STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 and of the Environmental Conservation Law of the State of New York and Part 360 Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by:

VILLAGE OF HOOSICK FALLS

Respondent.

ORDER ON CONSENT

R4-1496-93-04

Rec'd 5/10/93

WHEREAS:

1. Section 27-0703 of the Environmental Conservation Law ("ECL") provides the Department of Environmental Conservation ("Department or DEC") the power to adopt and promulgate, amend and repeal, rules and regulations governing the operation of solid waste management facilities. Part 360 of the Official Compilation of Rules and Regulations of the State of New York ("6 NYCRR") has been adopted and promulgated pursuant to such statutory authority.

2. Part 360, effective December 31, 1988 sets forth requirements for the design, construction, operation and closure of solid waste management facilities.

3. Respondent, Village of Hoosick Falls, operated a solid waste management facility ("facility") as that term is defined in 6 NYCRR Part 360 in the Town of Hoosick, County of Rensselaer, New York which is subject to the provisions of Article 27 of the ECL and 6 NYCRR Part 360.

4. On September 20, 1991, the Supreme Court of the State of New York issued an Order requiring the Respondent to cease acceptance of waste at the facility within 90 days of service of the Order and prepare an approvable closure plan within 280 days of service of the Order. The Order was served on Respondent on January 3, 1992.

5. Respondent ceased acceptance of waste at its facility on April 3, 1993 in compliance with the Order.

6. Respondent was required to submit closure plans for the facility on or before July 3, 1992. Closure plans were submitted on October 13, 1992.

7. The Department provided comments to Respondent on the closure plans on January 14, 1993.

8. The Respondent has applied for a closure grant pursuant to the funding provided by the Department's Environmental Quality Bond Act Program.

9. Compliance with this Order on Consent is a prerequisite for eligibility for a closure grant.

10. ECL Section 71-2703 provides for a penalty of up to $2,500 for each violation of titles 3 and 7 of Article 27 of the ECL and the rules and regulations promulgated pursuant thereto and an additional penalty of up to $1,000 per day for each day that such violation continues.

11. Respondent has affirmatively waived the right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by the terms, provisions and conditions contained within this Order.

NOW, having considered this matter and being duly advised, it is ORDERED THAT:

I. Compliance with the terms and conditions of this Order is accepted in full settlement of the violations alleged in this Order. The Department shall not institute any action or proceeding for penalties or other relief for the violations described above for so long as Respondent remains in compliance with this Order. Any failure by Respondent to comply fully with the terms of this Order may subject the Respondent to further enforcement action for the violations alleged in this Order. Compliance with this Order shall not excuse nor be a defense to charges of any violations of the ECL or any regulation or permit issued under the ECL, which may occur subsequent to the date of this Order.

II. In the event that Respondent shall fail to comply with the terms of this Order, the Respondent shall be liable for stipulated penalties in the following amounts:

1-5 days of violation.....$100.00/day
5-10 days of violation.....$200.00/day
11-20 days of violation.....$300.00/day
21+ days of violation.....$500.00/day

The stipulated penalties set forth above shall be paid to the Department within 15 days of written notice of a violation from the Department.

III. Respondent shall comply with the terms of the Schedule of Compliance which is attached to and made a part of this Order.

IV. Respondent shall not be in default of compliance with this Order to the extent that Respondent may be unable to comply with any provision of this Order because of an act of God, war, strike, riot or catastrophe as to any of which the negligence or willful misconduct on the part of Respondent was not a proximate cause. Respondent shall provide notice to the Department in writing immediately upon obtaining knowledge of such event, and shall request an appropriate modification to this Order. Relief under this clause shall not be available to Respondent, with regard to a particular event, if Respondent fails to provide timely notice of such event. The Respondent shall have the burden of proving entitlement to relief under this clause.

V. (a) If, for any reason, Respondent desires that any provision of this Order be changed, Respondent shall make timely written application therefor to the Department setting forth reasonable grounds for the relief sought, together with any supporting documentation tending to establish such grounds. Such request shall be made as soon as reasonably possible after Respondent learns of the grounds for such relief. (b) No change or modification to this Order shall be made or be effective except as may be specifically set forth in writing by the Department, pursuant to the procedure set forth in subparagraph (a) above.

VI. All reports and submissions required in this Order shall be made to the Region 4 Headquarters, Attention: Regional Engineer, New York State Department of Environmental Conservation, 2176 Guilderland Avenue, Schenectady, New York 12306.

VII. For the purpose of insuring compliance with this Order, and with applicable provisions of the ECL and regulations promulgated under the ECL, representatives of this Department shall be permitted access to the facility and to relevant records during reasonable hours, in order to inspect and/or perform such tests as may be deemed appropriate to determine the status of Respondent's compliance.

