

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of

PETER HENNER, ESQ.

DECLARATORY RULING
DEC 27-31

for a Declaratory Ruling

Introduction

Peter Henner, an attorney representing a group of citizens, has petitioned for a Declaratory Ruling pursuant to Section 204 of the State Administrative Procedure Act (SAPA) and Part 619 of Title 6 of the New York Codes, Rules, and Regulations (NYCRR) on the following questions:

- (1) When is coal combustion ash deemed to be “placed in commerce” for the purposes of not being considered a solid waste under 6 NYCRR Part 360?;
- (2) If coal combustion ash is exempt from regulation under Part 360 under its beneficial use regulations, is the transportation of such ash subject to 6 NYCRR Part 364?; and
- (3) If coal combustion ash is to be “placed in commerce” for the purposes described in 6 NYCRR §360-1.15(b)(15) and (16), what authority, if any, does the Department have to regulate the transportation, treatment, and storage of the ash prior to its ultimate use as a product?

The petition raises appreciable questions regarding the Department’s beneficial use determinations for coal combustion ash and the protections such determinations afford the public health and welfare and the environment. Accordingly, it is in the public interest to grant the instant petition and issue a declaratory ruling so to inform petitioner and the general public of the meaning of the “placed in commerce” phrase used in the beneficial use determination program and of the Department’s regulatory authority over the coal combustion ash.

Background

For the purposes of this declaratory ruling, the Department assumes that the facts set forth in petitioner's petition are true. According to petitioner, Callanan Industries is storing coal combustion ash at a facility that it owns at the Howe Caverns Quarry in Cobleskill, New York. The Department, through its Region 4 office, has informed petitioner that the transportation and storage of coal combustion ash in the manner performed by Callanan Industries in the given instance, is governed by a beneficial use determination (6 NYCRR §§360-1.15(b)), and is thereby exempt from the permitting requirements of 6 NYCRR Parts 360 and 364 as a commodity or material. Through separate correspondence, the Department also informed Callanan Industries of same, in addition to the applicability of air permitting exemptions to the storage silos. The Department has agreed to conduct an initial inspection of the storage silos and to further conduct routine inspections of the emission control devices installed in the silos. Routine inspections are not specifically required under Part 201, but have been offered by the Department as an additional level of control with respect to the storage and handling of the ash at the facility. Petitioner alleges that the ash remains a solid waste subject to Parts 360 and 364 until such time that it is used in the manufacture of concrete, aggregate, or other useful products. Petitioner further alleges that any release of the ash into the environment could cause significant air and water pollution because of the environmentally sensitive nature of the storage site.

Applicable Law

The Environmental Conservation Law (ECL) prohibits any person from operating, including site preparation and construction, a new solid waste management facility without first obtaining a permit. See, ECL §27-0707(1); 6 NYCRR Part 360. The term "solid waste" means "all putrescible and non-putrescible materials or substances discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection . . . including but not limited to garbage, refuse, industrial and commercial waste, sludge from air or water control facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris, discarded automobiles and offal." See, ECL §27-0701(1); See also, 6 NYCRR §360-1.2 (providing a more detailed description of when a material is a solid waste). The Department's beneficial use determination (BUD) program applies to certain materials that before being beneficially used were solid waste. See, 6 NYCRR §360-1.15(a). The use of specifically identified materials in accordance with Department regulations are not considered to be solid waste for the purposes of Part 360. See, 6 NYCRR §360-1.15(b). More specifically, coal combustion fly ash that is placed in commerce to serve as an ingredient to produce light weight block, light weight aggregate, low strength backfill material, manufactured gypsum or manufactured calcium chloride is not a solid waste. See, 6 NYCRR §360-1.15(b)(15). Additionally, coal combustion fly ash or coal combustion bottom ash placed in commerce to serve as a cement or aggregated substitute in concrete or concrete products; as raw feed in the manufacture of cement; or placed in commerce to serve as structural fill within building foundations when placed above the seasonal high groundwater table is not considered a solid waste. See, 6 NYCRR §360-1.15(b)(16). It is not necessary to obtain the Department's permission to use the BUDs listed under 6 NYCRR §§360-1.15(b)(15) or (16) so long as the materials are used as described in that subdivision.

