

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of the

GROUP FOR THE SOUTH FORK

for a Declaratory Ruling Pursuant
to Section 204 of the State
Administrative Procedure Act

DECLARATORY
RULING

DEC 27-26

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INTRODUCTION

Petitioner, Group for the South Fork, a not-for-profit environmental planning organization dedicated to natural resource protection, seeks a Declaratory Ruling pursuant to Section 204 of the State Administrative Procedure Act and Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), concerning the nature and percentage of the municipal wastestream which, under the Long Island Landfill Law (ECL §27-0704) and the implementing regulations (6 NYCRR Subpart 360-8), can be buried in landfills on Long Island after December 1990.¹

It is in the public interest to grant the instant Petition and issue a Declaratory Ruling to inform Petitioner and the general public of the Department's construction of the Long Island Landfill Law.

QUESTIONS PRESENTED

Petitioner asks six separate questions:

¹ Although Petitioner seeks a Declaratory Ruling for landfills located specifically on the East End of Long Island, the Long Island Landfill Law does not distinguish between East End and other Long Island landfills and applies equally to all landfills located in Nassau and Suffolk counties.

1. What materials can be buried in deep flow recharge area² landfills after 1990?
2. What materials can be buried in non-deep flow recharge area landfills after 1990?
3. If a municipality's intensive recycle/compost program is able to handle 52 percent of the wastestream, can the remainder be buried locally?
4. If a municipality is able to recycle/compost 70 percent of the wastestream, can the remainder be buried locally?
5. What percentage of the wastestream can be buried locally after intensive recycling/composting?
6. Can recycling/composting residue or leftovers be considered "clean fill" and buried as such in local landfills?

DISCUSSION

QUESTION 1. What materials can be buried in deep-flow landfills after 1990?

The answer to this question varies depending upon whether the landfill is: (a) a "new" landfill which became operational on or after December 18, 1983; (b) an "expansion" to a landfill which was existing on December 18, 1983, and the expansion became operational on or after December 18, 1983; or (c) an "old" landfill which was existing on December 18, 1983.

(a) "New" deep flow recharge area landfills. ECL §27-0704(3) generally prohibits on or after December 18, 1983, the operation of any new landfill which is located in a deep flow recharge area. See also 6 NYCRR §360-8.4(b). Therefore, the use of such a landfill for the disposal of a municipality's waste stream is prohibited. However, notwithstanding the general prohibition in deep flow recharge areas, the

² A "deep flow recharge area" is a "sensitive recharge area within the Counties of Nassau and Suffolk within the boundaries of hydrogeologic zones I, II, and III as defined in the Long Island Comprehensive Waste Treatment Management Plan of nineteen hundred seventy-eight." ECL §27-0704(1)(b).

Commissioner is authorized to allow, by permit, the disposal of "clean fill"³ material in Nassau and Suffolk counties (including in a deep flow recharge area) provided such material is not contaminated by hazardous wastes. ECL §27-0704(6) and 6 NYCRR §360-8.6(a).

³ "Clean fill" is defined by statute as "material consisting of concrete, steel, wood, sand, dirt, soil, glass, or other inert material designated by the commissioner." ECL §27-0704(1)(a). In addition to the materials listed by statute as constituting clean fill, the Department has, by regulation, identified construction and demolition debris as an inert material which also constitutes clean fill. 6 NYCRR §360-1.2(b)(22). "Construction and demolition debris" is defined as:

uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm-related cleanup. Such waste, includes but is not limited to bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes, electrical wiring and components containing no hazardous liquids, and metals that are incidental to any of the above. Solid waste that is not construction and demolition debris (even if resulting from the construction, remodeling, repair and demolition of structures and roads and land clearing), includes but is not limited to asbestos waste, garbage, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, carpeting, furniture, appliances, tires, drums and containers, and fuel tanks. Specifically excluded from the definition of construction and demolition debris is solid waste (including what otherwise would be construction and demolition debris) resulting from any processing technique, other than that employed at a construction and demolition processing facility, that renders individual waste components unrecognizable, such as pulverizing or shredding.