VIII. The failure of Respondent to comply fully and in timely fashion with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to the Respondent by the Department.

IX. The provisions of this Order shall be deemed to bind Respondent. Respondent is responsible for ensuring that its officers, directors, agents, employees, contractors, successors and assigns, and all persons, firms and corporations acting under or for it, comply with the terms and conditions of this Order.

X. The terms of this Order shall not be construed to prohibit the Commissioner of his duly authorized representative from exercising any Summary Abatement powers, either at common law or as granted pursuant to statute or regulations.

XI. The effective date of this Order shall be the date it is signed by the Department.

DATED: Schenectady, New York
1993

THOMAS C. JORLING
Commissioner
New York State Department of
Environmental Conservation

BY:

_____
ANTHONY ADAMCZYK
Regional Director
Region 4

al/3/1/2/hoosick.wp

SCHEDULE OF COMPLIANCE

1. On or before June 1, 1993 Respondent shall submit closure plans to the Department for approval that have been revised in accordance with the Department's comments of January 14, 1993.

2. On or before September 1, 1993 Respondent shall begin waste relocation and grading of the site in accordance with the plans that have been approved pursuant to paragraph 1 of this Schedule.

3. On or before December 31, 1994, Respondent shall complete closure of the facility in accordance with the plans that have been approved pursuant to paragraph 1 of this Schedule.

4. On or before April 1, 1995, Respondent shall submit to the Department an engineering certification for the closure of the facility.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

BY: Donald E. Bogardus

TITLE: Mayor

DATE: May 27, 1993

STATE OF New York

ss:

COUNTY OF Rens.

On this 27th day of May, 1993, before me personally came Donald E. Bogardus to me known, who being by me duly sworn did depose and say that he resides in Hoosick Falls, NY, that he is Mayor of, the Corporation described in and which executed the foregoing instrument, and that he signed his name as authorized by said Corporation.

Robin Mulligan

Notary Public

ROBIN MULLIGAN
Notary Public, State of New York
Qualified in Rensselaer County
Reg. No. 4870360
Commission Expires February 28, 1995

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

THOMAS C. JORLING,
Commissioner of the Department of
Environmental Conservation of the
State of New York, and Department of
Environmental Conservation of the
State of New York,

RJI 41-1057-90

Plaintiffs,

-against-

VILLAGE OF HOOSICK FALLS, Donald Bogardus
in his capacity as Mayor of the Village of
Hoosick Falls, and BOARD OF TRUSTEES of
the VILLAGE OF HOOSICK FALLS,

Defendants.

PRESENT: HON. WILLIAM H. KENIRY, JUSTICE SUPREME COURT

APPEARANCES: ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Plaintiffs
(Maureen F. Leary, Assistant Attorney General
of counsel)
Department of Law
The Capitol
Albany, New York 12224

DRYER, BOYAJIAN & TUTTLE
Attorneys for Defendants
(James F. Tuttle, of counsel)
75 Columbia Street
Albany, New York 12210

D E C I S I O N

KENIRY, WILLIAM H., J.

This case reflects the innate conflict between the power of the State of New York to regulate and control solid waste disposal and the ability of local municipalities to comply with the mandates imposed upon them by State law and regulations. It is an issue many local governments now face as they struggle to meet deadlines to close local non-conforming landfills set by consent orders signed by the municipalities and the state Department of Environmental Conservation (DEC). Many municipalities are confronted with the problem of raising the monies necessary to properly close their landfills while at the same time arranging for alternate waste disposal sites which satisfy State requirements.

This is not a case of environmentalists versus polluters. It is a case pitting the state Department of Environmental Conservation and its Commissioner against the Village of Hoosick Falls and its Mayor and Board of Trustees. It is a case in which this court must decide whether to compel the Village to close down its municipal landfill as mandated by State regulatory provisions and an earlier agreement in which the Village expressly agreed to do so.

The Village of Hoosick Falls was incorporated in 1827 and is located along the Hoosick River in rural Rensselaer County. Once a prosperous, bustling industrial community with several mills and factories clustered along its river bank, the Village's industrial base has gradually eroded as factories and industries have closed

their operations or moved elsewhere. The Village's tax base has correspondingly declined. Its population has shrunk from 4,023 in 1960 to 3,490 in 1990.

The Village has owned and operated a municipal landfill since the mid-1930s and has provided trash and garbage collection to its residents as part of its municipally-funded services. The landfill, located just outside the Village limits along Route 22 in the Town of Hoosick, Rensselaer County, covers 26 acres. The landfill accepts an average of 23 tons of municipal and industrial waste per day. It is located near a body of water known as Thayer's Pond. It has been operated and is now operating without any of the permits required by the State.