A generator of coal combustion ash must comply with special reporting requirements regarding the beneficial uses of coal combustion bottom ash and fly ash. See, 6 NYCRR §360-

1.15(c). A generator must submit an annual report to the Department that identifies the respective quantities of coal combustion bottom ash and fly ash it generated during the calendar year with respect to the amounts of such ash that were sent to manufacturers of roofing shingles or asphalt products and manufacturers of cement, concrete or concrete products and how much was used as a traction agent on roadways, parking lots and other driving surfaces or was used as structural fill. Id. With respect to coal combustion fly ash only, a generator must also report how much ash was used to produce light weight block, light weight aggregate, low strength backfill material (flowable fill), manufactured gypsum, and manufactured calcium chloride. Id.

Any person transporting a regulated waste originating and terminating at a location in this state must first obtain a permit. See, ECL §27-0305; 6 NYCRR §364. A regulated waste is a solid waste which is raw sewage, septage, sludge from a sewage or water supply treatment plant, waste oil, or industrial commercial waste. See, 6 NYCRR §364.1(d)(2); ECL §27-0301(4). The term solid waste has the same meaning for purposes of the waste transporter program as it does under Part 360. See, 6 NYCRR §§364.1(d), 360-1.2(a); ECL §§27-0303(7), 27-0701(1). Therefore, in order for a waste to be a regulated waste, thereby requiring a Part 364 permit for transport, it must first be a solid waste.

The Department has the authority to require that permits to construct and certificates to operate facilities be obtained from the Department for the purposes of controlling air contamination. See, ECL §19-0301. Air contamination means the presence in the outdoor atmosphere of one or more air contaminants which contribute or are likely to contribute to a condition of air pollution. See, ECL §19-0107(4); 6 NYCRR §200.1(e). An Air contaminant means a dust, fume, gas, mist, odor, smoke, vapor, pollen, noise, or any combination thereof. See, ECL §19-0107(2); 6 NYCRR §200.1(d).

Storage silos storing solid materials are exempt from air program permitting requirements at non-Title V facilities, provided all such silos are exhausted through an appropriate emission control device. See, 6 NYCRR §201-3.2(c)(27). The owner or operator of such a facility may be required by the Department to certify that it operates within the specific exemption criteria. See, 6 NYCRR §201-3.2(a). The Department must be granted access to the storage silos during normal operating hours for the purpose of determining compliance with the Part 201 permitting exemption and with any other state or federal air pollution control requirements, regulations, or law. Id. The owner or operator of a storage silo facility must operate and maintain the emission control devices required pursuant to 6 NYCRR §201-3.2(c)(27) in a manner consistent with good engineering practices. Failure to do so constitutes a violation of Part 201. See, 6 NYCRR §201-3.2(b).

Discussion

In regard to petitioner's first question, he asks when coal combustion ash is deemed to be placed in commerce for the purposes of not being considered a solid waste under 6 NYCRR Part 360. Coal combustion ash is not considered to be a solid waste under application of 6 NYCRR §§360-1.2(b)(15) and (16), when the material is "placed in commerce for service as" a particular commodity. The latter phrase means that the solid waste material has, where necessary, been cleaned, processed, or otherwise managed in such a fashion that the material meets the technical requirements or specifications for the intended use identified by the particular beneficial use determinations set forth in subdivision 1.15(b). See, Final Environmental Impact Statement for Revisions/Enhancements to 6 NYCRR Part 360 Solid Waste Management Facilities, (hereinafter

“FEIS”) May 1993, at pg. RS 1-30. The material becomes an inventory to the manager or owner of the former solid waste. *Id.* Based on industry standards, coal combustion ash does not require additional cleaning or processing in order to be suitable for use as a product pursuant to 6 NYCRR §§360-1.2(b)(15) and (16). *See generally, Id.* at RS 1-33 (*stating that testing done on coal combustion ash has consistently shown that toxicity of this material is not a concern when it is used in the ways allowed as beneficial use in the regulations.*) Therefore, coal combustion ash is placed in commerce when, in its natural state, it is intended to be used pursuant to 6 NYCRR §§360-1.2(b)(15) and (16).

The generator reporting requirements imposed by Part 360 allow the Department to keep track of the amounts of coal ash that are being beneficially used within the state. It is the Department’s position that materials used in accordance with 6 NYCRR §360-1.15(b) will not cause significant harm to human health and safety or the environment. *See, Id.* at RS 1-30. The beneficial use of these materials contributes to manufacturing processes within New York State and reduces the amount of waste going to our landfills. *Id.* In regard to environmental protection, however, a beneficial use material can once again become a solid waste if discarded by its manager or owner. *Id.*; *See also*, 6 NYCRR §360-1.2(a).

