
APPLICATIONS OF ONTARIO COUNTY
for Modification of the Part 360 and Title V Permits, and
for a Part 663 Freshwater Wetlands Permit for its Municipal
Solid Waste Landfill on Route 5 & 20 in the Town of
Seneca, Ontario County, New York.

**APPEAL OF ADMINISTRATIVE
LAW JUDGE'S RULING AS TO
ISSUES IN NEED OF
ADJUDICATION**

DEC Permit Application Nos. 8-3244-00004/00007,
00001, and 00021

INTRODUCTION

In a timely petition for full party status, Finger Lakes Zero Waste Coalition, Inc. (“FLZWC”) identified the size of Ontario County’s proposed landfill expansion as an issue for adjudication based on the Commissioner’s 1991 *Foster Wheeler- Broome County, Inc.* decision, which involves the proposed expansion of a municipal solid waste management facility, an incinerator, and the obligations of municipal planning units when proposing new or expanded waste disposal facilities. In the above-captioned matter, ALJ Bassinson concluded that the *Foster-Wheeler Broome County, Inc.* decision is limited to incinerators and is therefore “inapposite here”:

The sizing of incinerators relates to their efficiency; they are sized thermodynamically. The Foster Wheeler decision does not state that it is applicable to landfills, and its analysis is simply not applicable in this proceeding regarding the proposed expansion of the landfill.¹

This aspect of the ruling is clearly erroneous, as the 1991 decision specifically states the sizing

¹ ALJ Rulings, 9.

analysis set forth there “may be helpful in determining an appropriate size for landfills as well.”²

Accordingly, the size of the landfill expansion should be remanded for adjudication.

BACKGROUND

Since 2003, Ontario County has leased its landfill and recycling facility, located on the landfill site, to Casella Waste Systems.³ Under the County’s lease agreement with Casella, the County has abandoned all operational control over landfilling and recycling.⁴ The lease provides 100,000 tons per year of “reserved capacity” in the landfill for the County’s disposal needs, more than it has ever used.⁵ The lease also provides payments to the County in the amount of 25% of Casella’s gross revenue from out-of-county waste, which has reached about 90% of total waste receipts.⁶

With these provisions, Ontario County has reversed the incentives for waste diversion and has been driven to apply to expand the capacity of its landfill.⁷ Although the County continues to own the facility, and by owning it qualify for financial assistance from the

² Interim Decision of the Commissioner (Jorling), *In the Matter of the Application of the Foster Wheeler-Broome County, Inc. and the Broome County Resource Recovery Agency*, No. 7-0334-00023/00001-0, 1990 N.Y. ENV LEXIS 82, *9 (September 19, 1990). *See* FLZWC Petition, 10.n.14 (citing and quoting *id.*).

³ The lease agreement is provided as FLZWC Pet., Appx. C.

⁴ FLZWC Pet., 17-18.

⁵ *See id.*, Appx. C, at 6.

⁶ *Id.*, at 8 (Para. 2.5). *Cf.* FLZWC Pet., 10.n.13.

⁷ *See id.*, at 9 (Para. 3.3) (providing Casella with the “right” to expand the landfill at its “sole discretion”).

Department for its facility,⁸ Casella’s commercial goals have progressively displaced the County’s obligations as the municipal owner of the facility to plan and implement effective programs to divert waste from disposal under the Department’s rules and policy. Accordingly, after its criticisms of the County’s first-ever Local Solid Waste Management Plan in 2014 were rebuffed with silence by the County,⁹ Finger Lakes Zero Waste Coalition petitioned to adjudicate the issue of the consistency of the County’s application with the Department’s waste planning mandates and policy. FLZWC focused its issue on the necessity to subject the application to a “sizing analysis” pursuant to Commissioner rulings that “[solid waste disposal] facilities should not be sized to create economic incentives that would divert solid wastes that can be recycled to other less desirable forms of waste management.”¹⁰

⁸ Cf. I.C. Ex. 4 (2014 Correspondence, Region 8 letters to Ontario Co., dated January 17 and 27, 2014) (regarding landfill closure financial assistance provided by the Department in 2001).

