



MID-ATLANTIC ENVIRONMENTAL LAW CENTER

VIA ELECTRONIC and 1ST CLASS MAIL, and FACSIMILE

September 9, 2005

Ronald C. Hassinger, Chief
General Permits / Beneficial Use Section
Bureau of Land Recycling and Waste Management
Department of Environmental Protection
P.O. Box 8472
Harrisburg, PA 17105-8472

RE: General Permit Appl. #WMGR085D001

Dear Mr. Hassinger:

Hazleton Creek Properties, LLC, (“Hazleton Creek”) of Kingston, PA, is seeking a Determination of Applicability for a Residual Waste General Permit WMGR085 to govern activities at a former strip mine which has been known as the Hazleton City Landfill. The following comments regarding this matter are submitted on behalf of the Mid-Atlantic Environmental Law Center, Thomas J. Yurick, Sr., and an As Yet Unnamed Concerned Citizens Group.

The Department of Environmental Protection should deny Hazleton Creek’s application because it fails to meet the legal criteria required for approval. The General Permit WMGR085 contemplates the processing and beneficial use (disposal) of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash for mine reclamation. Irrespective of whether a mixture of such materials should be placed in direct contact with the environment generally, the placement at this particular site would not be in accordance with the scope of the General Permit.

The Site

The Hazleton Creek site is owned by Pagnotti Enterprises, Inc., a firm which holds numerous mine permits in Northeast Pennsylvania. This particular property is believed to stretch some 277 acres in both Hazle Township and the City of Hazleton.

After strip mining ceased at the site, significant portions served as the Hazleton City Landfill from the 1940s through the 1970s. In addition to receiving municipal solid waste, the site also received tens of thousands of barrels of liquid or semi-solid hazardous or otherwise toxic wastes. The fact that this took place is well-documented both in Agency files (See attachments 1 and 2 : EPA Memorandum, D. Bruner, 8/21/84; EPA 6/7/84 Site Inspection Photographs 7 and 8, 13 and 14) and by press accounts. Those sources are corroborated by recent photographs and accounts by local residents (See attachment 3: Photo by Thomas J. Yurick, Sr., 2005), some of whom have signed affidavits indicating what they saw. Electrical capacitors that appear to carry PCBs have been found on the surface, in numbers estimated to be around 162, (See attachment 4: 8/25/05 Standard Speaker article) with the expectation that hundreds more remain hidden. Area residents have also photographed and identified categories of special wastes such as medical wastes on the site as well. It is believed that all of this dumping activity has taken place over many years without the possession by site managers or owners of hazardous, residual, special, or municipal waste permits.

This site has been considered for inclusion on the Superfund National Priorities List (“NPL”). Internal EPA documents raised serious concern about the environmental impact of the hazardous wastes on site. Although EPA declined to add the Hazleton Creek site to the NPL following an investigation in the mid-1980s, this fact alone can by no means confer a “clean bill of health.” It is unfortunate, but there is reason to believe that sampling performed at the site has been inadequate to locate all areas of significant contamination. A report prepared by a federal agency indicated as much:

“While there are multiple historic reports that drums are present on site, there is no report of a complete investigation or removal action to address that potential source of contamination [2]. A drum found on site in 1984 contained high levels of metals and solvents. Furthermore, these same chemicals were found in sediment, surface water, and soil samples collected in the vicinity of the drum. According to a 1995 PADER worksheet, the drums were never removed.[9]”

Health Consultation for Hazleton City Landfill, Agency for Toxic Substances and Disease Registry, U.S. Department of Health & Human Services, p. 4 (May 24, 2001)

An EPA memorandum provides an additional example of this. (See attachment 5: handwritten memo re magnetometer survey of site by M. Snoparsky, 5/16/86) Lack of federal resources and/or poorly designed studies can bear some of the responsibility for why this site has not yet been placed on the NPL. In an attempt to rectify this problem, State Representative Todd Eachus has petitioned the EPA to re-open an investigation and declare it a Superfund site based on affidavits and other information recently obtained. (See attachment 6: news article, 8/17/05)

The General Permit Program, Legal Requirements, and the Present Application

The DEP maintains a General Permit program designed to simplify and hasten the process of permit acquisition for numerous activities for which the Department believes substantially similar conditions and operations would exist. If the basic function of the activity fits the description of the General Permit, DEP then applies a set of universal standards and work practices to the activity. These “general” requirements become binding upon the applicant after its submitted “Determination of Applicability” forms are approved by DEP.

