

In the Matter of
the Delisting Petition for the

**UNIVERSAL WASTE
INACTIVE HAZARDOUS
WASTE DISPOSAL SITE**
(Site ID No. 0633009)

**ISSUES RULING
AND SCHEDULING
ORDER**

PROCEEDINGS

Pursuant to section 375-1.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Universal Waste, Inc. and Clearview Acres, Ltd. petitioned the New York State Department of Environmental Conservation ("Department") to delete an inactive hazardous waste site, Universal Waste, Inc., located at Leland and Wurz Avenue, Utica, New York 13503 (the "Site") from the New York State Registry of Inactive Hazardous Waste Sites (the "Registry"). In the alternative, Universal Waste, Inc. and Clearview Acres, Ltd. (collectively referred to herein as "Petitioners") sought reclassification of the Site from Class 2 to Class 3.¹

Sections 375-1.9(a) and (b) of 6 NYCRR provide that a responsible party at a site may petition for the site's removal from the Registry. Within 45 days of receipt of a complete petition, the Department must either summarily grant or deny the

¹ The site classifications are set forth in 6 NYCRR Section 375-1.8 as follows:

(a) (2) In so maintaining the Registry, to the extent possible with available information, the department will classify sites according to the following criteria:

. . . (ii) A class "2" site is a site at which hazardous waste constitutes a significant threat to the environment, as described in section 375-1.4 of this Subpart.

. . . (iii) A class "3" site is a site at which hazardous waste does not presently constitute a significant threat to the environment, as described in section 375-1.4 of this Subpart.

Section 375-1.4 enumerates a number of environmental and public health concerns that would permit the Commissioner to find that hazardous waste disposed of at a particular site constitutes a significant threat to the environment, after a review of the available evidence and consideration of the site-specific factors set forth in Section 375-1.4(b) that the Commissioner deems relevant.

petition, and provide "a statement of reasons therefor" or convene an adjudicatory hearing if the petition cannot be summarily determined. 6 NYCRR § 375-1.9(d)(1), (2). Section 375-1.9(d)(1)(i) states that "a petition will be summarily denied if the factual allegations made therein, even if accepted as true by the department, would be insufficient to support the grant of the relief sought or any other proper relief." A petition cannot be summarily determined and, accordingly, a hearing would be convened, if the factual allegations in the petition, "if accepted as true by the department, would be sufficient to support the grant of the relief sought or any other proper relief, but the department does not accept such allegations as true." 6 NYCRR § 375-1.9(d)(2).

The property where the Site is located was listed in the Registry as a Class 2 site until approximately 1999, when the property was subdivided, at Petitioners' request, into the Utica Alloys and Universal Waste sites, respectively. The Utica Alloys parcel remained as a Class 2 site, and the Universal Waste parcel was reclassified 2a, until Petitioners undertook a Preliminary Site Assessment ("PSA") pursuant to a May 2000 Order on Consent.² Following the submission of the PSA, Department staff notified Petitioners by letter dated July 24, 2002 of the Universal Waste parcel's reclassification as a Class 2 site.

The petition by Universal Waste, Inc. and Clearview Acres, Ltd. was originally dated January 8, 2003. The corrected version is dated June 23, 2003. Petitioners contended that the contamination at the Site, specifically, the presence of polychlorinated biphenyls ("PCBs"), does not present a significant threat to the environment, and that delisting or reclassification is therefore warranted. Petitioners asserted that Department Staff made no showing that PCBs had migrated from the Site to a sewer outfall channel connecting to the Upper Mohawk River, or that the PCBs in the outfall channel are causing or materially contributing to a significant environmental effect or that it was reasonably foreseeable that those contaminants would do so. As a result, Petitioners argued that the Department could not conclude that the Site constitutes a significant environmental threat, warranting the Site's listing as Class 2 on the Registry.

Department Staff denied the petition by letter dated July 8, 2003. By letter dated July 17, 2003, Petitioners requested that

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According to the Order on Consent, Class "2a" is "a temporary classification which indicates that further investigation is required to determine whether conditions at the Site constitute a significant threat to the public health or the environment." Issues Conference Exhibit 3-4, Paragraph 3.

the Office of Hearings and Mediation Services "reconvene the adjudicatory hearing" concerning the status of the Site. The matter was assigned to ALJ Maria E. Villa.

