STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Petition of

ASHLAND CHEMICAL COMPANY

For a Declaratory Ruling

DECLARATORY RULING
DEC #27-15

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Ashland Chemical Company ("Ashland Chemical"), by its attorneys, Nixon, Hargrave, Devans & Doyle, has petitioned for a Declaratory Ruling, pursuant to Sections 204 and 206 of the State Administrative Procedure Act ("SAPA") and this Department's regulations at Parts 481 and 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), concerning the applicability to Ashland Chemical's storage facilities of certain statutes and regulations which this Department enforces. Particularly, Ashland Chemical has petitioned for a Declaratory Ruling with respect to two issues: whether its storage facilities are subject to (1) the permit requirements of 6 NYCRR Part 360 and (2) the program fees of Title 4 of Article 72 of the Environmental Conservation Law ("ECL") and 6 NYCRR Part 483.*

* Since the filing of the petition, the Department has amended its regulations on solid wastes (6 NYCRR Parts 360-367) to transfer all regulation of hazardous waste to new Parts 370-373, leaving the regulations concerning the management of municipal and industrial (non-hazardous) solid waste in the Part 360 series.

In addition, since the filing of the petition, Part 364 has been amended and consequently the version cited in the petition is no longer in effect. However, for the purposes of this Ruling covering the dates set forth in the petition (February 1983 to May 1984) the original version of Part 364 will be discussed. A subsequent discussion will indicate that the result is the same under new Part 364.

This Ruling will include both the old and new citations.

It is in the public interest to grant the instant petition and issue a Declaratory Ruling to inform petitioner, and the general public, when a waste transporter (permitted under 6 NYCRR Part 364) is also storing waste and requires a hazardous waste management facility permit, and on the relationship of federal and State law on this matter. In addition, it is in the public interest to inform waste transporters of their fee liabilities under ECL Article 72.

FACTS

The following facts are based solely on Petitioner's representations in the Petition and are assumed solely for the purposes of this Ruling.

Ashland Chemical is a national distributor of industrial chemicals. Its distribution system utilizes regional distribution centers, four of which are located within this State. As a service to its customers, Ashland Chemical also transports their drummed waste chemicals to a treatment, storage and disposal facility located in another state. The drummed waste chemicals consist primarily of used Ashland Chemical products, which are picked up by Ashland Chemical trucks at customers' business facilities concurrently with delivery of virgin products.

Trucks from three of the four distribution centers located within this State routinely transport the drummed waste chemicals either to a treatment, storage and disposal facility, which is located outside this State, or to another Ashland Chemical facility, which is located outside this State, although an

incident of on-truck storage for a period of approximately seven days occurred once at one such center, that located in the City of Rensselaer.

However, trucks from the fourth distribution center, that located in the City of Binghamton, routinely transport the drummed waste chemicals back to the Binghamton distribution center. There they are off-loaded and stored temporarily in a building until a full truckload of drums is accumulated, usually for five to seven days, and always less than ten days, at the end of which period they are transported to a treatment, storage and disposal facility outside this State. The Binghamton facility is not listed on the Part 364 permit as a storage facility under the permit.

During the period February 1983 through May 1984, a total of 1135 drums of waste chemicals had been stored at Ashland Chemical's Binghamton distribution center, the vast majority of which were hazardous wastes, either listed in 6 NYCRR 366.4 [new 371.4] or exhibiting characteristics identified in 6 NYCRR 366.3 [new 371.3]. During the period February 1983 through May 3, 1984, the average daily number of drums in temporary storage during transportation at the Binghamton facility was 12.3 drums. The drums met or exceeded United States Department of Transportation requirements for waste containers.

These drummed wastes, when temporarily stored in transit, are housed in a heated, explosion-proof concrete block building, one of four buildings at the facility. These drums are stacked no more than two high in an area separated from the other materials (drummed virgin solvents and empty drums) which are stored in this

building. Non-compatible materials, both ignitable or reactive virgin and waste products, are segregated by barriers. These barriers are at least 40 feet apart. Drums of wastes are inspected for structural integrity at the time of pickup, off-loading and during storage. Inspection forms are completed daily. Normally, there are personnel within approximately 15 feet of the waste storage area during the movement of waste storage containers, and they can detect and report any problems immediately.

APPLICABILITY OF 6 NYCRR PART 360 [NEW PART 373]

ECL Article 27 regulates solid and hazardous waste, and Title 3 thereof, entitled "Waste Transporter Permits", states, in ECL §27-0305(1), that the transportation of regulated waste originating or terminating at a location within this State requires a permit. Part 364 of the regulations implements this statutory requirement. Ashland Chemical is permitted as a waste transporter pursuant to 6 NYCRR Part 364.

