



Chapter VI

SOLID WASTE REGULATION

“Solid waste” is defined as follows:

The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended.

Resource Conservation and Recovery Act of 1976 (“RCRA”) §1004(27), 42 U.S.C. §6904(27); *see also* NY ECL §27-0701(1). Solid waste is governed both by RCRA, and regulatory programs under state law.

A. FEDERAL REGULATION

Subtitle D of RCRA, 42 U.S.C. §6941-6949a, addresses solid waste on the federal level. RCRA §4004, 42 U.S.C. §6944, requires EPA to promulgate regulations differentiating between “open dumps” and “sanitary landfills,” and setting criteria for sanitary landfills. RCRA §4005, 42 U.S.C. §6945, requires that all open dumps be closed or upgraded. Further, RCRA requires federal guidelines for state solid waste plans, §§4002, 4003, 42 U.S.C. §§6942, 6943, as well as a procedure for development, §4006, 42 U.S.C. §6946, and approval, §4007, 42 U.S.C. §6947, of such plans. Once such a plan is approved, a state becomes eligible for federal financial assistance. §§4007(b), 4008, 42 U.S.C. §§6947(b), 6948.

While federal regulation was formerly in the background, on October 9, 1993, EPA regulations promulgated under RCRA, set forth at 40 CFR Part 258, became effective to govern

all privately and publicly-owned “municipal solid waste landfill” (“MSWLF”) units. MSWLF units must now meet a variety of location restrictions, set forth in Subpart B of Part 258, related to airport safety, flood plains, wetlands, fault areas, seismic impact zones, and unstable areas. Further, MSWLF units must meet operating criteria set forth in Subpart C concerning procedures for excluding hazardous wastes, cover material requirements, disease vector and explosive gases control, air pollution criteria (including a ban on open burning), access requirements, run-on/run-off control, surface water discharge limitations, liquids restrictions, and recordkeeping.

All new MSWLF units and lateral expansions are now required to have a composite liner and leachate collection system, or else meet other approved design criteria. Part 258, Subpart D. Further, specific requirements for Groundwater Monitoring and Corrective Action, Subpart E, Closure and Post-Closure, Subpart F, and Financial Assurance, Subpart G, are specified. These federal regulations are self-implementing, but they do not appear to preempt existing state regulations and permit systems that do not conflict, or are stricter. However, states can be delegated authority over the program. Landfills that accept less than 20 tons of waste per day (on an annual basis) can qualify for exemptions from some requirements. 40 C.F.R. §258.1(f)(1).

Furthermore, the Commerce Clause of the U.S. Constitution provides limitations on the abilities of states and local governments to limit the source of “solid waste” that may be accepted by solid waste management facilities. Thus, a state or local government cannot prohibit a private facility from accepting garbage from out-of-state or other areas of the state, unless perhaps it is of a different character than other waste. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019 (1992). Nor can this be

accomplished by a taxing scheme that discriminates against out-of-state waste. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009 (1992); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 511 U.S. 93, 114 S.Ct. 1345 (1994). Further, states cannot adopt “flow control” rules that require private parties to only bring garbage to a particular facility. *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677 (1994). However, a public authority which operates its own facility probably can restrict the source of the garbage it accepts to sources within its own territorial limits within the state, and make exclusive contracts to dispose of the waste that the municipality collects. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert den’d* 516 U.S. 1112, 116 S.Ct. 911 (1996).

B. NEW YORK STATE POLICY

In the mid to late 1980's, largely due to the Mobro garbage barge incident in 1987, awareness grew that existing landfills were environmentally inadequate, and that New York State lacked the capacity to handle the solid waste that would be generated by its residents. Against this background, DEC first issued the New York State Solid Waste Management Plan (the “Plan”) in 1987, as contemplated by RCRA Subtitle D and ECL §27-0103. It is updated annually. The Plan called for rapid movement from landfilling to an integrated solid waste management program, treating solid waste as a resource to be recovered to the extent technically feasible. The Plan adopted a solid waste management hierarchy (the “Hierarchy”) consisting, in order of preference, of:

- (1) Waste Reduction
- (2) Reuse and Recycling

(3) Waste to Energy

(4) Landfilling.

The Plan called for a 50% reduction in the solid waste stream over the next 10 years, to be accomplished by reduction of waste (8-10%) by changing the way goods are manufactured, particularly by federal and state restrictions on packaging, and recycling and reuse (40-42%), to be accomplished primarily by local municipalities. The remaining 50% would be processed in resource recovery/waste-to-energy plants to further reduce volume and produce energy, and the balance, consisting primarily of plant residue and unprocessable materials, would then be landfilled. Thus, the Plan was to substantially reduce the reliance upon landfilling. At the same time as it was developing the Plan, DEC embarked upon a course to close most of the 294 operating landfills in the state, almost all of which were operating without current permits.

The State Legislature began implementing the basic goals of the Plan through the Solid Waste Management Act of 1988. Among other things, the law specifically adopted the Hierarchy as the official “policy” of the state in ECL §27-0106(1), which provides:

The following are the solid waste management priorities in this state:

- (a) first, to reduce the amount of solid waste generated;
- (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
- (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
- (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being

recovered, by land burial or other methods approved by the department.