6 NYCRR §360-1.2(b)(33)

Consequently, deep flow recharge area landfills which became operational on or after December 18, 1983, may receive for disposal only such clean fill material as is authorized by permit. The Department has established the permitting requirements for the construction and operation of clean fill landfills in Nassau and Suffolk counties by regulation at 6 NYCRR §360-8.6.

(b) "Expansions" to deep flow recharge area landfills existing on December 18, 1983. The Department, on or after December 18, 1983, was authorized to approve the operation of a limited expansion to any deep flow recharge area landfill existing on that date for the sole purpose of providing solid waste capacity where no other feasible means of solid waste management was available. ECL §27-0704(3). However, such an expansion could be approved by the Department only upon a showing that the purpose of the expansion was to provide solid waste disposal capacity prior to the implementation of a resource recovery system acceptable to the Commissioner which would be operational by December 18, 1990. Therefore, such limited expansions cannot be used to receive a municipality's solid waste after December 18, 1990. ECL §27-0704(3) and 6 NYCRR §360-8.4(c).

However, as in the case of "new" deep flow recharge area landfills, such expansions can, both before and after December 18, 1990, receive for disposal uncontaminated clean fill by permit under ECL §27-0704 and 6 NYCRR §360-8.6(a). Thus, after December 18, 1990, such expansions are allowed to receive for disposal only clean fill authorized by permit.

(c) "Old" deep flow recharge area landfills which were existing on December 18, 1983. The only deep flow landfills authorized to receive wastes other than clean fill after December 18, 1990, are landfills which were existing (not expansions) on December 18, 1983, and which meet the design and operational requirements of

ECL §27-0704(5)(a)-(e).⁴ These requirements are that: the owner or operator of the landfill post a financial guarantee; the landfill be underlain with a double liner with a leachate collection system; the landfill minimize the migration of gas beyond the boundaries of the facility; the landfill not accept industrial, commercial or institutional hazardous waste; and the landfill not be located in a wetland or floodplain.

The Department is not aware of any landfill in the deep flow recharge area which satisfies these requirements and therefore qualifies to accept for disposal any category of solid waste other than clean fill. Consequently, after December 18, 1990, the Long Island Landfill Law in effect prohibits any landfill located in the deep flow recharge area from accepting any waste for disposal except for clean fill pursuant to permit issued by the Department under ECL §27-0704(6) and 6 NYCRR §360-8.6.

Were a qualifying landfill to exist, it would be authorized, after December 18, 1990, to accept for disposal four categories of waste:

(1) Material which is the product of resource recovery⁵, incineration or composting. ECL §27-0704(5)(f) and 6 NYCRR §360-8.3(d)(1). The phrase "product of resource recovery, incineration or composting" is defined at 6 NYCRR §360-8.2(e) as "ash residue, noncombustible residue from a recyclables handling and recovery facility, noncombustible residue from a composting facility, and compost."⁶

⁴ See also 6 NYCRR §360-8.3(a), (b)(1), (b)(2)(i), (c), (d)(1) and (e).

⁵ "Resource recovery" is defined at ECL §27-0701(4) as "the separation, extraction and recovery of useable materials, energy or heat from solid waste through source separation, recycling centers or other programs, projects or facilities."

⁶ Note that the Department has the authority to issue a variance from the noncombustible requirements contained in this definition if the requirements of 6 NYCRR §360-1.7(c) are satisfied.

(2) Downtime waste. Downtime waste is defined at ECL §27-0704(1)(c) as "any treatable or burnable waste accumulated during a scheduled or unscheduled maintenance period of a treatment facility." Such waste could be received for disposal if "deposited in a special disposal area that is located and constructed so as to segregate these wastes and minimize their effect on residents of the surrounding area." ECL §27-0704(5)(f) and 6 NYCRR §360-8.3(d)(1). Not more than ten percent of the annual rated capacity of a resource recovery facility may be disposed of as downtime waste in any given year. ECL §27-0704(5)(f) and 6 NYCRR §360-8.3(d)(1). The term "resource recovery facility" is defined at 6 NYCRR §360-1.2(b)(130).

