

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Nassau County
Department of Public Works'
Request for a Hearing
(Roslyn/Beacon Hill Landfill)

RULING

November 29, 2004

The Nassau County Department of Public Works (DPW) made a request to the Department of Environmental Conservation Staff (DEC Staff) for variances from the Department of Environmental Conservation's solid waste management regulations with respect to DPW's closure of the Roslyn/Beacon Hill landfill. DEC Staff denied the request. DPW then requested a hearing on the denial.

This request for a hearing was contained in an undated letter, apparently sent in late June 2004, from Peter J. Gerbasi, P.E., Commissioner of Public Works, to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. The matter was assigned to Administrative Law Judge (ALJ) Susan J. DuBois.

The Roslyn/Beacon Hill landfill is a construction and demolition debris landfill. In a letter dated November 12, 2003, DPW requested two variances: (1) from subdivision 360-2.13(p) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), to allow use of a perimeter passive landfill gas venting system; and (2) from 6 NYCRR 360-2.13(s), to limit topsoil placement to those sections of the landfill that require additional soil in order to meet certain requirements. DEC Staff denied this request on May 25, 2004, by a letter from Anthony J. Cava, P.E. to Commissioner Gerbasi.

In a letter dated July 15, 2004, Karen A. Murphy, Esq., Regional Attorney for DEC Region 1, stated that DEC Staff was considering whether DPW is entitled to a hearing on the denial of the variance request. In a letter dated July 21, 2004, DEC Staff stated that DPW's obligation to close the landfill arose as a result of an order on consent and is part of the resolution of an enforcement action. DEC Staff stated that requests to modify the terms of the order on consent are not subject to the Uniform Procedures Act (Environmental Conservation Law (ECL) article 70) and that, accordingly, DPW is not entitled to the requested hearing. Attached with the July 21, 2004 letter was a copy of the order on consent, dated October 4, 1999 (File No. 1-6135-98-09).

On July 22, 2004, I wrote to Ms. Murphy and to Jane Houdek, Esq., counsel for DPW, allowing DPW to respond to DEC Staff's position. The response was to be mailed on or before July 30, 2004. I also requested that DEC Staff provide copies of any modifications or supplements to the October 4, 1999 order on consent.

As of August 23, 2004, I had not received any response from DPW. On that date, I sent a letter to DPW and DEC Region 1 denying the request for a hearing. The reasons I gave for denying the request were as follows: the compliance schedule attached with the order on consent requires that the closure requirements of 6 NYCRR part 360 in effect on December 31, 1988 apply to the compliance schedule. The order on consent does not contain any provision allowing for a hearing on requests for variances from these procedures nor on requests for modifications of the order on consent. In view of the statements in Ms. Murphy's letter, the terms of the order on consent, and the absence at that time of any opposition by DPW, I denied the request for a hearing.

On September 9, 2004, Ms. Murphy contacted me about a letter she had just received that was from Ms. Houdek and dated July 30, 2004. The letter was DPW's response to DEC Staff's July 21, 2004 correspondence. Following submissions from both parties about whether the response should be considered, I sent the parties a letter dated September 27, 2004 stating it would be preferable in this situation to get to the merits of whether a hearing would take place rather than to end the matter based upon late receipt of a letter due to law office failure. I stated I would consider DPW's July 30, 2004 letter, would allow DEC Staff to respond to it, and would reconsider my August 23, 2004 denial of the request for a hearing. DEC Staff submitted its response on October 15, 2004.

DPW position

DPW argued that the order on consent does not preclude a variance request or a hearing on denial of a variance request. DPW noted that the order on consent "expressly incorporates the 'requirements of 6 NYCRR Part 360 in effect on December 31, 1988.'" DPW argued that part 360 provides for variances and, consequently, DPW is not seeking to modify the consent order when it requests variances. DPW stated the variance applications comply with part 360 and, accordingly, comply with the order on consent.

DPW also provided a copy of a November 12, 1996 letter from DPW to DEC Region 1 in which DPW requested numerous variances from part 360 for closure of the Roslyn/Beacon Hill landfill. DPW stated DEC Staff granted the 1996 variance requests, but DPW did not provide any document stating this approval. DPW also argued that DEC Staff acknowledged and applied the part 360 provisions governing variances when it considered DPW's recent variance requests. Finally, DPW asked that the hearing be postponed so that DEC Staff may consider additional information in support of DPW's variance requests.

