

STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION

<p>In the Matter of the Alleged Violations of Articles 17 and 27 of the New York State Environmental Conservation Law</p> <p>- by -</p> <p>Raymond S. Hanaburgh</p> <p>Respondent.</p>	<p>RULING ON LIABILITY and PARTY STATUS</p> <p>September 29, 2006</p> <p>DEC Case #3-20040128-14</p>
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SUMMARY

In this administrative enforcement proceeding, Staff of the Department of Environmental Conservation (DEC Staff) has proven that Raymond S. Hanaburgh (respondent) has constructed and operated a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1)(i). After the close of the adjudicatory hearing, the Town of Warwick sent several letters objecting to the relief requested by DEC Staff in its closing brief. Specifically, the Town objected to DEC Staff's request that the Commissioner order Mr. Hanaburgh to remediate the site and allow for processing of wood on site for up to two years, in contravention of local zoning law. These letters are deemed to be a petition for intervention with regard to the penalty phase of this hearing (including remediation of the site) and the Town of Warwick is granted party status. Further proceedings will be scheduled involving the Town, DEC Staff and the respondent regarding appropriate remedial steps to be done at the site as well as the amount of civil penalty.

PROCEEDINGS

This administrative enforcement proceeding was commenced by service of a Notice of Hearing and Complaint dated July 6, 2005 upon Raymond S. Hanaburgh. In its complaint, DEC Staff alleged that the respondent constructed and operated a solid waste management facility without a permit in violation of 6 NYCRR 360-1.7(a)(1)(i) and discharged leachate from the facility without a State Pollutant Discharge Elimination System (SPDES) permit in violation of ECL 17-0701(1)(a).

Mr. Hanaburgh responded with a letter, received July 28, 2005, to DEC Staff counsel stating he could not afford counsel, but would attend the hearing.

A statement of readiness was filed with DEC's Office of Hearings and Mediation Services on October 31, 2005. On November 10, 2005 Administrative Law Judge (ALJ) P. Nicholas Garlick was assigned to the matter.

An adjudicatory hearing in this matter was convened on February 6, 2006 at the DEC Region 3 Office in New Paltz, NY. DEC Staff appeared through Steven Goverman, Esq., Assistant Regional Attorney, and called three witnesses: John Batz, Building Inspector and Building Code Enforcement Officer, Town of Warwick, NY; DEC Staff member Joseph Battista, Regional Enforcement Coordinator; and DEC Staff member Theresa Laibach, Environmental Program Specialist II, Division of Solid and Hazardous Materials. The Respondent appeared pro se and testified on his own behalf, but called no witnesses.

At the close of the adjudicatory hearing, the ALJ set a briefing schedule which was adjusted due to the late receipt of transcripts.

Mr. Hanaburgh submitted a package of materials with a cover letter dated March 27, 2006. In his cover letter, he states that he thought he had obtained permission from the Town for his operations and that he operated at the site for eight or nine years before being enjoined. With respect to the issue of leachate control, he stated he constructed two retention ponds and used hay bails to filter the water. He stated that he is willing to clean up the logs and stumps at the site if the Town would allow such activity. Mr. Hanaburgh also states in his cover letter that he is 81 years old, served in the U.S. Marine Corps during World War II during which time he fought in the Pacific Island campaign, then was stationed in China after the war. He was called back to serve in the Korean War during which time he was badly injured. He also notes that he lost a son during the Vietnam War. Included with his letter were: a newspaper article about the dedication of the Korean War Memorial and a copy of a 1994 application for site plan approval with the Town of Warwick. Mr. Hanaburgh did not make any additional submission, although an opportunity for him to do so was provided until May 19, 2006.

DEC Staff's brief was received on May 4, 2006. In its brief, DEC Staff set forth for the first time, the steps it sought the Commissioner to include in her order requiring Mr.

Hanaburgh to remediate the site, including the processing and removal of wood wastes at the site within two years.