At the core of the General Permit process is the assumption about the essential sameness of the conditions in which the activity will be performed. General Permit WMGR085 contemplates certain residual wastes being used for “mine reclamation.” However, in the instant case such an assumption cannot be made. It is undisputed that the site has been used as a landfill for decades, and there is ample evidence of the dumping of massive quantities of hazardous waste as part of such use. The nature of this site has been fundamentally changed as a result of the waste dumping. The Hazleton City Landfill is on EPA’s CERCLIS list and has been investigated for elevation to NPL status. The site can no longer be categorized as a surface mine for the purposes of DEP’s General Permit program. To ignore untold tons of waste and tens of thousands of barrels of toxins and determine that this is a site contemplated under General Permit WGMR085 would constitute arbitrary and capricious action by the Department.

In addition to the failure of the site to qualify for a General Permit on the basis of its fundamental categorization, DEP regulations provide further bases upon which to deny the request for Determination of Applicability. In Chapter 287 of the Pennsylvania Waste Regulations, regarding General Permits for processing and beneficial use of residual waste, the content requirements for General Permits are set forth and address the impacts of the activities to be permitted:

“(T)he activities authorized by the general permit will not harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth. At a minimum, for beneficial use of residual waste, the use of the waste as an ingredient in an industrial process or as a substitute for a commercial product may not present a greater harm or threat of harm than the use of the product or ingredient which the waste is replacing.”

25 Pa. Code §287.631(a)(4)(iii) (emphasis added)

The inquiry presented in the regulation must be satisfied in two ways: First, the inquiry applies to the action of placing a mixture of heavy metal and organic toxin-contaminated dredge material and heavy metal-laden industrial ashes and wastes in an unlined pit. Second, and just as significant, the inquiry applies to the action of permanently burying tens of thousands of barrels of hazardous waste and PCB-laden electrical capacitors in an unlined pit that is the consequence of the first activity.

On the first count, it should be noted that citizens and elected representatives in many counties and several states have fought hard to keep these dredge materials from being deposited in their communities. Their concerns center on likely impacts on the environment and upon human uses such as groundwater quality expected from the high levels of contamination in the dredge materials. Hazleton obtains water from area wells and from reservoirs that are also in the vicinity. Some nearby residents rely on private wells. It is a reasonable concern that contaminants from the dredge-ash-dust mixture may eventually migrate to groundwater. It is undisputed that underground water in the vicinity of the site also drains into the Jeddo Tunnel mine drainage system, eventually emptying into the Little Nescopeck Creek which in turn flows to the Susquehanna River. There is thus a pathway for contaminants from this residual waste to reach the Creek and River, further degrading water quality to the detriment of the environment and the health and welfare of Commonwealth residents.

On the second count, it is believed that some level of environmental contamination is being caused on an ongoing basis by the presence of the hazardous wastes buried at the site. A primary purpose of hazardous waste law at the federal and state level is to protect public health and the environment by holding those responsible for contamination accountable for cleanup where possible or using federal and state resources to remove contamination when necessary to accomplish the same end. Here, no effort is being made to remove more than a small fraction of the extensive contamination, and little has been done to confirm the overall effects of the presence of these materials and their potential for continuing future impacts on health, welfare and the environment. The ATSDR Report from 2001 stated these serious concerns:

“The discovery of hazardous waste on site is significant from the perspective of future residents. It is possible that future residents or utility workers will dig through several feet of the final cover and hit a drum. Before redevelopment can begin, it is important to ascertain the location of the drums buried on site and to remove the drums containing the toxic wastes. Furthermore, residents should be informed of the potential for buried drums (given the nature of the site before development).”