DEC Staff position

DEC Staff stated that DPW is seeking a modification of its obligations under the order on consent. DEC Staff argued that, because the requirement to close the facility is part of the resolution of an enforcement action and does not involve an application for a permit, the Uniform Procedures Act (ECL article 70) and the administrative review procedures of 6 NYCRR part 621 do not apply to it. DEC Staff argued that DPW signed the order on consent with full knowledge of its terms and a full opportunity to negotiate those terms, and that no party can be compelled to modify the terms of such an order. DEC Staff argued that, although the 1996 variance requests were submitted on variance request forms, they were actually requests for modifications of DPW's obligations under the order on consent.

Discussion

Neither 6 NYCRR part 622 nor 6 NYCRR part 624 expressly provide for a hearing to modify the terms of an order on consent (see 6 NYCRR 622.1(a), 624.1(a)). To determine whether or not a hearing is available in a dispute regarding an order on consent, one would look to the terms of the order on consent (see Matter of Eastern Transfer of New York, Inc. v Cahill, 268 AD2d 131, 707 NYS2d 521 [3d Dept 2000]; Matter of Ludlow's Sanitary Landfill, Inc. v New York State Dept. of Environmental Conservation, 112 AD2d 8, 490 NYS2d 395 [4th Dept 1985]; Flacke v Salem Hills Sewage Disposal Corporation, 91 AD2d 739, 457 NYS2d 992 [3d Dept 1982]).

The documents submitted by DEC Staff and by DPW provide information relevant to the legal status of the landfill closure and to what review processes may be available at present, although these documents provide only a partial account of the

interactions between DEC Staff and DPW concerning the landfill closure.

According to the 1999 order on consent, DPW was issued permit No. 10-84-0081 that allowed operation of the landfill as a construction and demolition debris disposal site. The permit had an effective date of October 7, 1987 and an expiration date of October 31, 1988. DPW violated part 360 by continuing to take waste after its permit to operate had expired and by failing to construct a final cover system within one year following last receipt of waste. The order on consent does not specify when DPW last received waste at the facility.

Under the order on consent, DPW affirmatively waived its right to a public hearing in this matter and agreed to be bound by the terms of the order on consent. The order required DPW to pay a civil penalty of \$15,000. DPW agreed to a compliance schedule, attached as Appendix A of the order, that requires it to submit an approvable closure plan to DEC Staff and to complete closure of the landfill within two years of approval of the closure plan by DEC Staff. Section II.A of the compliance schedule requires that the closure plan "include closure and post-closure requirements for the site in accordance with the requirements of NYCRR [sic] Part 360." Section I of the compliance schedule provides that, "Unless otherwise specifically noted herein, the closure and post-closure requirements of 6 NYCRR Part 360 in effect on December 31, 1988 shall apply to this Compliance Schedule."

Interaction between DPW and DEC concerning variances from 6 NYCRR part 360 took place in the mid-1990's, between the expiration date of the permit and the date of the order on consent. The correspondence submitted by DPW and DEC Staff does not indicate what permit or order, if any, governed the landfill at that time.¹ This earlier request for variances was stated in a November 12, 1996 letter from Peter J. Witkowski, Director of Hazardous Waste Services, DPW, to Anthony Candela, P.E., DEC Region 1. The letter does not identify the context in which the variances were requested (i.e., a permit application, an enforcement action, or other administrative process). The correspondence provided by the parties also does not contain DEC Staff's response to the 1996 variance request. The May 25, 2004

¹ Variances from the requirements of part 360, and applications for variances, are governed by subdivision 360-1.7(c) of both the current version and the December 31, 1988 version of part 360.

letter from Mr. Cava notes, however, that the 1996 variance request was approved by the Department in August 1997.

DPW argued that these mid-1990's variances demonstrate that DEC Staff has previously applied the part 360 variance procedures in this case. DEC Staff responded that although the 1996 variance requests were submitted on variance request forms, they were actually requests for modifications of DPW's obligations under the order on consent. Neither of these positions, however, appears to be completely supported by the documents submitted by these parties.

Even if DEC Staff treated the 1996 requests as variance applications, it is not clear that this occurred within the context of "this case." The date on which DEC Staff commenced the enforcement action that led to the order on consent is not identified, but based upon the file number used in the order on consent it may have been in 1998. The 1996-1997 variances obviously were granted before DPW entered into the October 4, 1999 order on consent governing closure of the landfill.

