALJ and Siting Board. On October 10, 2019, ALJ O'Connell issued a scheduling order directing the parties to submit prefiled direct testimony and exhibits related to the issues identified in the Siting Board's Third Interim Decision. Amy Witryol submitted prefiled direct testimony and associated exhibits from Patrick J. Whalen, Ronald J. Rubino, Nicolas O. Rockler, Ph.D., and Timothy Masters. The Residents for Responsible Government, Inc. (RRG), the Lewiston-Porter Central School District, and the Niagara County Farm Bureau jointly submitted prefiled direct testimony and associated exhibits from Jim Bittner, Kent D. Messer, Ph.D., and Kenneth Acks. CWM submitted prefiled direct testimony and associated exhibits from Jonathon Rizzo, and jointly from James Berlow and Michael N'dolo, as CWM's public interest panel.

Thereafter, Ms. Witryol and CWM moved to strike the prefiled testimony, in whole or part, of each other's witnesses. Those motions were followed by replies from the parties, and sur-replies from CWM and Ms. Witryol, as authorized by the ALJ. Ms. Witryol moved to strike the prefiled direct testimony and exhibits of CWM witnesses James Berlow and Michael N'dolo. CWM moved to strike the prefiled direct testimony and exhibits of Patrick J. Whalen, Jim Bittner, Kent D. Messer, Ph.D., and Ronald J. Rubino. On February 3, 2021, ALJ O'Connell

issued his Rulings on Motions to Strike Prefiled Direct Testimony (Rulings on Motions to Strike). ALJ O'Connell denied Ms. Wityol's motion, and granted, in part, CWM's motion to strike the testimony of Patrick J. Whalen, and granted CWM's motion to strike the testimony of Kent D. Messer, Ph.D. and a portion of the testimony of Ronald J. Rubino. The ALJ denied CWM's motion to strike the testimony of Jim Bittner. The ALJ also, sua sponte, struck portions of the testimony of Nicholas O. Rockler, Ph.D. that relied upon or referenced testimony that the ALJ had stricken or testimony on tourism that is outside the scope of the issues joined by the Siting Board, as well as exhibits referenced in the stricken Rockler testimony. (*See CWM Chemical Services, LLC, Rulings on Motions to Strike, February 3, 2021, at 10, 12-13, 16-19.*) The ALJ also denied Ms. Witryol's motion for summary judgment (*id.* at 21).

By motion dated February 16, 2021, Amy Witryol moved for permission to file an expedited appeal from ALJ O'Connell's Rulings on Motions to Strike. Ms. Witryol submitted her appeal with the motion. The Siting Board granted Ms. Witryol's motion and accepted her appeal as filed. (*See CWM Chemical Services, LLC, Ruling of the Facility Siting Board, March 18, 2021.*)

On appeal, Ms. Witryol argues that the ALJ erred in his Rulings on Motions to Strike because: (1) CWM's testimony regarding capacity assurance should be stricken, (2) Ms. Witryol is entitled to summary judgment as a matter of law, (3) CWM's testimony should be stricken because it is not significant, (4) the N'dolo testimony and associated reports should have been stricken and the ruling requires her to identify through cross-examination those portions of the N'dolo testimony that relate solely to RMU-2, (5) the testimonies of witnesses Whalen, Rubino and Rockler related to tourism should not have been stricken, and (6) the exclusion of issues identified by the Tuscarora Nation and Buffalo Niagara Waterkeeper (Waterkeeper) is

prejudicial.

CWM opposes Ms. Witryol's appeal citing in general that Ms. Witryol's motion to strike testimony was based on vague, subjective, and factually and legally erroneous contentions that the testimony was not relevant and failed to state a cognizable basis for striking testimony. CWM also argues that the ALJ correctly denied Ms. Witryol's motion for summary judgment and properly struck testimony of her witnesses related to tourism. CWM asks the Siting Board to affirm the ALJ's Rulings on Motions to Strike.

The Niagara County Farm Bureau, Waterkeeper, and Niagara County, the Town and Village of Lewiston, and the Village of Youngstown (Municipalities) filed papers in support of Ms. Witryol's expedited appeal.