On June 9, 2006, counsel for the Town of Warwick wrote to the ALJ objecting to allowing Mr. Hanaburgh to conduct any processing at the site. Counsel stated that processing of wood at the site would violate both the Town's zoning law and the court order enjoining such activities at the site. Counsel also argued that DEC did not possess the authority to supercede the Town's zoning law and order such processing at the site.

DEC Staff responded by letter dated June 29, 2006. DEC Staff counsel argued that the DEC Commissioner does possess the authority to override local laws. Specifically, ECL 71-2727(1) and 71-1929 authorize the Commissioner to order remedial action which is necessary and appropriate. With respect to the pending injunction, DEC Staff argues that the Commissioner should direct the matter be referred to the NYS Attorney General's office so that the injunction can be modified to allow processing at the site.

On July 14, 2006, counsel for the Town responded and argued that DEC does not have the authority to override local law in this case. Instead, counsel argued that the Commissioner should order the removal of all wood and wood waste from the site without on-site processing. Counsel argued that it would be a travesty of justice to reward the respondent for violations of local law by allowing him to process materials on-site.

FINDINGS OF FACT

1. Raymond S. Hanaburgh, the respondent, is the owner of real property located at 107 Penaluna Road, in the Town of Warwick, New York.
2. Mr. Hanaburgh has disposed of a pile of wood chips on the site that is between 30 and 40 feet high with a volume of approximately 5,000 cubic yards. This pile has been there for a period of time exceeding 18 months.
3. Mr. Hanaburgh never received approval from the Town of Warwick for his operations at the site. On July 1, 2003, Mr. Hanaburgh was issued five appearance tickets by the Town of Warwick's Code Enforcement Officer. On October 2, 2003, Hon. Peter C. Patsalos, J.S.C. issued an order enjoining Mr. Hanaburgh from delivering, disposing, storing or processing of wood and wood products at the site.

4. Since October 2, 2003, Mr. Hanaburgh, with the permission of the Town, has removed logs from the site and approximately 160 40-yard trailer loads of materials (t. 27).
5. Mr. Hanaburgh never received a DEC permit to construct or operate a solid waste management facility.

DISCUSSION

Liability

In its complaint, DEC Staff alleges that the Respondent committed two violations: first, he operated a solid waste management facility without appropriate DEC approval in violation of ECL 27-0707 and 6 NYCRR 360-1.7(a)(1)(i); second, he discharged leachate from this facility without a SPDES permit in violation of ECL 17-0701(1)(a).

To support its claim that Mr. Hanaburgh operated a solid waste management facility without the appropriate DEC approvals, DEC Staff presented photos of the site (Exh. 5) as well as the testimony of two DEC Staff members. DEC Staff member Joseph Battista testified that during a site inspection on January 23, 2004, he observed a pile of wood chips which he estimated to be approximately 5,000 cubic yards. During his visit he took photos of the pile. DEC Staff member Teresa Liabach also went on the site visit on January 23, 2004. She testified that Mr. Hanaburgh was not authorized to dispose of solid waste at the site. DEC Staff also called as a witness M. John Batz, the Town of Warwick's Building Inspector and Code Enforcement Officer. He testified that he responded to complaints of neighbors and visited the site many times before July 1, 2003. He also described the site as of the date of the hearing, February 6, 2006 and the pile of wood chips was there at that time. Mr. Hanaburgh did not challenge any of DEC Staff's evidence. Accordingly, DEC Staff has shown that Mr. Hanaburgh has stored solid waste, namely wood chips, for longer than 18 months, which pursuant to 6 NYCRR 360-1.2(b)(164) constitutes disposal. Since Mr. Hanaburgh did not have DEC authorization for such disposal, he has violated 6 NYCRR 360-1.7(a)(1)(i), constructing and operating a solid waste management facility without a permit, as alleged in DEC Staff's complaint.

