

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

TAG AGRI DEVELOPMENT (USA) LTD.

Declaratory  
Ruling 27-19

For a Declaratory Ruling pursuant to  
Section 204 of the State Administrative  
Procedure Act  
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TAG AGRI Development (USA) Ltd. (Petitioner), by its attorneys, Fitzpatrick, Trombley, Owens & Lahtinen, P.C., has petitioned for a Declaratory Ruling, pursuant to Section 204 of the State Administrative Procedure Act and this Department's regulations at Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), on the issue of whether wastes generated at its facility in the Town of Beekmantown, New York are wastes generated on a farm within the meaning of 6 NYCRR 360.1(f)(1)(i) and are thus exempt from the requirement of a solid waste management facility permit.

It is in the public interest to grant the instant Petition and issue a Declaratory Ruling to inform Petitioner and the general public of the Department's construction of the above-cited provision of the Department's regulations.

FACTS

The following facts are based solely on Petitioner's representations in its Petition and are assumed solely for the purposes of this Ruling.

Petitioner leases 105 acres from the Clinton County Industrial Development Agency in the Town of Beekmantown, Clinton County, New York on which is located a building housing a hydroponic endive maturation and marketing operation. The endive roots, grown elsewhere and brought to the facility, are cut to a proper size for placement in growing trays. The trays are then moved to the building's cool, dark growing areas where a nutrient-rich water solution bathes the roots for 21 to 23 days. The endives, once they have attained the desired quality and growth, are picked from the maturing areas, and the roots are separated from the leafy portions which are then packed at the facility and shipped to markets.

Petitioner also intends to import cattle from France for use as breeding stock. The cattle will be kept in barns already on Petitioner's property and will graze on Petitioner's hay fields at that location.

Petitioner is a member of the New York Farm Bureau, is an agricultural producer for Federal withholding and New York State sales tax purposes, and has a United States Department of Agriculture reference number.

Petitioner applied for and, on May 18, 1984, received a permit under Part 360 of the Department's regulations [6 NYCRR Part 360]. Under the terms of the permit and the regulations [6 NYCRR 360.8(b)(3)(i)(d)], the used nutrient solution is disposed of on the property surrounding the building itself, except when there is frozen or snow-covered ground or

periods of rain. During such periods, Petitioner transports the used nutrient solution to the Plattsburgh Water Pollution Control Plant for disposal. In a letter (Exhibit L) dated January 4, 1984, the Department informed Petitioner that disposal of surplus endive roots and leaves is exempt from regulation under Part 360 since those wastes are generated by a farming operation and disposal takes place on-site.

#### DISCUSSION

It is uncontroverted that the roots, leaves and used nutrient solution are solid waste for purposes of regulation under Part 360 since they are waste materials [6 NYCRR 360.1(c)(1)] and are not among the excluded materials. The used nutrient solution is, as indicated in the analysis submitted by Petitioner as part of its "Application for Variance from 6 NYCRR 360" dated March 20, 1984,<sup>1</sup> highly concentrated and, since it has a pH of three standard units, is more acidic than "acid rain". It is not excluded as "irrigation return flow" [see 6 NYCRR 360.1(c)(6)(iii)] because irrigated agriculture is not involved herein. Instead, the hydroponic operation matures the endives in a solution (which applies all the water and nutrients) in the absence of soil and the used nutrient solution is more

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<sup>1</sup> The Department has treated the analysis as confidential pursuant to Petitioner's request.

concentrated than typical irrigation water (which is the addition of moisture to supplement precipitation). In fact, the solution consists of chemicals which, if discharged to groundwater, have the potential of contravening State groundwater standards set forth in the Department's regulations at 6 NYCRR Part 703.

Part 360 regulates "solid waste management facilities" other than hazardous waste management facilities that are subject to Part 373 of the Department's regulations. See 6 NYCRR 360.1(a). A "solid waste management facility" is defined as "any facility employed beyond the initial solid waste collection process including but not limited to...landspreading facilities...."

6 NYCRR 360.1(d)(69). Petitioner's property is a solid waste management facility since the land surrounding the building where the maturation and marketing operation is taking place serves as the disposal site for the solid waste generated by the facility.

However, not all solid waste management facilities are regulated under Part 360. The list of exempt facilities is set forth in subdivision 360.1(f). One such exempt facility category consists of the following:

Disposal areas for solid waste generated from a ... farm are exempt when such wastes are generated and disposed of within the property boundaries of such ... farm, or used in normal farming operation.

6 NYCRR 360.1(f)(1)(i). To fit within this exemption, then, the solid waste must have been "generated" from a "farm" within the meaning of subparagraph 360.1(f)(1)(i) and, if it were, it must

either be disposed of on that farm or used in normal farm operations. The basic issue in this Ruling, then, is whether the Petitioner's hydroponic growing, packaging and shipping activities within the building and its disposal activities on the land fit within this farming waste exemption.

The conditional exemption for solid waste "generated" from a "farm" contemplates only such traditional farming activities (for the beneficial purposes of fertilizing the soil or serving as soil conditioners in normal farming operations) as the landspreading of manures generated by animals on a farm and the plowing under of the crop residues from the harvesting of plants grown in the farm's soil to feed its animals or to be sold commercially. Indeed the term "farm", when used as a noun, commonly connotes the use of land for agricultural purposes or a tract of land devoted to raising domestic animals. See Webster's Ninth New Collegiate Dictionary, p. 449 (1985).