The law also called for a “state-local partnership, in which the basic responsibilities for the planning and operating of solid waste management facilities remaining with local governments and the state provides necessary guidelines and assistance.” §27-0106(2). Thus, the Act provided for local solid waste management plans, which would be put together by a “local planning unit” (defined as “a county, two or more counties, acting jointly, a local government or authority... or two or more municipalities...”), and would set forth the strategy for the locality to comply with the Hierarchy. ECL §27-0107. The local plans must include a comprehensive recycling analysis, as well as a description of the facilities, laws and initiatives necessary to carry out the program.

No application for a state permit for a solid waste management facility is complete unless the facility is consistent with the Hierarchy. ECL §27-0707(2)(a). Moreover, no such application by a municipality is complete without a local solid waste management plan. §27-0707(2)(b). Furthermore, all municipalities are now required to have in effect a local law that mandates source separating of materials for which “economic markets for alternative uses exist.” General Municipal Law §120-aa(2)(a). “Economic markets” are defined on an “avoided costs” basis, so that the local law must require source separation and recycling of a category of materials if the net cost of collection, transport and recycling or reuse is less than or equal to the cost of collection, transportation and disposal.

Further, a Bureau of Waste Reduction and Recycling was established within DEC. ECL §27-0717. Among other things, it is changed with authority to set regulatory standards for use of the terms “recycled,” “recyclable” and “reusable,” and the official state emblem for these terms.

Limited funding is provided for local solid waste plans and recycling programs. ECL §§27-0109, 27-0405. Under Article 54 of the ECL, programs were established for state funding of non-hazardous municipal landfill closures, and municipal waste reduction and recycling projects.

C. NEW YORK STATE REGULATION OF SOLID WASTE MANAGEMENT

In general, all solid waste management facilities in New York State require permits both for construction, and operation. ECL §27-0707; 6 N.Y.C.R.R. §360-1.7(a). “Solid waste management facility” is defined as:

Any facility employed beyond the initial solid waste collection process including, but not limited to, transfer stations, baling facilities, rail haul or barge haul facilities, processing systems, including resource recovery facilities or other facilities for reducing solid waste volume, sanitary landfills, facilities for the disposal of construction and demolition debris, plants and facilities for compacting, composting or pyrolyzation of solid wastes, incinerators and other solid waste disposal, reduction or conversion facilities.

ECL §27-0701(2). Regulatory exemptions include on-site disposal areas for farms and single-family homes. 6 N.Y.C.R.R. §360-1.7(b)(1). The process for obtaining such a permit is governed by the Uniform Permit Procedures set forth in ECL Article 70. Comprehensive requirements for the application process and facility construction and operation are set forth in 6 N.Y.C.R.R. Part 360.

Special legislative initiatives address battery management (regulating the content of batteries, and requiring rechargeability of nickel cadmium and small lead-acid batteries), ECL §27-0719, and landfills in Long Island, ECL §27-0704. Further, DEC is specifically required to regulate facilities storing 1,000 or more scrap tires, which otherwise might have been claimed not to be “waste.” ECL §27-0703(6).

Title 3 of ECL Article 27 requires waste transporter permits for transportation of certain “regulated waste,” defined as “raw sewage, septage, sludge from a sewage or water supply treatment plant, industrial-commercial waste, low-level radioactive waste..., waste tires or waste oil.” ECL §27-0303. Specific standards for transporters of regulated waste are set forth in 6 N.Y.C.R.R. Part 364.

While the state is the primary regulatory authority for solid waste, local regulation is specifically contemplated. Thus, ECL §27-0711 provides that all “local laws, ordinances or regulations... which are not inconsistent” with Title 7 of ECL Article 27 or Part 360 “shall not be superseded by it.”

D. NEW YORK STATE REGULATORY STANDARDS

The state regulations governing solid waste management facilities, 6 N.Y.C.R.R. Part 360, are broken up into the following subparts:

Subpart	Title
360-1	General Provisions
360-2	Landfills
360-3	Solid Waste Incinerators and Refuse-Derived Fuel Processing Facilities or Solid Waste Pyrolysis Units
360-4	Land Application Facilities
360-5	Composting Facilities
360-6	Liquid Storage
360-7	Construction and Demolition Debris Landfills
360-8	Long Island Landfills
360-9	State Assistance for Municipal Landfill Closure Projects
360-10	Regulated Medical Waste Storage, Transfer and Disposal
360-11	Transfer Stations

360-12	Recyclables Handling and Recovery Facilities
360-13	Waste Tire Storage Facilities
360-14	Used Oil
360-15	Comprehensive Solid Waste Management Planning
360-16	Construction and Demolition Debris Processing Facilities
360-17	Regulated Medical Waste Treatment Facilities

In general, applications for a facility permit must include detail sufficient to show compliance with regulatory requirements, §360-1.9(a), engineering plans, reports and specifications, §360-1.9(e), a comprehensive recycling analysis (for municipal facilities only), §360-1.9(f), a discussion of impacts on any inactive hazardous waste disposal sites within 150 feet, §360-1.9(g), and contingency plans, §360-1.9(h). Permits must also provide for mitigation of adverse impacts, supervision of construction activities, inspection of operations, and compliance with a recyclables recovery program. §360-1.11 (a,g,h). Further, permits are only transferable upon DEC approval, and permits to operate are good for no longer than 10 years. §360.1.11(b,d).