Health Consultation for Hazleton City Landfill, Agency for Toxic Substances and Disease Registry, U.S. Department of Health & Human Services, p. 4 (May 24, 2001)

Section 287.631(a)(4)(iii) preconditions the issuance of a General Permit to the Hazleton Creek firm on a finding of NO threat of harm from its activities. Based on the record, it would be opportunistic speculation for the Department to make a finding that no such threat exists. Indeed, it is believed that such a finding would constitute arbitrary and capricious action by the Department.

Regarding the Determination of Applicability itself, the regulations state:

“The Department will determine that the general permit does not apply to the proposed beneficial use or processing activity and will deny coverage under the general permit if the applicant fails to demonstrate to the Department’s satisfaction that the proposed activity is consistent with the terms and conditions of the general permit, and does not have the potential to harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth.”

25 Pa. Code § 287.642(e)

The bar is set quite high. The applicant has the burden of demonstrating to the Department’s satisfaction that there is NO *potential threat* of harm to human welfare or the environment as a result of the activity prior to obtaining approval from the Department. In this case, it is extremely doubtful that “no potential threat” that any amount of harm would result from the permanent burial of thousands of tons of hazardous wastes can be shown by anyone. The regulations do not pose a “cost-benefit” test of any kind in this determination. Potential for *any* amount of harm, even a slight adverse impact, would compel the Department to issue a denial, even should the Department agree at a policy level with the goals of eventual “land recycling” at this site. In light of the significant evidence of the presence of hazardous wastes at the site, and the identification of available pathways to human and environmental contacts, the Department must conclude that General Permit coverage cannot be extended to Hazleton Creek under the auspices of 25 Pa. Code § 287.642(e).

DEP has rejected applications for determination of applicability for General Permits in the past. For example, in Tire Jockey Services, Inc. v. Comm. Of Pa. DEP, EHB Docket No. 2001-155-K (2002), the Environmental Hearing Board heard an appeal of such a denial. DEP denied coverage under General Permit No. WMGR038. for two primary reasons. First, “Tire Jockey had failed to demonstrate to DEP’s satisfaction that the proposed operation at the Site was consistent with the terms and conditions of the General Permit WMGR038.” Tire Jockey, p. 22. In this case, General Permit WMGR085 requires significant bonding for the operation. Hazleton Creek Properties, LLC. is the entity that has submitted the application. It is believed that this entity has few assets and has been established largely for the purpose of this particular project. It is a fair question to ask whether such an entity can adequately assure the Department of its bonding capabilities. Likewise, other conditions of the General Permit require frequent testing of the loads of residual waste to be processed or “beneficially used” before they can be accepted. How can the Department assure the public that a newly established entity such as Hazleton Creek will have the resources and expertise to properly conduct the required testing?

Compliance history is also a critical issue and DEP may deny General Permit coverage on the basis of a questionable history of compliance. In Tire Jockey, “the compliance history of Tire Jockey and its related parties, and the failure of Tire Jockey to accurately report that compliance history, showed a lack of ability or intention to comply

with the terms and conditions of the general permit.” Tire Jockey, p. 22. In this case, the newly formed Hazleton Creek has no compliance history, so DEP must look to its related parties. That means the environmental compliance history of Mark Development, the Hazleton Redevelopment Authority, the City of Hazleton, and Pagnotti Enterprises, the long-time landowner, must all bear scrutiny. As an initial matter, it bears repeating that while the City of Hazleton leased the site from Pagnotti for use as a landfill, it is believed that they did not possess a Solid Waste Management Act permit. Operation of a disposal facility without a permit is a very significant violation of the law.

Conclusion

However well-intentioned the goal of reclaiming blighted lands in the Commonwealth might be, the grant of General Permit coverage to advance that goal cannot overlook major incompatibility issues present at given sites. In order to protect the welfare of residents and the environment, this application must be denied and work must begin to remove the extensive toxic contamination at the Hazleton Landfill. Only when that work is accomplished should permanent reclamation projects be authorized.

Sincerely,

Michael D. Fiorentino, Esq.
On Behalf of Thomas J. Yurick, Sr.,
As Yet Unnamed Concerned Citizens
Group, and MAELC

Enclosures (Fax and 1st Class Mail only)