Looking to petitioner’s second question, he asks if the transportation of coal ash is subject to 6 NYCRR Part 364 where such ash is exempt from regulation under Part 360 through application of a beneficial use determination. Coal combustion ash that is placed in commerce as described in the preceding paragraph is not a solid waste. As a material or product that is not a solid waste, coal combustion ash is not a regulated waste under Part 364. *See*, 6 NYCRR §364.1(d)(2); ECL §27-0301(4). In determining whether a Part 364 permit will be required for a beneficial use material, the Department evaluates the potential for the handling, transportation, or storage of the material to have an adverse impact on public health, safety, or welfare or the environment. *See*, FEIS at RS 1-27. The transportation of coal combustion ash in accordance with the Department’s beneficial use provisions is not subject to Part 364 and a waste transporter permit is not required.

Lastly, petitioner asks what authority, if any, does the Department have to regulate the transportation, treatment, and storage of the ash prior to its ultimate use as a product if coal combustion ash is placed in commerce for the purposes described in 6 NYCRR §§360-1.15(b)(15) or (16). As stated above, the transportation of coal combustion ash pursuant to the beneficial use provisions of Part 360 is not subject to the waste transporter requirements of Part 364. In regard to treatment of the ash, industry standards/specifications for the uses of coal ash identified in 6 NYCRR §§360-1.15(b)(15) and (16) do not require that coal ash be pre-treated in order to be suitable for such uses¹.

¹ If coal combustion ash did, in fact, require treatment prior to being acceptable for use as a product or material pursuant to 6 NYCRR §360-1.15(b)(15) and (16), the material would continue to be regulated as a solid waste until such point that the material met the technical requirements or specifications for use as a product or material listed under the beneficial use provisions. Under such a scenario, the ash would be both a solid waste under Part 360 and a regulated waste under Part 364 until such time that the “placed in commerce” criteria could be met.

In regard to storage, the Department has the authority to regulate the storage of the ash that has been placed in commerce for the purposes described in 6 NYCRR §§360-1.15(b)(15) and (16) under two (2) situations: first, where regulatory jurisdiction is not contingent upon classification of the material as a solid waste, such as under the Department's air program, and second; where the material is discarded² by its owner or manager. Addressing the latter scenario first, any discard of the ash pursuant to 6 NYCRR §360-1.2(a) would trigger Part 360 jurisdiction of the discarded material as a solid waste. More specifically, the coal ash would again be classified as a solid waste if it was discharged, deposited, injected, dumped, spilled, leaked, or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water; burned or incinerated; or accumulated, stored, or physically, chemically, or biologically treated (other than burned or incinerated) instead of or before being disposed of. See, 6 NYCRR §§360-1.2(a)(2) and (3). As a solid waste, the Department would have the authority to regulate the discarded material under Part 360.

As stated previously, storage silos storing solid materials are exempt from air program permitting requirements at non-Title V facilities, provided all such silos are exhausted through an appropriate emission control device. See, 6 NYCRR §201-3.2(c)(27). If the storage silos were not exhausted through appropriate emission control devices or if such devices were improperly operated or maintained, the facility would be in violation of Part 201. Id. The operation of storage silos outside of such exemption criteria would trigger the Department's regulatory jurisdiction under Part 201.

Ruling

For purposes of 6 NYCRR §§360-1.15(b)(15) and (16) coal combustion ash is deemed to be placed in commerce when the solid waste has, where necessary, been cleaned, processed, or otherwise managed, so that the material meets the technical requirements or specifications for the intended use identified by the particular beneficial use determination. Coal combustion ash does not require additional cleaning or processing as it meets the technical requirements or specifications for use pursuant to the beneficial use determinations in its natural state. Therefore, coal combustion ash, in its natural state, is deemed to be placed in commerce when it is intended to be used pursuant to 6 NYCRR §§360-1.15(b)(15) and (16). The transportation of coal combustion ash pursuant to 6 NYCRR §§360-1.15(b)(15) and (16) is not subject to 6 NYCRR Part 364. The Department has the authority to regulate the storage of ash that has been placed in

commerce for the purposes described in 6 NYCRR §§360-1.15(b)(15) and (16) where regulatory jurisdiction is not contingent upon classification of the material as a solid waste and under circumstances where the material is again discarded, such that it becomes reclassified as a solid waste.

² See, 6 NYCRR §360-1.2(a). A material is discarded if it is abandoned by being disposed of; burned or incinerated; or accumulated, stored, or physically, chemically, or biologically treated (other than burned or incinerated) instead of or before being disposed of. A material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked, or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water.