Solid waste management facilities are subject to numerous operational requirements set forth at §360-1.14. Solid waste cannot enter ground or surface waters, leachate cannot be discharged to surface waters without a SPDES permit, and leachate must not cause contamination causing violation of groundwater quality standards. Other operational requirements set forth in §360-1.14 pertain to such things as access, monitoring of waste, general inspection and monitoring, recordkeeping, confinement of solid waste, vector, dust, odor and noise control, maintenance of roads and equipment, prohibition of open burning, facility operator requirements, and closure.

The Part 360 regulations also impose numerous siting restrictions. New facilities cannot be sited on farmland that is taken through eminent domain that consists predominantly of agricultural soil groups 1 or 2. §360-1.7(a)(2)(i). Nor can a facility be sited in a state wetland, on a floodplain (unless proper provisions are made), so as to cause or contribute to “the taking of any endangered or threatened species of plants, fish or wildlife, or to the destruction or adverse modification of their critical habitat,” or adjacent to certain public water sources from surface waters. 360-1.7(a)(2).

Landfills are comprehensively regulated by Subpart 360-2. The application for a landfill permit must include engineering plans that set forth the “landfill's location, property boundaries, adjacent land uses, and detailed construction plans,” operation drawings, a landscape plan, an engineering report that “comprehensively describes the existing site conditions and a full engineering analysis of the landfill and its containment components, including closure and post-closure plans and criteria,” a construction quality assurance/quality control report, an operation and maintenance manual, a contingency plan, a hydrogeologic report, a landfill siting report, a comprehensive recycling analysis (for municipalities only), a leachate management plan (including a SPDES permit application, if necessary), a mined land use plan (if on-site cover will be used), and cost estimates for closure, post-closure, and if applicable corrective action.

Numerous criteria further limit the locations where landfills may be constructed. In particular, a new landfill cannot be sited over primary water supply aquifers, principal aquifers or within public water supply “stabilized cone of depression area,” near public airports, in unstable, unmonitorable or unremediable areas, or within certain fault or seismic impact zones. §360-2.12(c). Limitations are also placed on construction within federally regulated wetlands.

All landfills must be constructed with a double composite liner system with a primary and secondary leachate collection and removal systems, §360-2.13, except that single liner systems are permitted for certain ash monofills. §360-2.14. Closure and post-closure requirements are set forth at §360-2.15. Special requirements relate to landfill gas recovery facilities. §360-2.16.

Besides being subject to construction and operational requirements set forth at Subpart 360-3, incinerators and resource recovery facilities must meet air pollution standards set forth at 6 N.Y.C.R.R. Subpart 219-2 and emissions standards in RCRA. Further, specific provisions apply to management of ash residue, which is often toxic and may contain high levels of heavy metals and dioxins. 6 N.Y.C.R.R. §360-3.5.

Recyclable handling and recovery facilities handling nonputrescible materials are regulated by Subpart 360-12. They generally require permits, and must meet various operational requirements, including storage limitations, limited access, and reporting and record keeping. §360-12.2. Container redemption facilities, “buy-back centers,” certain waste tire facilities that meet waste tire facility requirements, and intermediate processors are exempt. §360-12.1(b). Further, a manufacturer “which produces, through physical or chemical transformation of the material, a marketable product,” and automobile dismantlers, are exempt provided certain reporting requirements are met. §360-12.1(b)(2),(c). Further, certain other facilities, such as those handling “exclusively source separated, nonputrescible solid waste that generate less than two tons or 15 percent of their average intake per day (whichever is greater) as residue” need only register with DEC, and do not need a permit. §360-12.1(d).

Likewise, while composting is considered a form of reuse/recycling, composting facilities require permits, and are governed by standards set forth at Subpart §360-5. However, composting facilities composting less than 3,000 cubic yards of yard waste per day or handling only animal manure are exempt if acceptable methods are used. §360-5.1.

Currently, DEC is in the process of proposed revisions to Part 360.

E. NEW YORK STATE ENFORCEMENT

In 1995, New York toughened its penalties for noncompliance with state solid waste rules. Pursuant to ECL §71-2703(1)(a), a violation is subject to civil and administrative penalty of up to \$7,500 per violation, plus up to \$1,500 per day for continuing violations. Further, a violator can “be enjoined from continuing such violation and any permit or certificate issued to such person may be revoked and suspended or a pending renewal application denied.” The fine amount is greater for releases of solid waste into the environment. ECL §71-2703(1)(b). Various other penalties are set in Title 27 of ECL Article 27. Violations of RCRA are also subject to administrative, civil and criminal penalties.