Regulated waste, as defined by ECL §27-0303(4), includes "industrial-commercial waste" which, as defined by ECL §27-0303(2), includes hazardous waste. Consequently, there is no question that the wastes transported and stored by Ashland Chemical are regulated wastes under the statute. The sole issue, therefore, is whether, in connection with the transportation of such wastes pursuant to the Part 364 permit, storage occurs requiring a separate Part 360 [new Part 373] permit. Ashland Chemical claims that incidental storage is permissible under its

Part 364 permit and cites old 6 NYCRR 364.2(a)(3) and 365.3(a)(4) for support.

Under 6 NYCRR 364.2(a)(3) no person may "conduct storage of any waste incidental to removal, transport or transfer" without first obtaining a Part 364 permit. Thus, the regulation contemplates that a waste transporter permit may authorize the storage of waste "incidental" to the principal activity of transportation. "Storage" is defined for purposes of the waste transporter law to mean "the holding of waste for a temporary period, at the end of which the waste is processed, recovered, disposed of, or stored elsewhere." ECL §27-0303(6) and old 6 NYCRR 364.1(b)(8) (emphasis added). However, "incidental" storage is not defined in the old Part 364. A definition of "storage incidental to transport" is presently set forth in new 6 NYCRR 364.1(c)(12).

Although ECL §27-0305(5) requires that an application for a waste transporter permit indicate, among other things, "any place of temporary storage used or to be used by the applicant", this cannot be read to authorize temporary storage under a Part 364 permit, but only seeks to elicit information that may lead to the listing on the issued Part 364 permit of approved storage facilities.

A waste transporter permit is not the only necessary authorization for the storage of hazardous waste, as, indeed, old 6 NYCRR 364.1(a) expressly warned:

> This Part governs the collection, transport and transfer of waste, as defined in this Section, within this state, and the delivery of such waste to storage, treatment,

> processing and disposal facilities. The construction and operation of storage, treatment, processing and disposal facilities for this waste are governed by regulations promulgated pursuant to Environmental Conservation Law: Article 17, titles 7 and 8 (SPDES); Article 19 (Air pollution control); Article 23, title 23 (Re-refining of used oil); Article 27, title 7 (Solid waste management facilities), title 9 (Industrial hazardous waste management) and title 11 (Siting industrial hazardous waste facilities). A person who engages in both (1) collection, transport, transfer, or storage incidental thereto, and (2) construction or operation of a storage, treatment, processing or disposal facility, must comply with both this Part and the relevant facility regulations noted above.

Storage facilities for hazardous waste (as well as generators, transporters, and treatment and disposal facilities) are subject to Title 9 of Article 27, entitled "Industrial Hazardous Waste Management", and require a Part 360 [new 373] permit. ECL §27-0913(1) provides that "No person shall engage in storage ... of hazardous wastes without first having obtained a permit pursuant to title seven of this article." The regulation promulgated under the authority of ECL Article 27, Title 7, is 6 NYCRR Part 360 [new 373], which similarly provides at section 360.2(b) [and now similarly in 373-1.2] that, unless exempted by the regulation or granted a variance, "no person shall ... operate a solid waste management facility, except in accordance with a valid operation permit issued to such person by the department pursuant to this Part". The term "solid waste management facility" includes "storage areas or facilities", 6 NYCRR 360.1(d)(91) [new 360.1(d)(67)], and now the term "hazardous waste management facility" includes storage, 6 NYCRR 370.2(b)(69).

Storage is defined, for purposes of Title 9, as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." ECL §27-0901(8) and 6 NYCRR 360.1(d)(94) [new 360.1(d)(69), 370.2(b)(133)] (emphasis added). Although this definition of storage differs slightly from that given above under ECL Article 27, Title 3 and Part 364, nevertheless it also clearly indicates that "storage" always includes "temporary storage".

The petitioner also argues that the Part 365 [new 372] regulations recognize that transporters may serve as temporary storage facilities. But while 6 NYCRR 365.3(a)(4) [new 372.3(a)(6)] imposes certain requirements on transporters who store hazardous waste, 6 NYCRR 365.1(h) [new 372.1(h)] unequivocally gives notice that those requirements are in addition to, and not in lieu of, the pertinent requirements of 6 NYCRR Part 360 [new 373].

The petition also asserts that DEC, in the New York State Hazardous Waste Manifest Guidance Manual ("Guidance Manual") published in March 1982, has interpreted the prior State regulation to allow temporary or incidental storage for no longer than 10 days, as long as the wastes are not mixed or removed from their original containers. The Guidance Manual is instructive in distinguishing between temporary and incidental storage, although it is important to note that the time periods are different under current law. The first two paragraphs discussing "Storage Incidental to Transport" are as follows:

> In many cases a transporter will find it necessary to store wastes in a vehicle for a short period of time prior to delivery to the TSD facility. This could occur due to picking up the shipment too late to deliver it to the TSD facility, switching tractors on the load, weekend stops, and changing drivers. While these occurrences can and do take place, it is the transporter's responsibility to insure the integrity of the load. Therefore, unless an emergency occurs, these storage incidents should only take place in locations that are owned or controlled by the transporter.
>
> Short term or incidental storage episodes should be minimized whenever possible to avoid triggering an exception report. In addition, the longer a load sits, the greater chance of leakage occurring. In no case can this type of storage last longer than 10 days. If longer periods are necessary, the load must be taken to a permitted storage facility.