DEC Staff's second alleged violation, that Mr. Hanaburgh discharged leachate from this facility without a SPDES permit in violation of ECL 17-0701(1)(a) has not been proven. Both Mr.

Battista and Ms. Liabach testified that they witnessed leachate running from the pile of wood chips and flowing across the site. However, DEC Staff did not enter any evidence that Mr. Hanaburgh did not have a SPDES permit to do so, as alleged in the complaint. DEC Staff seems to have abandoned this alleged violation and does not make an argument about it in its closing brief. Accordingly, this alleged violation is not proven.

Civil Penalty and Other Relief

While not set forth in its complaint or at the hearing, in its closing brief, DEC Staff sets forth the relief it seeks in this case. DEC Staff seeks a civil penalty of \$35,000 with \$25,000 of that amount suspended upon condition that Respondent proceeds with due diligence to remediate the site and complete the remediation within two years. The remediation sought by DEC Staff includes: (1) the prohibition on the acceptance of any additional wood waste of solid waste at the site; (2) the submission, within 45 days, of a detailed remediation plan for the site to DEC Staff for approval; (3) following DEC Staff approval of the plan, the respondent shall have two years to process the wood wastes at the site and remove them, provided that he shall not stockpile more than 100 cubic yards of processed wood wastes at the site at a time; (4) the construction of a fence or other suitable barrier to restrict vehicle access to the site; and (5) the placement, prior to the commencement of remediation activities, of erosion controls around the perimeter of the disturbed areas and maintenance of them during the remediation process.

As stated above, the Town of Warwick objects to any authorization by the Commissioner of processing wood at the site. By letters dated June 9, 2006 and July 14, 2004, the Town states that such authorization would be contrary to local zoning laws and the existing judicial order enjoining such activity at the site. DEC Staff has responded to the Town's arguments by asserting that the DEC Commissioner possesses the authority to override local zoning laws in ordering remediation and seeking the Commissioner to refer the matter to the Attorney General's office to obtain a modification to the existing injunction to allow processing at the site.

At this point, I am unable to make a recommendation to the Commissioner regarding the amount of civil penalty that should be imposed in this case or what remediation should occur at the site. The disclosure by DEC Staff of its proposed remediation in its closing brief did not provide the Town with notice of the

proposed remedy until after the adjudicatory hearing and did not allow an opportunity for the Town to intervene at the hearing.

The standards for intervention in a DEC adjudicatory enforcement hearing are set forth in 6 NYCRR 622.10(f). The Town's letters will be treated as a petition for intervention in this matter. In its letters, the Town has set forth its relationship to the instant action as well as its position and the legal arguments it would make regarding the proposed remediation. Specifically, the record includes evidence regarding the Town's enforcement efforts at the site as well as its position that the materials at the site should be removed and processed elsewhere. This would seem to be contradicted by statements by the respondent in the record that off-site processing of wood is not feasible in this case (t. 94, 99). In addition, should the Commissioner order processing of wood at the site in contravention of local law, there is a reasonable likelihood that the Town's interests would be substantially adversely affected. Accordingly, the Town should be given an opportunity to present evidence to support its proposed remediation as well as be provided an expanded opportunity to make its legal arguments that the DEC Commissioner does not possess the authority to authorize on-site processing of the wood in this case. Therefore, the Town is granted party status in the penalty and remediation phase of this matter and further proceedings will be scheduled to reopen the record with respect to these issues.

Albany, New York
September 29, 2006

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

To: Mr. Raymond S. Hanaburgh
P.O. Box 181
Highland Mills, NY 10930

Steven Goverman, Esq.
Assistant Regional Attorney
NYSDEC Region 3
21 South Putt Corners Road
New Paltz, NY 12561-1696

J. Benjamin Gailey, Esq.
Jacobowitz and Gubits, LLP
158 Orange Avenue
P.O. Box 367
Walden, NY 12586-0367