⁹ FLZWC’s criticisms are provided at its Pet., Appx. D. These criticisms specifically identify the absence of implementation plans to match the aspirations found in the plan. Subsequently FLZWC wrote to the Department seeking informal assistance to rectify “[the final] draft Plan’s failure to incorporate any of the public comments submitted to the County.” *Id.*, Appx. E, at 2. Failure to respond to public comments on a draft LSWMP violates 6 NYCRR § 360-15.9(p).

¹⁰ Interim Decision of the Commissioner, *In the Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, No. 7-0334-00023/00001-0, 1990 N.Y. ENV LEXIS 82, *1-2 (September 19, 1990). Cf. Final Decision of the Commissioner, *In the Matter of Harbert/Triga Company and the St., Lawrence Solid Waste Authority*, Nos. 60-87-0887, 60-87-0660, 60-87-0661, 1990 N.Y. ENV LEXIS 46, *4 (June 8, 1990) (“The facility should not be sized so as to be in competition with recycling efforts but rather should be a complementary component of an integrated solid waste management system.”); Interim Decision of the Commissioner, *In the Matter of the Applications of Ogden Martin Systems of Onondaga, Inc. and the Onondaga County Resource Recovery Agency*, No. 7-3142-0028/00002-0, 1992 N.Y. ENV LEXIS 21, *9-18 (May 4, 1992) (reviewing the applicant’s sizing analysis “to determine whether there is any realistic possibility that the operations of the proposed plant would compete with waste reduction and recycling efforts”).

The Commissioner's 1991 decision in the *Foster-Wheeler Broome County, Inc.* matter is a major statement of the Department's policy for municipalities seeking to achieve compliance with the Solid Waste Management Act of 1988,¹¹ which includes New York's solid waste management hierarchy,¹² and solid waste planning measures mandated by Part 360 for municipally owned solid waste facilities. The 1988 Act "mandated that source separation and recycling programs commence in each municipality within the state no later than September 1, 1992."¹³ Ontario County does not source-separate recyclable materials. Ontario County's recycling rate, as a percentage of its own waste stream, has never emerged from single digits.¹⁴ No new conditions encouraging or requiring increased recycling have been proposed for the modified Part 360 permit, compared to the permit issued by the Department for the County landfill without the proposed expansion.¹⁵ As noted above, approximately nine times the waste generated by the County is disposed in the landfill from other counties.¹⁶

The 1988 Act promulgated, *inter alia*, ECL § 27-0106 and General Municipal Law § 120-aa, which requires municipalities to "adopt . . . a local law or ordinance to require that solid

Cf. also ALJ Rulings, 7.n.5 ("At the issues conference, FLZWC counsel stated that a CRA would be part of the sizing analysis and that 'sizing analysis is the central issue.'").

¹¹ Chapter 70, Laws of 1988, 1988 N.Y. Laws 1966.

¹² ECL § 27-0106.

¹³ Norman H. Nosenchuck, *Key Events of the New York State Solid Waste Management Program: 1970-1995*, 7 ALB. L.J. SCI. & TECH. 69, 79 (1996).

¹⁴ FLZWC Pet., 10.n.12.

¹⁵ I.C. Tr., 77.

¹⁶ FLZWC Pet., 10.n.13.

waste which has been left for collection or which is delivered by the generator of such waste to a solid waste management facility, shall be separated into recyclable, reuseable or other components for which *economic markets* for alternate uses exist,” and specifically defines economic markets as “instances in which the full avoided costs of proper collection, transportation and disposal of source separated materials are equal to or greater than the cost of collection, transportation and sale of said material less the amount received from the sale of said material.”¹⁷

The Part 360 regulations require the Department to ensure that “a permit to authorize the construction of a new solid waste management facility or expansion of a facility” will not be issued unless and until the application “describe[s] how the proposed facility is consistent with the State’s solid waste management policy identified in section 27-0106 of the ECL.”¹⁸ In addition, the engineering report required for Part 360 applications must demonstrate how the application is “consistent with the applicable goals and objectives of solid waste management plans in the proposed service area of the facility and of the New York State Solid Waste Management Plan in effect at the time of permit application.”¹⁹ Here, the applicant’s engineering report references the LSWMP but provides no evaluation of the landfill expansion proposal’s consistency with the plan or with the State’s solid waste hierarchy.²⁰ In the issues conference, the

¹⁷ Gen. Mun. § 120-aa(2)(a) (emphases added).

¹⁸ 6 NYCRR § 360-1.10(a).