In support of their request, Petitioners cited to the Commissioner's Decision and Order in Utica Alloys, Inc., 1987 WL 55369 (Jan. 16, 1987). In Utica Alloys, Commissioner Henry Williams adopted Administrative Law Judge ("ALJ") Robert O'Connor's findings and conclusions with respect to Petitioners' property before it was subdivided into two separate sites. Id. ¶ 4. ALJ O'Connor's report, in a motion for summary order, stated that the issue whether the site as then constituted posed a significant threat to the environment should be adjudicated. Id. at p. 4; *7-8. According to Petitioners, in light of this determination, a hearing should be held. Department Staff opposed the request.

By letter dated September 5, 2003, Department Staff reiterated its summary denial, stating that "[t]he Department has determined that the factual allegations made within the delisting petition, even if accepted as true by the Department, are insufficient to support the Department's either deleting the site from the Registry of Inactive Hazardous Waste Disposal Sites or reclassifying the site as a 'Class 3' site." The letter went on to state that even if the Site did not pose a significant threat based upon the criteria in Section 375-1.4(a)(1), "the provisions of Section 375-1.4(a)(2) require the Department to find that the contamination of soils, sediments and groundwaters by PCBs related to the site, when evaluated in accordance with the factors set forth in Section 375-1.4(b), presents a significant threat to the environment."

In a ruling dated November 2, 2003, the ALJ denied the request for a hearing. See Matter of Universal Waste Hazardous Waste Site, ALJ Ruling at 3-4, 2003 WL 22668212, *3. The ALJ noted that Department Staff accepted the factual allegations in the petition as true, but concluded that the facts alleged by Petitioners were insufficient to establish Petitioners' entitlement to the relief sought. Id. According to the ALJ, because Department Staff summarily denied the petition, no hearing was provided for under the regulations, and, as a result, no administrative adjudicatory forum was available to review Petitioners' contentions concerning the insufficiency of Department Staff's "statement of reasons" for the summary denial or the merits of the delisting petition. Id.

Petitioners sought judicial review, pursuant to article 78 of the New York Civil Practice Law and Rules, of the Department's summary denial. In a decision dated May 26, 2004, and entered June 3, 2004, Supreme Court, Oneida County, vacated the Department's summary denial, and ordered that an administrative

hearing be held, "consistent with 6 NYCRR §375-1.9 and 6 NYCRR §624.1 et seq."³ (see Matter of Universal Waste, Inc. v. New York State Dept. of Env'tl. Conservation, Julian, J., Index No. CA-2003-002781, at 10).

Notice of the hearing was published on July 21, 2004 in the Department's electronic Environmental Notice Bulletin, and in the July 27, 2004 edition of the Utica Observer Dispatch. On August 31, 2004, the legislative hearing was held at the State Office Building in Utica, New York. The City of Utica's Mayor, Timothy Julian, submitted a letter urging collaboration among Department Staff, Universal Waste, the City of Utica, the Utica Brownfield Revitalization Corporation, and other property owners in the area in an attempt to achieve a timely and cost-effective remediation and restoration of the City's waterfront. According to Mayor Julian, Department Staff's efforts to determine the Site's classification and to determine each property's individual contribution is a less effective approach than combining resources to focus on solutions, rather than expending resources on litigation.

Hans Arnold, Executive Director of the Oneida-Herkimer Solid Waste Authority was the only speaker at the legislative hearing. Mr. Arnold stated that, in his opinion, a copy of the full file with respect to this matter should have been made available in Utica, as well as in the Department's Central Office in Albany. Mr. Arnold went on to express his concerns, as an adjacent landowner, with respect to possible contaminant migration from the Site. According to Mr. Arnold, the entire area should be assessed to determine whether one particular site poses a significant threat to the environment. No other public comments, either written or oral, were received.

On September 22, 2004, the issues conference was held at the same location. The hearing notice set a deadline of September 17, 2004 for receipt of filings for party status. No petitions for party status were received. Pursuant to 6 NYCRR Section 624.5(a), Department Staff and Petitioners are mandatory parties to this proceeding. Department Staff and Petitioners agreed that the issue to be adjudicated is whether the Site presents a significant threat to the environment, such that listing on the Registry is warranted.