The Village's landfill has been the focus of extensive administrative proceedings between the Village and State authorities which have culminated in this lawsuit. The plaintiffs are the State of New York, Thomas C. Jorling, Commissioner of the Department of Environmental Conservation (DEC) and the Department of Environmental Conservation (DEC). The complaint alleges eight (8) causes of action including claims that the defendants are operating a solid waste management facility without a permit; violating certain regulations concerning the operation of a landfill; violating an administrative order directing closure of the landfill; improperly allowing leachate, solid waste and pollutants to be discharged into the surface and ground waters of the State in contravention of State quality standards; discharging leachate, solid waste and pollutants without a permit; creating a

public nuisance; and for the appointment of a receiver by the court pursuant to CPLR 6401 to inventory the assets of the Village and render an accounting; prepare, submit and implement a proper closure plan; conduct post-closure monitoring and maintenance; and recommend further action necessary to protect the public health and environment.

Issue has been joined. The defendants deny the material allegations of the complaint.

The plaintiffs now move for summary judgment. Plaintiffs contend that there is no defense to the causes of action set forth in the complaint; that the Village has willfully refused to comply with two consent orders and an administrative order of DEC; and that the operation of the municipal landfill should be permanently enjoined and penalties imposed against the Village.

The defendants oppose the motion arguing that triable issues of fact exist.

The Village and the State first clashed over the landfill in 1979 and the result was a consent order entered into between DEC and the Village. The Village then failed to comply with the terms of the consent order. In 1984, DEC initiated an administrative enforcement action which resulted in a second consent order being executed by the Village and the State dated October 15, 1984. At that time, as part of such agreement, the Village was assessed a penalty of $5,000 and, among other things, agreed to retain an engineering consultant; install monitoring wells on or before June 1, 1985; and either begin construction of a new solid waste

facility or execute a contract with a third party for the disposal of solid waste on or before June 1, 1986; apply for a State pollution discharge elimination (SPDES) permit on or before July 1, 1986; and either commence the operation of a new solid waste facility or implement a contract for the disposal of solid waste with a third party on or before September 1, 1986. In short, the Village agreed to close its landfill by September 1, 1986.

Contending that the Village failed to comply with the consent order, DEC initiated a second administrative enforcement proceeding in February 1987 alleging at least six violations of the terms of the consent order including the Village's failure to obtain a permit to operate the landfill; to submit a closure plan; to install monitoring wells; to apply for a SPDES permit; to properly operate the landfill in accordance with established regulations; and in failing to close the landfill and/or find an acceptable solid waste disposal alternative. An administrative hearing was held. The Village appeared but failed to contest the merits of the complaint. The administrative law judge thereafter issued a report recommending that the relief requested by DEC be granted. An order was issued by the Commissioner on September 23, 1987 which imposed a monetary penalty of $6,500 upon the Village and directed that the Village submit an approved closure plan within six months and thereafter close its landfill in accordance with said plan. The order was not appealed. The Village subsequently paid the fine on June 27, 1988 but has allegedly failed to submit a closure plan and close the landfill. This action was commenced on September 12,

1988.

In opposition to the summary judgment motion, the Village contends that it indeed submitted a closure plan to DEC in September 1988 but that DEC never officially responded thereto. The Village, supported by the affidavit of Mayor Donald Bogardus, further opposes the motion by arguing that there is no evidence that the landfill constitutes a nuisance and that there is no demonstrable contamination or leachate leaving the site and entering the groundwater or surface water. The Village finally contends that it is financially unable to fulfill the mandates contained in the administrative order.

In considering a motion for summary judgment "the Court's role is limited to issue finding, not issue resolving" (Amatulli v Delhi Const. Corp., 77 NY2d 525, 532). The relief sought by the plaintiff in this case is drastic. The court has carefully reviewed both the record before it and the legal arguments of both sides.

Contrary to the Village's representations, the court finds no evidence that the Village complied with the administrative order of September 23, 1987 which required that the Village submit "an approvable closure plan within six months of the date of the Order". The documentary evidence indicates that the Village, through its retained engineer, submitted an "interim closure plan" on September 16, 1988.[1] Clearly, the administrative order was not

---

[1]. The Village has not included in the papers before the court a copy of the closure plan which it claims to have submitted.

satisfied by that submission.