¹⁹ 6 NYCRR § 360-1.9(e)(4)(iii).

²⁰ See I.C. Ex. 4 (Ontario County, Part 360 Applic., Appx A [Engineering Report], 2, Table 1-1.

County contended that its LSWMP meets all requirements under Subsection 360-1.9(f), including the requirement to undertake a sizing analysis,²¹ but neither its engineering report nor the issues conference record includes the 2014 Ontario County LSWMP.²²

To qualify for a Part 360 permit, the County must show how a landfill expansion designed to maintain an annual disposal capacity tenfold greater than the demonstrable needs of the County, in combination with a recycling rate that fails to perform as expected by the standards of Part 360 could be consistent with State policy, Subpart 360-15.9, the demonstration required under Subsection 360-1.9(e)(4)(iii), and the County's Department-approved waste planning goals and objectives.²³

ONTARIO COUNTY'S LSWMP

The principal requirements for solid waste management planning imposed on Ontario County by Part 360 are found in Section 360-15.9, listing in detail the required components of a local solid waste management plan ("LSWMP"). Consideration of these components is important in this case because the County had no approved LSWMP until July 17, 2014,²⁴ Department approval of a LSWMP is not subject to notice and public comment,²⁵ and a comprehensive recycling analysis ("CRA") was approved in 1989, but for a different planning unit²⁶ and a

²¹ 6 NYCRR § 360-1.9(f)(7)(ii).

²² *See* I.C. Tr., 74.

²³ I.C. Tr., 60, 72.

²⁴ I.C. Ex. 7c, Exhibit C.

²⁵ 6 NYCRR § 360-15.1.

²⁶ I.C. Tr., 63; FLZWC Pet., Ex. D, at 2.

different landfill on the same site.²⁷ In addition, in its approval letter, regional staff indicated it had considered “the elements set forth in Section 27-0107.1” of the ECL governing LSWMPs, but not the required components listed in Section 360-15.9.²⁸

The general requirements for an acceptable LSWMP are stated in the preamble to Section 360-15.9:

A plan must take into account the objectives of the State's solid waste management policy set forth in section 27-0106 of the ECL and provide for the management of all solid waste within the planning unit for at least a 10-year period. It also must reflect and employ sound principles of solid waste management, natural resources conservation, energy production, and employment-creating opportunities.

In this case, Ontario County has provided for the management of all solid waste within the county planning unit for at least 10 years because it has contracted with Casella to reserve 100,000 tons per year of disposal capacity in the County’s landfill for the needs of the County. This by itself, however, does not “reflect and employ sound principles of solid waste management, natural resources conservation, energy production, and employment-creating opportunities.” In addition, the County must reasonably demonstrate how it will reduce its needs for waste disposal in a landfill over time.²⁹ As Commissioner Jorling stated: “It is easy to project high recycling rates or to describe ambitious recycling plans; it is far more difficult to implement

²⁷ I.C. Tr., 55 (CRA approval for “the Phase IIA landfill”); *id.*, 54 (DEC Staff Attorney: “The Phase III landfill . . . is the landfill we’re working with today.”). *Cf.* I.C. Ex. 2 (*ENB Notice*, January 26, 2015, for proposed expansion of the Phase III landfill).

²⁸ I.C. Ex. 7c, Exhibit C.

²⁹ 6 NYCRR § 360-1.9(f)(7)(ii).

successfully a recycling program.”³⁰

The first five specific components required for a LSWMP listed after the preamble are easily met, and are met in this case, describing the planning unit and its population (here, Ontario County); “the quantity and types of solid waste that are being generated in the planning unit”; “identification of proposed or existing solid waste management facilities”; future projections of population and waste generation; and “projections of changes to the waste stream, and the effects of the changes on the current and proposed management practices in the planning unit.”³¹ For example, no changes to the County’s waste stream are proposed. However, the County’s LSWMP is silent regarding the effect of reserving more disposal volume in the county landfill than the county’s maximum waste generation rate accepting on the County’s incentives to reduce its generation rate further.

The additional components listed under Section 360-15.9 are not met. The first of these requires “a comprehensive recycling analysis for the planning unit, to include those items identified in subdivision 360-1.9(f) of this Part.”³² The missing Subsection 1.9(f) items are listed in the FLZWC Petition,³³ and their absence in the County’s LSWMP is discussed at length in FLZWC’s comments on the County’s draft plan, attached to the Petition.³⁴

The second missing component is:

³⁰ 1991 N.Y. ENV LEXIS 73, *26.