Petitioner's facility arguably satisfies the meaning of a "farm" set forth in Tax Law §703(i) and Labor Law §511(6)(b).<sup>2</sup> Endives are "farm products" as defined in Agricultural and Markets Law §2(5).

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<sup>2</sup> However, the County of Clinton Industrial Development Agency owns the land and provides assistance to Petitioner. The purposes of such agencies are primarily for commercial and industrial, not agricultural, projects. See General Municipal Law Sections 895-f and 854(4).

The classification of Petitioner's facility as a "farm" for tax and other purposes, however, is not binding upon the Department in construing the so-called "farming exemption". When making this determination, the Department must be mindful of its mandate to regulate the operation of solid waste management facilities in such a manner as to prevent or reduce conditions inimical to the public health, safety, and welfare [see ECL 27-0703.1]. Because the regulatory scheme is remedial in nature, its provisions must be liberally construed. McKinney's Statutes §321. In addition, any regulatory exemption from regulation under Part 360 should be narrowly construed. See McKinney's Statutes §213; cf. id. at §95.

The Department has consistently treated Petitioner not as a "farm" but as a commercial food processing facility and the surrounding land as a landspreading facility. The permit (Exhibit A) issued on May 18, 1984, properly describes the project as "operation of liquid nutrient solution landspreading facility from endive forcing plant". A year later, on June 24, 1985, the Department reaffirmed this position in a letter to Petitioner (Exhibit B) which states:

your facility cannot be considered a 'farm' since the hydroponic facility is independent of the 'farm' land. Your facility is completely enclosed in a building and all product inputs (growth solution and endive plants) are imported to the facility. The function of the surrounding property is as a waste disposal site.

Because the hydroponic operation to mature endives is not a traditional farming activity, neither the used nutrient solution nor the discarded leaves and roots are wastes generated on a farm. As a commercial food processing facility, a Part 360 permit is required.

Notwithstanding the Department's determination that the facility constituted a commercial processing facility and not a farm, Department staff bifurcated the wastes generated at the facility into those resulting from food processing and those resulting from farming. A guidance document interpreting the regulation in question. [Division of Solid and Hazardous Waste Policy SW-83-17 dated January 1, 1983; now SHW-85-16, dated January 1, 1985] exempts from regulation under Part 360 the disposal of wastes from food processors consisting of parts of plants processed (as here, the endive plant roots and leaves) if they are used as a fertilizer or soil conditioner in traditional farming operations under best agricultural management practices. The landspreading of other food processing wastes, such as sludges or residues resulting from the physical, chemical or biological processing of plants or vegetables, and which are not a recognizable portion of the plant or vegetable (such as sauerkraut brine, wastewater treatment sludge, or cooking residues), is subject to a Part 360 permit.

It is with this guidance document in mind that the Department's January 4, 1984, letter was written to Petitioner, informing it that the part of its operations consisting of

on-site disposal of surplus endive roots and leaves is conditionally exempt from regulation under Part 360 as waste generated by a farming operation. That letter did not address the issue of the nutrient solution. This led to a situation where the letter addressed and exempted only the roots and leaves, without addressing the nutrient solution; and the permit addressed only the nutrient solution, without addressing the roots and leaves. Under the current regulation, 6 NYCRR 360.1(f)(1)(i), as applied to these circumstances, this interpretation is incorrect since the conditional exemption is applicable only to wastes which are generated by a farm.

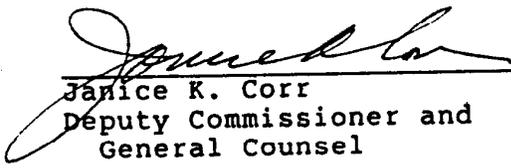
The disposal of all wastes generated by food processing facilities -- as Petitioner's -- are regulated under Part 360, whether or not some of the wastes disposed of are akin to farm crop wastes. Hence, this guidance document, insofar as it allows segmentation of entire facilities into component parts rather than treating them as whole, is inconsistent with the existing regulatory scheme. Because the disposal of organic residues is highly unlikely to result in conditions inimical to the public health, safety or welfare, or to environmental degradation, those wastes may be exempted from the regulatory requirements of 6 NYCRR Part 360. See L.1973, C.399, §1. Consequently, Department staff is hereby requested to undertake rulemaking to exempt specified types of wastes from regulation, regardless of their origin.

Until these regulatory changes occur, Petitioner is required under this Declaratory Ruling to obtain a Part 360 permit to dispose of all the wastes from the hydroponic operation, including the endive roots and leaves. However, the substantive requirements pertaining to disposal of roots and leaves should be minimal given that Petitioner already holds a Part 360 permit for disposal of the used nutrient solution.

CONCLUSION

Neither the roots and leaves nor the used nutrient solution discarded during Petitioner's food processing operations are solid wastes generated from a "farm" within the meaning of subparagraph 360.1(f)(1)(i) of the Department's regulations. Accordingly, Petitioner must have a permit under 6 NYCRR Part 360 to dispose of those roots and leaves and to landspread the used nutrient solution that is generated in its food processing operation.

DATED: ALBANY, NEW YORK  
August 12, 1987

  
Janice K. Corr  
Deputy Commissioner and  
General Counsel