The law to be applied in this case is settled. The Village contractually bound itself, by its stipulated agreement, to the October 15, 1984 consent order to close the existing landfill and to either begin the operation of a new solid waste management system or contract with a third party to meet its solid waste disposal needs by September 1, 1986. The validity and enforceability of such consent orders have been judicially recognized (State of New York v Town of Wallkill, __AD2d__ [3rd Dept. July 25, 1991]; Matter of Bayswater Civic Assn. v New York State Dept. of Envtl. Conservation, 159 AD2d 566; Town of Ramapo v Williams, 100 AD2d 965). The Village conceded its non-compliance with the terms of the consent order by not answering DEC's complaint in the 1987 enforcement proceeding and thereafter became bound by an administrative order issued by the Commissioner on September 23, 1987, an order which the Village did not challenge and which must be accorded great weight and judicial deference (ECL § 71-2703(1); Flacke v Onondaga Landfill Systems Inc., 69 NY2d 355).

The Village alleges that it is without the financial means to now comply with the directive to close the landfill. Although the court recognizes the often-oppressive burdens which State-imposed mandates place upon municipalities, the argument of financial hardship has been rejected by an appellate court as an excuse for non-compliance with a closure order absent evidence that alternative waste disposal was "unavailable or too expensive" (Matter of Town of Brunswick v Jorling, 149 AD2d 832).

The record demonstrates that the Village has failed to comply with the terms of the administrative order dated September 23, 1987 and has not shown that alternative waste disposal is unavailable or too costly. Plaintiffs are entitled to summary judgment in their favor on their first, second, and third causes of action.

The court finds merit in the Village's argument that there are triable issues of fact concerning the allegations that the landfill constitutes a public nuisance and is discharging harmful leachate. The preliminary results of the report prepared by Gibbs and Hill, Inc., a consulting firm retained by DEC, raises questions concerning the merits of the plaintiff's fourth, fifth and fifth[2] causes of action. Summary judgment on those causes of action is not warranted.

The court must now consider what relief should be awarded to plaintiffs—premised upon the grant of partial summary judgment. Plaintiffs seek a permanent injunction prohibiting the Village from operating the landfill and from accepting any new solid waste into the landfill as well as an order directing the Village to submit and implement an approvable closure plan. The plaintiffs further seek the imposition of monetary penalties against the Village. Finally, the plaintiffs ask that the court appoint an independent receiver to oversee the closure of the landfill.

The Village has for over 12 years been faced with the knowledge that its non-conforming landfill must be closed. It

---

[2]. The complaint contains two causes of action denominated as "Fifth".

behooves no one to prolong the inevitable. The landfill should be closed and it must be closed. It is incumbent upon this court to set a definite deadline. The first step in the closure process is to terminate the Village's acceptance of new material into the landfill. It is the court's ruling that the Village of Hoosick Falls landfill be closed to the acceptance of any and all solid waste no later than 90 days from the service of a copy of the order herein with notice of entry upon the defendants' attorney.

The court directs that the Village prepare an approvable closure plan and submit such plan to DEC no later than 180 days from the service of a copy of the order herein with notice of entry upon defendants' attorney.

The plaintiffs are entitled to seek the imposition of statutory fines and penalties against the defendants which of course they are doing. The court must, however, hold a hearing to consider first whether to impose such fines or penalties, and if so, to determine the amount (see, State of New York v Town of Wallkill, ___AD2d__ [3rd Dept., July 25, 1991]; Flacke v Bio-Tech Mills, Inc., 95 AD2d 916). In view of the mandates herein imposed upon the Village, the court deems it an appropriate exercise of its discretion to delay the commencement of the hearing until the deadlines imposed by the court have elapsed. It may be that the defendants' responses to such mandates will be relevant to the issues which must be considered by the court at the hearing.

The final issue which the court must address is the plaintiffs' request that an independent receiver be appointed, pursuant

to CPLR 6401, to insure that the landfill be closed and that a closure plan be submitted and implemented.

There is judicial precedent for the appointment of a receiver to take control of a landfill and supervise closure in a case involving a privately-owned and operated landfill (see, Flacke v Onondaga Landfill System Inc., 69 NY2d 355). The court has found no precedent, and the parties have cited none, for the appointment of a receiver to act in the place and stead of duly-elected local municipal officials. The court notes that, throughout the almost 13 years that the Village of Hoosick Falls landfill has been the focus of controversy, there has never been an order issued by a court which has directed the Village to take specific action. There have been two consent orders and two administrative orders, none of which the Village has fully complied with. The court is not prepared, on the record before it, to presume that the elected Mayor and Trustees of the Village of Hoosick Falls will refuse or neglect to carry out the directives of the court. The motion for the appointment of a receiver is denied at this time without prejudice to its later renewal by plaintiffs.

Plaintiffs' motion is granted, in part, and denied, in part, without costs.

Plaintiffs to submit order on notice.

Dated: September 20, 1991
Clifton Park, New York

William H. Keniry
J.S.C.

12.20.91