³¹ 6 NYCRR §§ 360-15.9(a)-(e).

³² 6 NYCRR § 360-15.9(f).

³³ FLZWC Pet., 12-13.

³⁴ *Id.* Ex. D.

[an] evaluation of the various technologies for storage, treatment, and disposal of solid waste within the planning unit, including:

(1) determination of appropriate sizing of solid waste management facilities, based on projected quantities and composition of the solid waste to be treated, stored, or disposed of within the planning unit and waste generation minimization/recyclables recovery efforts;

(2) costs of the various alternatives; and

(3) an assessment of the potential environmental, economic and social impacts associated with each technology³⁵

The County is barred from providing this component under its contract with Casella.³⁶

In addition, the next listed component under Section 360-15.9 is missing from the County's LSWMP:

selection of an integrated system for managing each of the various types of solid waste to be treated, stored, or disposed of within the planning unit. If the plan relies on the private sector to manage a specific waste stream, the plan must address how this waste stream will be managed if the private sector does not adequately manage this waste stream. Additionally, the plan must specify how the private sector is to be notified of the responsibility for management of a specific waste stream and, if the planning unit proposes to provide technical, administrative and financial assistance to the private sector in meeting this responsibility, how it will provide that assistance³⁷

Instead of an integrated system, the LSWMP provides a disjointed list of "implementation items" without "specify[ing] what methods it will use to ensure the Plan's success,"³⁸ or "how

³⁵ 6 NYCRR § 360-15.9(g).

³⁶ See FLZWC Pet., Ex. C, Paras. 3.8 and 7.1 (providing that Casella (NEWSNY) is authorized to act on the County's behalf in all permitting matters).

³⁷ 6 NYCRR § 360-15.9(h).

³⁸ FLZWC Pet, Ex. D, at 2.

the implementation items will be financed,”³⁹ and without “identify[ing] any method or metrics that the county will use to monitor progress in meeting the proposed suggestions.”⁴⁰ Thus, the mere existence of a Department-approved LSWMP (which was the situation in the *Foster Wheeler-Broome County, Inc.* matter), in the absence of permit conditions designed to ensure plan goals can and will be achieved, is insufficient to satisfy Part 360.

COMMISSIONER JORLING’S SIZING ANALYSIS

In the *Foster-Wheeler Broome County, Inc.* decision the Commissioner makes it clear that the “method of analysis” he sets forth there for determining a proposed sizing issue “may be helpful in determining an appropriate size for landfills as well but the remedies that I would consider in that context would still depend upon the degree to which the size or capacity was shown to impair waste reduction and recycling efforts.”⁴¹ In a subsequent decision addressing a motion to reconsider, Commissioner Jorling clarified that the sizing analysis required under Part 360 is principally concerned with evaluating the inherent competition between waste diversion and waste disposal, without regard to facility type (*e.g.*, landfill vs. incinerator):

My primary concern with the construction of overcapacity or increasing is that it may act as a disincentive to maximum feasible waste reduction, recycling and reuse, and it may saddle ratepayers with exorbitant and unnecessary costs. A throughput limit [for a solid waste incinerator] is one tool to attempt to limit competition between a resource recovery facility [*i.e.*, an incinerator] and recycling, and it may be used in an appropriate case. It is not foolproof, however, as any regulatory restriction on use may be

³⁹ *Id.*

⁴⁰ *Id.*, at 3.

⁴¹ 1991 N.Y. ENV LEXIS 73, *9 (December 18, 1991). *Cf.* FLZWC Petition, 10.n.14 (citing and quoting same).

removed in the future. *Aside from the issue of economic feasibility of resource recovery plants when operating at artificially low levels*, the Broome proposal contained a number of features which made the risks of a throughput limit in Broome unacceptable when judged in reference to my primary concern.⁴²

The additional features included “that the facility was 45% oversized for its waste shed”; the solid waste planning unit’s population “was projected to decline by 0.2% per year for the operational period of the facility”; a “a two train boiler configuration” would commit the facility to a level of operations exceeding the planning unit’s needs; and the planning unit’s “recycling efforts had been quite poor.”⁴³ “All of these factors led me to conclude that the construction of a substantially oversized facility . . . would have been a poor public policy decision.”⁴⁴

Here, similarly, the landfill facility is approximately 900% oversized for its waste shed (considered as the planning unit); the solid waste planning unit’s population is projected to decline slightly operational period of the facility; the expansion would clearly commit the County to a level of operations exceeding the planning unit’s needs; and the County’s recycling efforts have been quite poor.