(3) Wastes that are untreatable by a resource recovery system. "Untreatable waste" is defined at ECL §27-0704(1)(h) as "material that because of its size or composition cannot be processed by a treatment facility." See also 6 NYCRR §360-1.2(b)(163). "Resource recovery system" is defined in 6 NYCRR §360-8.2(f) as "a system that provides environmentally sound management of collected solid waste through facilities planned, designed, assembled, and constructed to maximize the potential for resource recovery." Untreatable wastes could be received for disposal if "deposited in a special disposal area." ECL §27-0704(5)(f) and 6 NYCRR §360-8.3(d)(1).

(4) Uncontaminated clean fill. As previously mentioned, disposal of uncontaminated clean fill is authorized in Nassau and Suffolk counties by permit only. ECL §27-0704(6) and 6 NYCRR §360-8.6.

QUESTION 2. What materials can be buried in non-deep flow landfills after 1990?

The Long Island Landfill Law requires that only qualifying non-deep flow landfills may receive waste for disposal after 1990. In order to qualify to receive waste, such landfills must comply with certain design and operational requirements. Old non-deep

flow recharge area landfills which were existing on December 18, 1983, must satisfy the requirements contained in ECL §27-0704(5)(a)-(f), including that the owner or operator of the landfill post a financial guarantee; the landfill be underlain with a double liner with a leachate collection system; the landfill minimize the migration of gas beyond the boundaries of the facility; the landfill not accept industrial, commercial or institutional hazardous waste; and the landfill not be located in a wetland or floodplain. See also 6 NYCRR §360-8.3.

New non-deep flow recharge area landfills which became operational on or after December 18, 1983, and expansions made on or after December 18, 1983, to non-deep flow recharge landfills which were existing on December 18, 1983 are required by law to comply with the design and operational requirements set forth in ECL §27-0704(4)(b)-(f) and 6 NYCRR §360-8.3 for old non-deep flow recharge area landfills. In addition to having to comply with these requirements, such expansions or new landfills may receive waste for disposal only if the Commissioner first makes "an affirmative determination that such landfill will not pose a threat to groundwater quality." ECL §27-0704(4)(a) and 6 NYCRR §360-8.5.

If a non-deep flow landfill, whether "new" or "old", meets these design and operational requirements it may receive for disposal up to a maximum of five categories of waste after December 18, 1990. The first four categories of waste are the same categories as may be disposed of in qualifying landfills located inside of the deep flow recharge area after December 18, 1990 (i.e., downtime waste, untreatable wastes, clean fill, and material which is the product of resource recovery, incineration, or composting). These categories of waste may be received by a qualifying non-deep flow recharge area landfill in the same manner and to the same degree as they could be received by a qualifying deep flow recharge area landfill. See previous discussion.

The fifth category of waste that may be disposed of after December 18, 1990, in landfills located outside of the deep flow recharge area is raw municipal waste, referred

to in the Long Island Landfill Law as "wastes other than" those four categories of waste listed above. However, a qualifying landfill may receive this waste for disposal only if:

such disposal is approved by the commissioner based upon a finding made after the opportunity for a public hearing that (1) no resource recovery facility is available to accept such waste; (2) the owner of the landfill is making all reasonable efforts to implement a resource recovery system acceptable to the commissioner; and (3) that the landfilling of such wastes will not have significant adverse environmental impacts.

ECL §§27-0704(4)(g) and 27-0704(5)(f). See also 6 NYCRR §360-8.3(d)(2).

In approving the disposal of such "other wastes" the Commissioner is required to impose "conditions necessary to mitigate any adverse environmental impacts to the maximum extent practicable." ECL §27-0704(4)(g), (5)(f) and 6 NYCRR §360-8.3(d)(2). The Commissioner is also required to impose "a schedule under which the municipality shall implement an acceptable resource recovery system." ECL §§27-0704(4)(g), (5)(f) and 6 NYCRR §360-8.3(d)(2). Thus, the Commissioner is authorized to allow a qualifying landfill located outside of the deep flow recharge area to accept "other wastes" only as an interim measure until an acceptable resource recovery system is implemented pursuant to a schedule imposed by the Commissioner.