Guidance Manual at p.III-15 (emphasis added).

This excerpt confirms that "incidental storage" is storage on the vehicle while temporary storage is storage off the vehicle and in the facility. In context the statements mean that short-term storage in the vehicle for up to 10 days may be permissible under the enumerated circumstances. If longer storage is required, the Guidance Manual states that the load must be taken to a "permitted storage facility", i.e., removed from the vehicle and deposited at a facility for which a Part 360 permit has been issued. Of course, if such removal from the vehicle takes place at anytime, much less the 10 days suggested as an outside maximum for on the vehicle storage, then a permitted storage facility is needed. Such is the case at Ashland Chemical where hazardous wastes are immediately off-loaded into a warehouse. Consequently, the Guidance Manual confirms that the critical fact is removal off the vehicle, not the length of time within the perimeter of the facility. Thus, it is clear that both the statute and the regulations implementing it contemplate that a solid waste

management facility operation permit is required to authorize any storage of hazardous waste, even temporary storage, that includes wastes moved off a truck into a facility.

The clarification that incidental storage is only short-term storage on the vehicle itself has been incorporated into the new Part 364 and into the new hazardous waste regulations (Part 370 series). In the amendments to Part 364, which became effective on January 10, 1985, definitions of "storage incidental to transport" and "transfer incidental to transport" were added to clarify the regulation. These terms are defined as follows in new 6 NYCRR 364.1(c):

> (12) "Storage incidental to transport" means any on-vehicle storage which occurs enroute from the point of initial waste pickup to the point of final delivery for purposes such as, but not limited to, overnight on-the-road stops, stops for meals, fuel and driver comfort, stops at the transporter's facility for weekends immediately prior to shipment, or on-vehicle storage not to exceed three days at the transporter's facility for the express purpose of consolidating loads (where such loads are not removed from their original packages or containers) for delivery to an authorized treatment, storage or disposal facility.
>
> ....
>
> (14) "Transfer incidental to transport" means any transfer of waste material associated with storage incidental to transport where such material is not unpackaged, mixed or pumped from one container or truck into another.

These additions make it absolutely clear that storage incidental to transport and transfer incidental to transport (which activities are authorized by a Waste Transporter Permit) do not include the off-loading, warehousing and combining of loads which characterize the activity at the Binghamton facility. This

new text is consistent with the original intent of Part 364 although it does now specify that on-vehicle storage cannot exceed three days, rather than the ten days noted in the old Guidance Manual.

In addition, new 6 NYCRR 373-1.1(d)(1)(xv) requires the facility to have a storage permit if storage exceeds the five-day maximum period of time that wastes can remain on a vehicle at a transfer facility:

> Storage of manifested shipments of hazardous waste in containers or vehicles by a transporter at its own transfer facility for a period of five calendar days or less is exempt, provided that the transporter complies with the following requirements:
>
> (a) Maintain a log of the time and date on which each container or transport vehicle of hazardous waste is received or shipped, including the number from its manifest.
>
> (b) Does not unpackage, mix or pump from one container or transport vehicle into another.
>
> (c) Does not open any containers or transport vehicles for any purpose, including sampling, transfer, treatment, or addition of absorbent.
>
> (d) Store the waste in containers or transport vehicles which meet the design requirements specified by US DOT for each type of waste stored. During storage and shipment, these containers or transport vehicles must be packaged, labeled and marked in accordance with 49 CFR Parts 172, 173, 178, and 179 (see 6 NYCRR subdivision 370.1(e)).
>
> (e) Does not open, handle, or store containers or transport vehicle in a manner which may rupture the container or transport vehicle or cause it to leak.
>
> (f) Comply with the standards for hazardous waste discharges from transporters specified in 6 NYCRR paragraph 372.3(d).
>
> (g) Inspect the containers or transport vehicles at least daily looking for leaks and for

> deterioration caused by corrosion or other factors, and keep a log of the inspections.
>
> (h) Does not store containers or transport vehicles of ignitable or reactive wastes less than 50 feet from the facility's property line, and separate and protect these containers from sources of ignition or reaction.