³ Section 375-1.9(d)(2)(ii) states that "the procedures of Part 624 of this Title may be used for adjudicatory hearings other than permit matters, and such procedures shall be utilized in any hearing held pursuant to this section except to the extent that any provision of such Part is contrary to the statute implemented by this section, in which event the statutory provision controls . . ."

DISCUSSION AND RULING

Although the parties do not dispute that the issue to be adjudicated is whether the Universal Waste Site poses a significant environmental threat and therefore should be listed on the Registry, Department Staff raised concerns with respect to the scope of discovery sought by Petitioners pursuant to the New York State Freedom of Information Law ("FOIL") (Public Officers Law §§ 84-90). Petitioners' FOIL requests sought, among other things, information concerning possible off-Site sources of PCBs, including the Utica City Dump, the Niagara Mohawk Harbor Point Property, Bossert Manufacturing Corp., Burn-Rite Coal, Madden Property, Bendix Fluid Power Division, Erie Canal (Town of Frankfort Section), and Chicago Pneumatic Tool Company.

According to Department Staff, the contribution, if any, of these sites to the PCB contamination attributable to the Universal Waste Site is irrelevant and beyond the scope of the adjudicatory hearing. During a conference call on October 1, 2004, Department Staff advised that all documents responsive to the FOIL request had been provided to Petitioners for their review, but reiterated its objections to the introduction of information concerning other sites as irrelevant to this proceeding. Petitioners argued that off-site contaminant contribution must be considered in determining whether the PCBs in the Mohawk River are attributable to the Universal Waste Site.

Section 624.8(b)(1)(i) provides that an administrative law judge has the power to "rule upon all motions and requests, including those that decide the ultimate merits of the case." Section 3101 of the CPLR mandates full disclosure of all evidence "material and necessary" in the prosecution or defense of an action. In Matter of Saratoga County, the ALJ interpreted this provision to require discovery as to all evidence relevant to the issues identified for hearing, and as to all information reasonably calculated to lead to the discovery of relevant evidence. ALJ Ruling at 1, 1995 WL 1780809, *1 (Oct. 27, 1995) (citing D. Siegel, New York Practice, §344, at 422 [1978]); see Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968)(test is one of usefulness and reason).

Given the standard articulated in Matter of Saratoga County, it is premature to exclude evidence concerning the potential contribution of other sites to the contamination at issue, or to limit Petitioners' discovery solely to information about the Site. Pursuant to Section 375-1.9(d)(2)(iii), Petitioners bear the burden of proof to show that the Site does not pose a significant threat. Essentially, Petitioners must prove a negative. In light of this,

it is not appropriate in this case to limit Petitioners' access to information reasonably calculated to lead to the discovery of relevant evidence. Any challenge by Department Staff to the use of information concerning off-site sources may be raised in a motion to exclude portions of Petitioners' prefiled testimony, or advanced during Department Staff's cross-examination of Petitioners' witnesses.

FURTHER PROCEEDINGS

As agreed during the October 1, 2004 conference call, prefiled testimony is to be submitted by Tuesday, October 19, 2004. Service by electronic mail is authorized, with hard copy to follow by overnight mail. A conference call has been scheduled for 3:00 p.m. on Friday, October 22, 2004. The Office of Hearings will initiate the call.

The adjudicatory hearing will commence at 10:00 a.m. on Tuesday, October 26, 2004, in Room 919 at DEC's Central Office, 625 Broadway, Albany, New York. The hearing will continue on Wednesday, October 27, and Thursday, October 28. Further hearing days will be scheduled as necessary.

_____/s/
Maria E. Villa
Administrative Law Judge

October 7, 2004
Albany, New York

TO: Michael B. Gerrard, Esq.
Arnold & Porter
COUNSEL FOR PETITIONERS
399 Park Avenue
New York, New York 10022-4690

Dolores A. Tuohy, Esq.
Associate Attorney
Division of Environmental Enforcement
New York State Department of Environmental
Conservation
625 Broadway
Albany, New York 12233-5500