With regard to DEC Staff's position, in 1996 DPW could not have requested a modification of its "obligations under the Order" because that order is dated October 4, 1999. If there was an earlier order on consent, in effect in 1996, neither DPW nor DEC Staff has identified it.

The procedure by which DEC dealt with the 1996 variance request has little, if any, bearing on what should be done with the present request due in part to the omitted information as outlined in the preceding three paragraphs and, more importantly, because DPW entered into the 1999 order on consent. According to both DEC Staff and DPW, the 1999 order on consent governs the current landfill closure activities (see, letters dated July 21, 2004 and July 30, 2004).²

² The order on consent was executed by DEC on October 4, 1999. The compliance schedule in the order requires preparation and approval of a closure plan on a schedule that would probably take between one and three months, and requires the landfill closure to be completed within two years after DEC's approval of the closure plan. In view of this date and timetable, I asked DEC Staff to provide copies of any modifications or supplements to the order (letter of July 22, 2004 to Ms. Murphy and Ms. Houdek). No such documents were provided.

The current request for variances pertains to actions DPW is required to take under the 1999 order on consent entered in an enforcement proceeding. DPW is asking permission to conduct two aspects of the landfill closure in ways different from the closure requirements specified in 6 NYCRR 360-2.13(p) and (s). The order on consent requires that the closure plan "must include closure and post-closure requirements for the site in accordance with the requirements of [6] NYCRR Part 360." While one might be able to read this, as DPW proposes, to include the part 360 variance provision as part of what would be taken into account in arriving at an approvable closure plan, the other reference to the part 360 closure and post-closure requirements weighs against that reading. Section I of the compliance schedule states, "Unless otherwise specifically noted herein, the closure and post-closure requirements of 6 NYCRR Part 360 in effect on December 31, 1988 shall apply to this Compliance Schedule."

Part 360, as it existed on December 31, 1988, contained specific requirements about the materials and construction of gas venting layers in final cover systems and about the topsoil layer. The most reasonable interpretation of the order on consent is that DPW agreed to comply with those requirements and that its closure plan would provide the details of how those requirements would be carried out at the Roslyn/Beacon Hill landfill.

Through its November 2003 variance request, DPW asked to do two things differently from the closure requirements specified in the December 31, 1988 version of part 360. Even if this request were made in the context of a permit for the landfill, which it was not, it would involve doing the closure differently from the manner authorized by DEC and would involve a permit modification. Even a permittee could not, for example, construct a gas venting layer in a way that does not comply with the section of part 360 governing these and then claim it was acting in accordance with part 360 on the basis that part 360 allows for variances.

DPW is not a permittee in the present situation but instead is a respondent subject to an order on consent. In agreeing to the order on consent, DPW agreed to be bound by its terms. DPW further agreed that the order was the complete and entire order between it and DEC concerning the facility (paragraph XX). Under paragraph XVIII, "No terms, conditions, understandings or agreements purporting to modify the terms of this Order shall be binding unless approved in writing by the DEC." DEC could approve such modifications, but the order leaves this to the discretion of DEC. The order on consent does not contain any provision allowing for a hearing if DEC does not agree to a

requested modification of the order. Part 622 of 6 NYCRR, the Department's uniform enforcement hearing procedures, does not require or provide the opportunity for a hearing in this situation. DPW has not cited any other law or regulation that would give it a right to the requested hearing.

Ruling: DPW's June, 2004 request for a hearing is denied.

Appeals

This ruling is not appealable as of right. If a party wishes to appeal, it may seek leave to do so by making a motion for leave to file an expedited appeal (see 6 NYCRR 622.10(d), 624.8(d)). Such motions must be received by or before 4:45 PM on December 10, 2004, addressed to: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. A copy of the motion must be received by all persons on the enclosed service list by the same deadline. Service by fax is not authorized.

Responses to such motions must be served within the time limits specified in 6 NYCRR 622.6(c) and 622.6(b), which are also found at 6 NYCRR 624.6(c) and 624.6 (b).

/s/

Albany, New York
November 29, 2004

Susan J. DuBois
Administrative Law Judge

Encl.

TO: Jane Houdek, Esq.
Karen Murphy, Esq.