The period of time during which the Commissioner may allow the disposal of such other wastes is not fixed by statute or regulation and consequently might vary from municipality to municipality, depending upon such factors as how long the municipality could reasonably be expected to take to implement the particular resource recovery system which was accepted by the Commissioner and whether the municipality has already made reasonable progress towards implementing that system. However, any schedule imposed by the Commissioner would likely require the municipality to proceed expeditiously with the development and implementation of the approved resource recovery system, since the owner of the landfill is required to make "all

reasonable efforts to implement a resource recovery system acceptable to the commissioner." ECL §§27-0704(4)(g) and 27-0704(5)(f) and 6 NYCRR §3608.3(d)(2).

QUESTION 3. If a municipality's intensive recycling/compost program is able to handle 52 percent of the wastestream, can the remainder be buried locally?

QUESTION 4. If a municipality is able to recycle/compost 70 percent of the wastestream, can the remainder be buried locally?

QUESTION 5. What percentage of the wastestream can be buried locally after intensive recycling?

Neither ECL §27-0704 nor 6 NYCRR Subpart 360-8 specifies any particular percentage of a municipality's total untreated waste stream which can be disposed of in either a deep flow recharge area or non-deep flow recharge area landfill in either Nassau or Suffolk County after December 18, 1990. Therefore, the concept of "percentage of the waste stream" is an inappropriate criterion to use in determining the waste which a landfill is authorized to accept for disposal under the Long Island Landfill Law and associated regulations. Consequently, the Department is unable to provide a specific answer to these three questions.

As discussed previously, ECL §27-0704 and 6 NYCRR Subpart 360-8 classify solid waste which is eligible for landfilling on Long Island into five categories and authorize qualifying landfills to accept for disposal only certain categories, determined by such factors as landfill location (*i.e.*, deep flow recharge area or non-deep flow recharge area) and the date the facility became operational. That the Legislature intended the restrictions on the categories of waste which a landfill could accept for disposal to result in a reduction in both the volume and toxicity of the waste stream being landfilled is evidenced by the very terms of the Long Island Landfill Law. Waste that is eligible for landfilling is eligible because of its origin or composition after appropriate

treatment,⁷ and not because it happens to fall within any particular predetermined percentage. Furthermore, the use of the term "untreatable waste" in ECL §27-0704(4)(g) and (5)(f) indicates that the Legislature intended that municipalities utilize a resource recovery system consisting of readily available technologies designed to treat most of the waste stream. The only untreated wastes that the Long Island Landfill Law authorizes to be disposed of in qualifying landfills are downtime waste, waste that because of its size or composition is unable to be treated by a resource recovery system, and clean fill by permit.

Although strict percentage limitations are not contained in the statute or its associated regulations, the percentage of a municipal waste stream which a particular landfill may accept for disposal after December 18, 1990, can be very crudely determined by first ascertaining which categories of solid waste the particular landfill may accept for disposal. Next, each of those categories may be individually examined to determine what percentage reduction of the solid waste stream can be effected.

The first category of waste which a landfill may be authorized to accept for disposal -- material which is the product of resource recovery, incineration or composting -- is a treated waste. Such waste is defined as "ash residue, noncombustible residue from a recyclables handling and recovery facility, noncombustible residue from a composting facility, and compost." 6 NYCRR §360-8.2(e). Although the Long Island Landfill Law does not require a showing of any particular percentage reduction before such landfilling may be authorized, Department experience indicates that the disposal of such waste, after combustion, typically takes up to 90 percent less landfill airspace capacity than the disposal of the untreated waste from which it is produced. Likewise,

⁷ "Treatment" is defined in 6 NYCRR §360-1.2(159) to include "any method, technique or process designed to change the physical, chemical, or biological character or composition of any solid waste to recover energy or materials from it to render it safer to transport, store, or dispose of, or to make amenable for reuse, recovery, storage, or reduction in volume."

the residue from recycling programs will constitute a small fraction of the untreated waste stream from which it originated.

