

RAP - 2000



Robert F. Flacke
Commissioner

New York State Department of Environmental Conservation
10 Wolf Road, Albany, New York 12233 -0001

April 30, 1982

Sidney L. Manes, Esq.
Crystal, Manes and Rifken, P.C.
507 East Fayette Street
Syracuse, NY 13202

Re: Declaratory Ruling -27-08
In the Matter of
HAZ-O-WASTE CORPORATION,
CANAL ROAD, WAMPSVILLE,
NEW YORK 13163

Dear Mr. Manes:

This letter will serve as a declaratory ruling pursuant to your request dated March 11, 1982. Due to certain ambiguities in the petition we will now restate the questions posed as we understand them:

1. Is the action of the Department on the Haz-O-Waste Part 360 permit application excluded (grandfathered) from the requirements of the State Environmental Quality Review Act (SEQR)?
2. Does the Haz-O-Waste facility located at Wampsville, New York require the issuance of a certificate of environmental safety and public necessity from an industrial hazardous waste siting board?
3. Is Haz-O-Waste entitled to a variance from 6NYCRR 360.1(e)(1)(2)(ii) which requires certification by a professional engineer of all plans and specifications submitted to the Department for approval?
4. What are the rights of Haz-O-Waste under existing consent orders to transport waste cyanides?

These questions will now be dealt with sequentially.

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Question No. 1

Petitioner maintains that the provisions of Article 8 of the ECL (SEQR) are not applicable because of the grandfathering provisions in §§8-0117.3 and/or 8-0117.4.

For reasons more fully stated below, the provisions of Article 8 of the ECL regarding environmental review are applicable to any applications for permits submitted by Haz-O-Waste.

The legislature adopted several clarifying amendments to the law in Chapter 252, Laws of 1977, as further amended by Chapter 460, Laws of 1978. These amendments specify that the grandfathering provisions of §§8-0117.3 and 8-0117.4 are operable only when a project has received "all final approvals." Although a consent order is a departmental approval, it does not constitute "all final approvals" within the meaning of the statutory language.

The series of consent orders issued to Haz-O-Waste taken collectively, contemplate further departmental approvals (i.e. issuance of Part 360 and Part 364 permits). Further, the language of the clarifying amendments contemplate regulatory approvals. Consent orders invoke the enforcement powers of the Department rather than its regulatory jurisdiction.

Consent orders are issued where permitting standards are not immediately achievable. Facilities that are placed on compliance schedules through operation of a consent order cannot be considered to have achieved "all final approvals" until all required permits have been granted.

Any result other than that stated above would effectively create a benefit for those who have successfully avoided complying with permit requirements.

Question No. 2

Proposed facilities that will be "located at the site of an existing [industrial hazardous waste] facility and [whose] operation is substantially similar to the existing facility with respect to the mode of waste management and the type and quantity of hazardous waste being managed" are exempt from the requirements of Part 361 (361.1(f)(2)).

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In the matter under consideration, the proposed facility has been in existence since 1973; however, it has not been operated pursuant to a Part 360 permit. Modifications to the facility are intended to bring the existing operation into full compliance with Part 360 but will not substantially expand the scope of the activities being conducted. Although the Department will not extend the benefits of 361.1(f)(2) to a facility that was operating without authority, i.e. illegally, such is not the case in this instance. The Haz-O-Waste operation has been conducted since 1978 pursuant to consent order. The consent order authorizes a continuing operation until the facility is upgraded to meet permitting standards. Therefore, the Haz-O-Waste operation must be considered to be an existing facility within the meaning of 361.1(f)(2), and the modifications to such facility do not substantially modify the existing operation. Therefore, I conclude that the provisions of 6NYCRR Part 361 are not applicable to Haz-O-Waste Corporation and no certificate of environmental safety and public necessity is required.

Question No. 3

No person is entitled to a variance as of right. The determining factors concerning the issuance of a variance as set forth in 360.1(g) are as follows:

" (ii) demonstrate that compliance with the identified provisions would, on the basis of conditions unique and peculiar to the applicant's particular situation, tend to impose a substantial financial, technological, or safety burden on the applicant or the public; and

(iii) demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or welfare, the environment, or natural resources and will be consistent with the provisions of the ECL, those provisions of RCRA and its implementing regulations that the Department has received authorization to administer, the purpose of these rules and regulations and the performance expected from applications of these rules and regulations."

An adequate showing to justify the granting of a variance is an issue of fact and therefore is not an appropriate subject for a declaratory ruling.

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Further, it should be noted that Education Law §7209.1 requires that:

"No official of this state, or of any city, county, town or village therein, charged with the enforcement of laws, ordinances or regulations shall accept or approve any plans or specifications that are not stamped:

a. With the seal of an architect or professional engineer or land surveyor licensed in this state and bearing the authorized facsimile of the signature of such architect or professional engineer or land surveyor, or

b. With the official seal and authorized facsimile of the signature of a professional engineer or land surveyor not a resident of this state and having no established business in this state, but who is legally qualified to practice as such in his own state or country, provided that such person may lawfully practice as such in this state, and provided further that the plans or specifications are accompanied by and have attached thereto written authorization issued by the department certifying to such right to practice at such time."

Therefore, we must conclude that the provision in Part 360 which requires that the submittal of plans and specification be stamped by a professional engineer licensed to do business in New York, is a statutory one which derives from the above quoted provision of the Education Law. The Department is without authority to vary the explicit requirements of a statute - therefore, we conclude that petitioner, as a matter of law, is not entitled to a variance from 360.3(c)(2).

Question No. 4

As stated above, the Department understands the fourth question posed to ask for a declaration of rights under a series of consent orders issued to Haz-O-Waste to transport waste cyanides.

Consistent with the State Administrative Procedure Act and 6NYCRR Part 619, the General Counsel's office of the Department of Environmental Conservation issues declaratory

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rulings involving only interpretation of laws, rules and regulation administered by the Department. This process is not intended as a mechanism for appellate review of departmental orders. It is improper within the context of a declaratory ruling to interpret an operative consent order of the Department. Points of ambiguity should be resolved through negotiation with the appropriate unit of the DEC administering the enforcement order (in this case Region 7) or failing that, petitioner must pursue its remedies in a court of law. Any violation of the terms of the consent order, as interpreted by Region 7, will be considered actionable conduct.

Petitioner is urged to pursue procurement of a Part 364 waste hauler permit which will provide explicit and definitive operating authority. Adequate remedies exist within the context of uniform procedures permitting process to satisfy petitioner's concerns on this matter.

Sincerely,



Richard A. Persico
General Counsel/
Deputy Commissioner

RHF/tc

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