DISCUSSION

Capacity Assurance

On appeal, Ms. Witryol argues that any testimony regarding the issue of capacity assurance was dispensed with in the ALJ's December 22, 2015 Issues Ruling. In addition, Ms. Witryol argues that the New York State Hazardous Waste Facility Siting Plan (Siting Plan) (October 2010) and each annual update to the Siting Plan has concluded that New York State has adequate capacity for the destruction, treatment or disposal of hazardous waste generated in the State. (*See* Ms. Witryol's appeal at 2.)

In response, CWM argues that Ms. Witryol never argued in her motion to strike that consideration of any portion of the Berlow testimony was prejudicial, and therefore claims that Ms. Witryol is raising this issue for the first time on appeal. CWM also argues that Ms. Witryol's further argument that the Berlow testimony should have been struck because capacity

assurance was not included in Siting Plan criteria offered for public interest is contradicted by the Siting Plan. CWM points out that the Siting Plan does not define “otherwise necessary or in the public interest,” but the Siting Plan discusses how the demonstration can be made and further provides that the “discussion is offered for consideration, but is not intended to be definitive or limiting.” Therefore, CWM argues, the Berlow testimony related to the public interest benefits of ensuring future hazardous waste treatment and disposal capacity from RMU-2 is consistent with the Siting Plan. (*See* CWM’s opposition to appeal at 7-10.)

CWM goes on to argue that the Berlow testimony is not an attempt to reopen the Siting Plan’s determination that there is not an immediate need for additional in-state hazardous waste disposal capacity. “The absence of an immediate need for additional disposal capacity in New York does not negate the benefits of contributing to assurance of future national and state capacity.” (*Id.* at 10.) The Siting Board notes, however, that the Siting Plan does not discuss immediate need, it discusses the need for capacity as projected for twenty years. In other words, the Siting Plan discusses the need for current and future capacity and concludes that national capacity exists for at least twenty years. The Department’s annual updates have stated that the conclusions reached in the Siting Plan remain accurate.

Ms. Witryol argued in her motion to strike that the Siting Plan and its updates have demonstrated that the facility is not needed. Therefore, CWM should not be allowed to present testimony regarding capacity assurance. (*See* Ms. Witryol’s motion at 10, 12, fn 46.) In support of Ms. Witryol’s appeal, the Municipalities assert that Mr. Berlow’s testimony seeks to quantify benefits that involve the long-term need for hazardous waste disposal services in New York. Because the ALJ previously ruled that the need for new or expanded capacity is not reviewable in this proceeding, the Municipalities argue that Mr. Berlow’s testimony regarding the future

need for hazardous waste disposal capacity is irrelevant.

In his 2015 Issues Ruling, ALJ O’Connell denied CWM’s request to adjudicate whether sufficient treatment, storage and disposal facilities are available to manage the hazardous waste generated in New York. ALJ O’Connell also concluded that this proceeding is not the appropriate forum to seek review of the 2010 Siting Plan, and that the authority to make a determination on capacity rests with the Department, not the Siting Board. The ALJ concluded that the Siting Board lacks the authority to substitute its judgment with respect to the 2010 Siting Plan developed and adopted by the Department from a Statewide perspective. “In sum, the conclusions in the 2010 Siting Plan concerning the need for new or expanded hazardous waste TSD facilities are not reviewable in this proceeding. Moreover, CWM has not stated that its offer of proof with respect to need is relevant to any other determinations that the Siting Board is required to make pursuant to ECL 27-1105(3)(f). Therefore, CWM has not raised an issue for adjudication (*see* 6 NYCRR 624.4[c][1][i], [ii]).” (*See CWM Chemical Services, LLC*, Issues Ruling, December 22, 2015, at 34 [emphasis added]).

The Siting Board agrees. The ALJ determined in 2015 that CWM did not offer proof that need (capacity assurance) was relevant to a determination whether the facility is otherwise necessary or in the public interest. CWM did not appeal from the ALJ’s 2015 Issues Ruling. Accordingly, CWM’s attempt to offer that proof now, after failing to appeal from the 2015 Issues Ruling, is untimely and ignores the 2015 Issues Ruling of the ALJ. Mr. Berlow’s testimony discusses national capacity assurance and the benefits RMU-2 would provide for future capacity assurance, and warns of possible outcomes if RMU-2 is not added to the national capacity. Such testimony is inconsistent with the ALJ’s 2015 Issues Ruling. The Siting Board concludes that the Berlow testimony on national capacity assurance addresses speculative dire

consequences if RMU-2 is not approved and the United States Environmental Protection Agency determines at an unknown time in the future that national capacity does not exist. Because RMU-2 can help assure that those dire consequences do not befall the State and the nation, Mr. Berlow concludes that the construction of RMU-2 will have a significant benefit to the public interest. As stated above, that testimony is an untimely attempt to raise an issue that has not been joined for adjudication.

