

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of a Request for a
Declaratory Ruling by

NIAGARA RECYCLING, INC.

Under Section 204 of the State
Administrative Procedure Act

DECLARATORY
RULING

24-05

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Niagara Recycling, Inc., by its attorneys, Duke, Holzman, Yaeger and Radlin, have requested pursuant to 6 NYCRR §619 a determination as to the applicability of the Freshwater Wetlands Act [Article 24 of the Environmental Conservation Law ("ECL")], to a certain parcel they own which is partly in the City of Niagara Falls and partly in the Town of Niagara, Niagara County.

The Freshwater Wetlands Act has a "grandfathering" section of ECL §24-1305, which provides in relevant part:

The provisions of this article shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to the effective date of this article from the local governmental authority or authorities having jurisdiction over such land use. As used in this section, the term "final approval" shall mean:

* * * * *

(b) in the case of a site plan not involved in the subdivision of land, approval by the appropriate body or office of a city village or town of the site plan....

The wetland in question is approximately 16 acres of emergent marsh and wooded swamp located in the Town of Niagara.

The petitioner submitted a series of approvals and permits for its operation which began before the effective date of the Freshwater Wetlands Act in 1975.

On June 2, 1972, the Town Board of the Town of Niagara granted permission to Niagara Recycling, Inc.:

"Motion made by Justice Zygmont that permission be granted to Niagara Recycling, Inc. as per request and subject to the Town Attorney's review. Supervisor Rivers said that Mr. Boniello is going to write the request with a ten year regulation and if the Town feels that they are not living up to the agreement as far as recycling, they must come back for a rehearing. Justice Timko asked to include in the motion that 56th Street should be used as the entrance and exit. Justice Timko seconded the motion. Ayes: Zygmont, Janese, Sembert, Timko, Rivers. No's: none. Motion carried."

Niagara Recycling, Inc. also submitted a copy of the June 16, 1972, permit from the Town of Niagara to operate a refuse disposal area. In this permit, after a general description of the property for which the permit is sought, there is a condition with an explicit scope limitation:

"That the height and area used or to be used shall not be extended or enlarged of its present operation; and the use hereafter shall be continued only to the extent as such use now exists."

The map attached to the permit clearly shows the wetland at issue here was not part of the area of "present operation" in 1972. Therefore, the permit from the town did not cover the wetland.

Petitioner has also submitted documents to show that on November 20, 1972, the Niagara County Health Department granted Niagara Recycling a thirteen month permit for the period from December 1, 1972, to December 31, 1973. Although the NCHD permit arguably contemplated use of the wetland, that permit expired. Prior to the termination date, the Legislature moved the regulation of sanitary landfills to this Department as of September 1, 1973. ECL Article 27. It was 1979 before this Department issued a permit to petitioner.

Niagara Recycling operates today pursuant to a permit from the Department's Division of Solid Waste which has a condition that Niagara Recycling must get a freshwater wetlands permit in order to operate in the wetland. In any event, and regardless of the applicability of the Freshwater Wetlands Act to this parcel, petitioner must still secure a permit pursuant to the new regulations for solid waste management facilities which became effective May 5, 1981, 6 NYCRR Part 360, especially §360.8(a)(1) and (3), and (b)(1)(i).

However, approval from this Department is irrelevant as to grandfathering : the grandfathering section of Article 24 is only concerned with local governmental approval by the city, village or town. §24-1305(6). Also irrelevant is the continuing litigation between the petitioner and the Town of Niagara because no subsequent events have enlarged the scope of the relevant permit. See Town of Niagara v. Niagara Recycling, Inc. (Sup. Ct. Niagara Co. May 20, 1981); Niagara Recycling Co. v. Town Board of the Town of Niagara, 437 N.Y.S. 2d 560 (Sup. Ct. Erie Co. 1981).

In light of the limitations in the local permit which Niagara received, it does need a freshwater wetlands permit to operate a refuse disposal area on the parcel in question.

/s/

Richard A. Persico
General Counsel/Deputy Commissioner

Dated August 11, 1981

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