Shortly after the *Foster-Wheeler Broome County, Inc.* decision the Department issued a revised version of its guidance document, *Avoided Costs in Solid Waste*, TAGM SW-92-06, revised August 24, 1992, which guides a municipality’s “economic markets” analysis required under Gen. Mun. § 120-aa(2)(a), informed by Commissioner Jorling’s “method of analysis” for sizing solid waste management facilities in compliance with Subpart 360-15 and ECL § 27-0106.

⁴² 1992 N.Y. ENV LEXIS 41, *2 (July 16, 1992) (emphases added).

⁴³ *Id.*, *2-3.

⁴⁴ *Id.*, *3.

Cf. Petition, 12, 14-16, 19-20 (citing and quoting *Avoided Costs in Solid Waste*). However, as FLZWC stated in its comments on the County’s draft LSWMP, no avoided costs analysis was included or prepared in support of the plan.⁴⁵

Under the *Foster-Wheeler Broome County, Inc.* decision, it is not enough that Ontario County has an approved LSWMP. The County’s landfill expansion application must be evaluated to determine whether it is “consistent with the goals and objectives of such plan.”⁴⁶ In its Petition, FLZWC specifically asserts that the County’s landfill expansion application is not consistent with the County’s LSWMP; and, because it creates disincentives to waste disposal diversion, including recycling, the application is not consistent with the State’s waste management hierarchy;⁴⁷ and, as detailed in its comments on the County’s LSWMP, no plans for actually implementing the objectives of the plan exist.⁴⁸ In the issues conference, the County declined to demonstrate it would or could implement its LSWMP goals and objectives regarding waste diversion and recycling.⁴⁹ Instead, the County relied entirely on regional staff’s approval of the LSWMP, denied that consistency of its expansion application with the plan goals and objectives could be addressed in this proceeding, and contended (but did not attempt to

⁴⁵ See FLZWC Pet., Ex. C.

⁴⁶ 6 NYCRR § 360-2.12(a)(2)(i). The predicate for this provision is the failure of the landfill expansion site to provide 20 feet of unconsolidated deposits, as measured from the base of the liner system. See I.C., Ex. 4 (Ontario County, Part 360 Applic., Appx. A, at 10).

⁴⁷ FLZWC Petition, 3, 5, 16-17, 19-26. In commenting on the draft LSWMP, FLZWC called for the County to renegotiate its lease with Casella. FLZWC Pet., Ex. D, at 4.

⁴⁸ *Id.*, Ex. D.

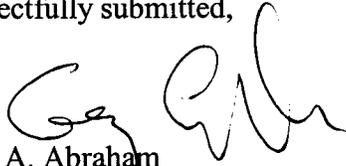
⁴⁹ See FLZWC Pet., 19-26.

demonstrate) that the lease agreement with Casella creates “no disincentives for recycling”.

CONCLUSION

Because the commercial goals of the private landfill operator to which Ontario County has leased its landfill and recycling facility compete with the statutory and regulatory obligations of the County as owner of the landfill and recycling facility,⁵⁰ the ALJ in this matter should have but did not evaluate the consistency of the proposal to expand the landfill with the County’s LSWMP and the State’s waste management policy. More specifically, the sizing of the expansion is an issue because it could support the addition of permit conditions, compared to the draft Part 360 permit, or permit denial,⁵¹ and because FLZWC specified the County’s LSWMP—reporting on the history and present status of recycling, future waste management goals and aspirations for implementing those goals—and its lease with Casella as the principal evidence and grounds upon which FLZWC contends the County’s Part 360 application is deficient respect to facility size.⁵²

Respectfully submitted,



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cc: Service List

⁵⁰ Cf. FLZWC Pet., 17-18.

⁵¹ 6 NYCRR §§ 624.4(c)(2)-(3).

⁵² 6 NYCRR § 624.5(b)(2)(ii).