For the reasons stated above, the Siting Board concludes that testimony regarding the public benefits of assuring future national capacity will not be considered in this proceeding. Accordingly, the ALJ's Rulings on Motions to Strike regarding the Berlow testimony is modified as follows and otherwise affirmed.

Upon review, the Siting Board strikes the following from the Berlow testimony: page 18, lines 3, 4, and 5; page 18, line 19 through page 20, line 24. In addition, the Siting Board strikes the following from the report prepared by Mr. Berlow entitled, *Public Interest Benefits of Construction and Operation of Residuals Management Unit 2 at the Model City Facility in Niagara County, New York*: page 5, starting with section III and its heading to page 10, section IV.

Tourism

Ms. Witryol argues that the Siting Board overlooked an error in the ALJ's ruling on tourism that prejudices her ability to present testimony on tourism. The ALJ joined the issue of second home purchases as a measure of tourism because it was within the scope of whether CWM's proposal would have any effects on property values and tax receipts in the community. The ALJ further concluded that Ms. Witryol's offer of a report created by Tourism Economics

(Tourism Economics' report)¹ failed to meet her burden of persuasion with respect to any other topics related to tourism (*citing* 6 NYCRR 624.4[c][4]). The ALJ stated clearly, "other aspects of any proposed tourism issue will not be adjudicated." (*See CWM Chemical Services, LLC, Issues Ruling [Issues Ruling]*, December 22, 2015, at 85). In summary, the ALJ expressly stated that the following issues were joined for adjudication:

- “• Whether CWM’s proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts. A relevant subtopic of this substantive and significant issue is whether CWM’s proposal would have any effect on second home purchases as a measure of tourism spending.
- “• The scope of the property value and tax receipts issue should include information about whether the potential impacts associated with CWM’s proposal can be isolated from the potential impacts associated with other facilities.
- “• What are the potential effects of CWM’s proposal on attracting other economic development projects to the Towns of Porter and Lewiston? Relevant subtopics of this substantive and significant issue are:
 - “o Where other economic development projects could be located in the Towns of Porter and Lewiston; and
 - “o Whether the potential impacts associated with CWM’s proposal on economic development projects can be isolated from any potential effects associated with other facilities.
- “• Whether CWM’s proposal would impact the marketability of agricultural products raised on farms located in the vicinity of the site of the Model City facility.” (*See id.* at 92.)

The Siting Board considered appeals from the 2015 Issues Ruling and, in reviewing the ALJ’s Issues Ruling, the petitions and appeals from the parties, understood that any proposed issue related to impacts on tourism was limited to impacts on second home purchases as a

¹ Tourism Economics is an Oxford Economics company based in Oxford, England. The report prepared for New York State Empire State Development, is titled “The Economic Impact of Tourism in New York” and included a section entitled “Greater Niagara Focus”, which provided an analysis of the economic impact of tourism on the counties of Erie, Niagara, Orleans, Wyoming and Genesee.

measure of tourism spending. It was also clear from the record that Ms. Witryol failed to identify a witness that relied upon or would testify about the contents of the Tourism Economics' report, therefore failing to meet her burden of persuasion, as the ALJ concluded. The Siting Board considered Ms. Witryol's appeal from the issues ruling and affirmed the ALJ's ruling stating that "the record will not be further developed on those issues." (*See CWM Chemical Services, LLC*, Interim Decision of the Facility Siting Board, August 16, 2016, at 19.)

During the second issues conference convened on July 10, 2018, Ms. Witryol identified Patrick Whalen, President, Niagara Global Tourism Institute, as a new witness who would testify about a report titled, *Niagara Falls Prospect Survey*, dated December 2015 (also referred to as the *Love Canal Survey*). In the Supplemental Rulings, ALJ O'Connell stated, "Mr. Whalen may testify about the December 2015 report as it relates to whether CWM's proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts, as well as the related subtopic concerning potential effects on second home purchases as a measure of tourism spending. (Tr. at 134-135; *see* December 2015 ruling at 82-85, 92.)" (*See Matter of CWM Chemical Services, LLC*, Supplemental Rulings, February 14, 2019, at 25.)