The second category of waste which a landfill may be authorized to accept for disposal -- untreatable waste -- includes those materials which due to their size or composition cannot be processed by a treatment facility, i.e., are not able to become products of resource recovery, incineration, composting or a resource recovery system approved by the Department. The amount of untreatable wastes being landfilled should constitute a relatively small percentage of a municipality's total waste stream when an appropriate resource recovery system has been implemented by the municipality.

The third category of waste which a landfill may be authorized to accept for disposal -- clean fill -- can be landfilled only pursuant to ECL §27-0704(b) and 6 NYCRR §360-8.6. Clean fill, like untreatable waste, is an untreated waste which should constitute a relatively small percentage of a municipality's total waste stream. It is likely that the Legislature determined that clean fill does not need treatment before disposal because it is a relatively benign waste as compared to other untreated solid wastes.

The fourth category of waste which a landfill may be authorized to accept for disposal -- downtime waste -- is also an untreated waste. Since this waste is not benign, the Long Island Landfill Law and associated regulations prohibit a particular resource recovery facility, in any given year, from landfilling more than ten percent of its annual rated capacity as downtime waste.* ECL §§27-0704(4)(g), (5)(f) and

* For instance, if the annual rated capacity of a particular resource recovery facility were 146,000 tons, then it would be prohibited from disposing of more than 14,600 tons per year as downtime waste in a qualifying landfill located either inside or outside the deep flow. It should be noted, however, that a facility's annual rated capacity will normally not equal the volume of solid waste generated by a municipality due to (1) design and engineering considerations and (2) a difference in boundaries between the facility's waste
(continued...)

6 NYCRR §360-8.3(d)(1). Up to ten percent of the annual rated capacity of more than one resource recovery facility may be disposed of at any one landfill.

ECL §27-0704(4)(g) and (5)(f) and 6 NYCRR §360-8.3(d)(1).

The fifth category of waste which a landfill may be authorized to accept for disposal is "other wastes," *i.e.*, untreated municipal wastes. As previously discussed, the Commissioner may authorize a landfill to receive such wastes for disposal only as an interim measure provided, among other things, the owner of the landfill is making all reasonable efforts to implement a resource recovery system "acceptable" to the Commissioner. Thus, during this interim period a municipality could be authorized to landfill its untreated waste stream.⁹

Neither the Long Island Landfill Law nor the associated regulations contain percentage standards to guide the Commissioner in determining whether a particular

⁹(...continued)

shed service area and the municipality in which the facility is located. Therefore, ten percent of a facility's annual rated capacity does not necessarily equal ten percent of the volume of solid waste generated by a particular municipality.

⁹ This is not to say, however, that a municipality could therefore landfill 100 percent of its untreated waste stream. During this interim period provisions of law other than the Long Island Landfill Law should operate to reduce significantly the volume of "other wastes" being landfilled. For instance, General Municipal Law §120-aa requires municipalities to adopt local laws by September 1, 1992, requiring source separation of solid waste into recyclable, reusable or other components for which economic markets exist. Many municipalities have already adopted such local laws. Furthermore, in authorizing a landfill to receive "other wastes" for disposal the Department would seek to require the municipality to observe the State solid waste management policy contained in ECL §27-0106(1) which establishes waste reduction followed by reuse and recycling, energy recovery, and landfilling as the State's solid waste management priorities. Also, municipalities must strive to maximize recycling as called for in the New York State Solid Waste Management Plan. Consequently, even those municipalities authorized to landfill "other wastes" as an interim measure would be required to implement aggressive reuse and recycling programs which should significantly and progressively reduce the volume of untreated solid waste having to be landfilled.

resource recovery system proposed by a municipality is "acceptable," thereby allowing the Commissioner to authorize otherwise qualifying landfills to accept for disposal "other wastes" as an interim measure. However, to be acceptable to the Commissioner such a system would be required to provide "environmentally sound management of collected solid waste through facilities planned, designed, assembled, and constructed to maximize the potential for resource recovery." 6 NYCRR §360-8.2(f). Thus, the greater the expected reduction in volume and toxicity of a municipality's waste stream from a proposed resource recovery system, and the higher the proposed system is ranked in the State's preferred solid waste management practices hierarchy, the greater the likelihood that the system would be found to be acceptable by the Commissioner.