At first blush there appears to be an inconsistency between the above provisions concerning the maximum amount of time incidental storage on the vehicle at the transporter's facility can occur. On one hand 6 NYCRR 364.1(c)(12) states it is three days; on the other hand 6 NYCRR 373-1.1(d)(1)(xv) states it is five days. However, the two provisions can be harmonized as follows: 6 NYCRR 373-1.1(d)(1)(xv) provides for a Part 373 permit exemption for incidental storage of hazardous wastes as long as that storage will not exceed five days duration and stringent conditions are met; 6 NYCRR 364.1(c)(12) and 364.3(a)(2), read together with 6 NYCRR 373-1.1(d)(1)(xv), require a person applying for a Part 364 permit to inform the Department of the proposed place of storage of the hazardous wastes if incidental storage in excess of three days will occur.

Petitioner also requests a Ruling pursuant to SAPA Section 206 which states that any person subject to a requirement by a State statute or rule, and to a similar requirement imposed by the federal government, may petition for a Declaratory Ruling whether compliance with the federal requirement will be accepted as compliance with the State requirement. However, it is immaterial that sections 263.12 and 264.1(g)(9) of Title 40 of the Code of Federal Regulations contain an express exemption from the storage facility permit requirements and the standards for such

facilities for a transporter storing manifested hazardous waste for less than ten days at a transfer facility. A state is forbidden to regulate this subject matter less stringently than does the United States Environmental Protection Agency, according to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6929 (1976), but a state is not thereby forbidden to regulate more stringently. General Electric Co. v. Flacke, 118 Misc.2d 729, 733, 461 N.Y.S.2d 138, 140 (Sup. Ct. 1982). The issue at hand is clearly one wherein this State has chosen to regulate more stringently, by declining to adopt the federal exemption, as it properly may do.

The reason why the federal requirement does not satisfy the purposes of the State statute is that the ten-day exemption would allow temporary storage of hazardous wastes to be free of permitting and other requirements. Since it is the declared intent of Title 3 of Article 27 to protect the environment from mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal and to prevent a discharge of wastes into the environment, such temporary storage sites must be permitted so that no unregulated activities occur which may lead to a relaxation of management standards resulting in discharges into the environment.

From the foregoing, it will be seen that it is the law of this State that a place used for the temporary storage of hazardous waste taken off of a permitted vehicle is a solid waste management facility required by ECL §27-0913(1) to be permitted

pursuant to ECL Article 27, Title 7, and 6 NYCRR Part 360 [new 373]. Incidental storage on a vehicle may be permissible under some circumstances (and not require a hazardous waste permit) but not under the facts set forth in the petition with respect to Ashland Chemical's Binghamton facility.

APPLICABILITY OF 6 NYCRR PART 483

Petitioner has also requested a Declaratory Ruling, pursuant to 6 NYCRR 481.9(b), that the Ashland Chemical facilities are not subject to hazardous waste program fees. A hazardous waste program fee, depending on the quantity of waste handled, is imposed by ECL §72-0402.2 (a) and (b), on "All facility operators required to obtain a permit ... for the ... storage ... of hazardous waste pursuant to title nine of article twenty-seven of this chapter...." See also 6 NYCRR 483.1(b)(1). The term "required to obtain a permit", as used therein, is defined at 6 NYCRR 480.2(ii) to include any facility conducting any hazardous waste management activity not exempted by 6 NYCRR 360.1(f) [new 373-1.1(d)]. Thus a hazardous waste management facility is liable for the hazardous waste program fee, even if it is operating unlawfully by operating without such a permit.

Ashland Chemical's Binghamton distribution center was routinely used during the period April 1, 1983, through March 31, 1984, for the storage of hazardous wastes, and therefore it was a hazardous waste management facility required to have a permit and so is liable for the program fee.

However, it is unclear on the facts whether the Rensselaer facility was engaged in storage. On one hand, the Petition, in a general statement, says that "the facts concerning the types of wastes transported, handling practices and policy training at the Binghamton facility are the same for the distribution centers located in Buffalo, Rensselaer and Syracuse". Petition, p.2. This implies that operations at Rensselaer were similar to those at Binghamton (off-loading and warehousing). On the other hand, the Petition makes a specific statement about the Rensselaer facility: "The Rensselaer distribution center has had only one incident of temporary storage. On that one occasion, drummed wastes in transit were stored for approximately 7 days on the truck." Petition, p.3. This seems to say that only one incident occurred (confined to the period February 1983 through May 3, 1984) but no off-loading occurred. Since during that period of time (prior to January 1985) seven days of storage on the truck would not violate the previously permissible ten-day period of incidental storage, it may be that no storage requiring a permit occurred at Rensselaer.

In conclusion, Ashland Chemical's storage facilities are subject to the permit requirements of 6 NYCRR Part 360 [new 373] to the extent that they are used for the temporary storage of

hazardous wastes and, if so used, they are subject to the hazardous waste program fees of ECL Article 72, Title 4, and 6 NYCRR Part 483.

DATED: Albany, New York
April 8, 1986

Janice K. Corr
Deputy Commissioner and
General Counsel