In her supplemental petition and during the second issues conference, Ms. Witryol sought to expand the scope of the tourism issue to include potential effects on tourism in addition to second home purchases. Ms. Witryol's supplemental petition presented an updated Tourism Economics' report and offered Mr. Rockler to testify about the report's findings. The ALJ denied Ms. Witryol's request to expand the scope of the tourism issue, stating that portion of Ms. Witryol's motion did not meet the applicable criteria at 6 NYCRR 624.5(c)(2) for late filed petitions. (*See Matter of CWM Chemical Services, LLC*, Supplemental Rulings, at 25-26.) In other words, Ms. Witryol needed to demonstrate why she could not have offered a witness that

relied, in part, upon the Tourism Economics' report and would testify about the report's conclusions in 2015, but failed to do so. The fact that the report may be updated annually has no bearing on this issue.

In its Ruling and Third Interim Decision, the Siting Board quoted and cited the ALJ's ruling regarding the tourism issue and, in conclusion, affirmed the Supplemental Rulings. The Siting Board expressly agreed with the ALJ that issues already joined for adjudication will not be expanded. (*See Matter of CWM Chemical Services, LLC*, Third Interim Decision, at 15.) The Siting Board understood then that the ALJ expressly allowed the *Niagara Falls Prospect Survey* to be used in this proceeding and that Mr. Whalen would be allowed to testify regarding that survey. The Siting Board further understood that the testimony would be limited to whether CWM's proposal would have any effect on property values in the community, and upon the municipal and school property tax receipts, as well as impacts on second home purchases as a measure of tourism spending. The Siting Board also understood that Ms. Witryol failed to meet her burden of persuasion on her proposed expanded tourism issue in 2015, that she did not satisfy the criteria for late filed petitions in her supplemental petition regarding the Tourism Economics' report, and that the ALJ determined that the introduction of the *Niagara Falls Prospect Survey* and Whalen testimony could not be used to expand the issues that were previously joined. The Siting Board affirmed the ALJ's determination.

Waterkeeper argues that the Siting Board should consider all the timely available information as a matter of public interest including the *Love Canal Survey* and tourism considerations. The Municipalities similarly argue that to the extent that "the Siting Board relies on an error in the ALJ's determination of timeliness for offering the *Love Canal Survey*, an appeal regarding the scope of the issue of impacts of RMU-2 on tourism is warranted." The Municipalities

also argue that the ALJ ruled that the *Love Canal Survey* should not be considered because it could have been offered earlier in the proceeding. (See Municipalities Reply to Witryol Expedited Appeal, at 6-7.)

The arguments of Waterkeeper and the Municipalities contradict the findings and conclusions of the Supplemental Rulings and Third Interim Decision that Mr. Whalen will be allowed to testify regarding the *Niagara Falls Prospect Survey* and how the survey relates to the issues previously joined. Ms. Witryol's attempt to isolate language of the Third Interim Decision to support her current argument is unpersuasive. Ms. Witryol's attempt to expand this issue was previously rejected by the ALJ and the Siting Board in 2015, 2016 and 2019. Ms. Witryol provides no basis for revisiting those determinations now. Accordingly, the ALJ's ruling is affirmed.

Remaining Issues on Appeal

The Siting Board has considered Ms. Witryol's remaining arguments on her appeal from the ALJ's Rulings on Motions to Strike Prefiled Testimony and concludes they are without merit. Accordingly, except as modified above, the ALJ's ruling is affirmed.

CONCLUSION

That portion of the Rulings on Motions to Strike regarding the prefiled direct testimony of James R. Berlow related to capacity assurance is modified as discussed above, and the ALJ's Rulings on Motions to Strike is otherwise affirmed.

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 February 3, 2021 Rulings on Motions to Strike Prefiled Direct Testimony

Appeal

- Appeal of Amy Witryol, filed February 16, 2021

Replies

- Niagara County Farm Bureau, letter in support of motion and appeal of Amy Witryol, dated February 20, 2021
- CWM Chemical Services, LLC, opposition to appeal of Amy Witryol, dated March 23, 2021
- Buffalo Niagara Waterkeeper, reply in support of appeal of Amy Witryol, filed March 28, 2021
- Niagara County, the Town and Village of Lewiston, and the Village of Youngstown, reply to Witryol expedited appeal, dated March 29, 2021