As to the question of what categories of waste such landfills could accept for disposal after such a system has been implemented, it is implicit in the Long Island Landfill Law that the landfill could then accept for disposal only untreatable waste, downtime waste, clean fill, and the product of resource recovery, incineration or composting. Such a construction is consistent with those provisions of the Long Island Landfill Law authorizing the disposal of these four categories of wastes in qualifying non-deep flow recharge area landfills located outside of the deep flow which have never been authorized to accept for disposal "other wastes."

QUESTION 6. Can recycling/composting residue or leftovers be considered "clean fill" and buried as such in local landfills?

A. Residues. "Residue" is defined in 6 NYCRR §360-1.2(b)(129) as "all solid waste remaining after treatment and includes, but is not limited to, ash residue and other solid waste which is not recovered or combusted." In the context of recycling, residue from a materials recovery facility would likely consist of bottle caps, broken glass and labels. In the context of composting, residue from a composting facility would likely consist of small pieces of plastic and broken glass. Under 6 NYCRR §360-8.2(e), recycling and composting residues constitute a product of

resource recovery, incineration or composting if noncombustible.¹⁰ Therefore, such residues may be disposed of in qualifying landfills. ECL §27-0704(4)(g) and (5)(f) and 6 NYCRR §360-8.3(d)(1).

Under 6 NYCRR §360-8.2(e), compost (whether combustible or noncombustible) constitutes a product of resource recovery, incineration or composting which may be disposed of in qualifying landfills.

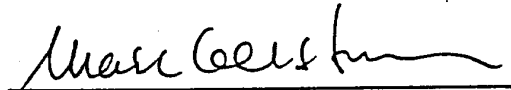
Recycling and composting residues do not constitute clean fill. As previously discussed, "clean fill" is defined by statute and regulations as material consisting of concrete, steel, wood, dirt, soil, glass, construction and demolition debris or other inert material designated by the Commissioner. See ECL §27-0704(1)(a) and 6 NYCRR §360-1.2(b)(22). Recycling and composting residues do not fit within any of the categories of material contained in this definition and have not been otherwise designated as clean fill by the Department. The Department does not contemplate any such clean fill designation for recycling and compost residues because under 6 NYCRR §360-8.2(e) such residues constitute a "product of resource recovery, incineration or composting" and the legislature clearly intended that this category of waste be disposed of in qualifying Long Island landfills, not clean fill landfills. See ECL §27-0704(4)(g) and (5)(f) and 6 NYCRR §360-08.3(d)(1).

(B) Leftovers. The term "leftovers" is not defined by statute or regulation and its meaning is not apparent from the context of its use in the Petition. For the purpose of this Declaratory Ruling it is assumed that the term "leftovers" refers to "untreatable waste" as defined in ECL §27-0704(1)(h) and 6 NYCRR §360-1.2(b)(163), i.e., "material that because of its size or composition cannot be processed by a treatment

¹⁰ Note, however, that pursuant to 6 NYCRR §360-1.7(c) the Department might be able to grant a variance from this noncombustible requirement and consequently authorize the disposal of combustible recycling and compost residues in a qualifying landfill on a case-by-case basis.

facility." Such waste does not fit within any of the clean fill material categories, nor does the Department contemplate any designation that would authorize such inclusion because the legislature intended that this category of waste be disposed of in qualifying Long Island landfills, not clean fill landfills. See ECL §27-0704(4)(g) and (5)(f) and 6 NYCRR §360-08.3(d)(1).

DATED: Albany, New York
July 1, 1992



Marc S. Gerstman
Deputy Commissioner and
General Counsel