



west virginia department of environmental protection

Environmental Enforcement
601 57th Street
Charleston, WV 25304
Telephone: 304-926-0470 Fax: 304-926-0488

Joe Manchin III, Governor
Stephanie R. Timmermeyer, Cabinet Secretary
www.wvdep.org

May 8, 2006

Mr. Pasquale N. Mascaro
Lackawanna Transport Company
320 Godshall Drive
Harleysville, PA 19438

**VIA FACSIMILE AND
CERTIFIED RETURN RECEIPT REQUESTED**

Dear Mr. Mascaro:

Enclosed is Order No. SW-0078 dated the 8th day of May, 2006. This Order is issued to Lackawanna Transport Company by the Director of the Division of Water and Waste Management under the authority of Chapter 22, Article 15, Section 15, of the Code of West Virginia. This Order contains notification of the right of appeal under the provisions of Chapter 22, Article 15, Section 16.

It is important to note that the West Virginia Department of Environmental Protection's Office of Legal Services conducted an extensive review of the various legal proceedings associated with this matter, including the pending case in Wetzel County Circuit Court. Counsel's advice was carefully considered prior taking this administrative action.

I may be reached at 304-926-0470 should there be any questions.

Sincerely

Michael A. Zeto
Chief Inspector

cc: Lisa A. McClung, Director, DWWM
Cliff Whyte, Asst. Director, DWWM
Larry Betonte, ACI, EE
Northwest Region, EE
Perry McDaniel, OLS
Lackawanna Transport Company, Wetzel County Landfill (Hand Delivery)
Ashley Toy, US EPA, Region II



West Virginia Department
of Environmental Protection

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**ORDER
ISSUED UNDER THE
SOLID WASTE MANAGEMENT ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 15**

TO: Mr. Pasquale N. Mascaro
Lackawanna Transport Company
320 Godshall Drive
Harleysville, PA 19438

DATE: May 8, 2006

ORDER NO.: SW-0078

INTRODUCTION

The following findings are made and Order issued to Lackawanna Transport Company (hereinafter "LTC") pursuant to the authority vested in the Director of the Division of Water and Waste Management under Chapter 22, Article 15, Section 1 et seq. of the Code of West Virginia.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. LTC is the owner and operator of the Wetzel County Sanitary Landfill, a solid waste disposal facility located near New Martinsville, West Virginia, Wetzel County. This facility currently operates under Solid Waste Facility Permit No. SWF-1021/WV0109185 issued on March 15, 2004.
2. Previously, on February 28, 1991, the Department of Environmental Protection (DEP) issued Order No. SW-003-91 to LTC, establishing a maximum monthly tonnage limit for its existing facility. Order No. SW-003-91 referred to LTC's facility as a "solid waste facility" authorized to accept 9,999 tons per month.
3. On October 25, 1991, the DEP denied LTC's application for a solid waste facility permit.
4. On February 24, 1992, LTC, without waiver of its legal position that a CON was not necessary, filed an application with the PSC for a "grandfathered" CON. On February 27, 1992, the PSC issued a CON to LTC "allowing continued operation of a commercial solid waste facility."
5. On March 24, 1992, LTC and DEP settled a suit filed by LTC following the October 1991 permit denial. That settlement called for DEP to reconsider its permit decision and

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authorized LTC to construct lined cells at the landfill and to operate the cells for 105 days, with LTC assuming the risk that the permit might not ultimately be issued.

6. On November 25, 1992, DEP issued a "Partial Solid Waste Facility Permit to LTC. That permit included "compost and sludge" among the wastes listed.
7. On July 21, 1993, the Wetzel County Solid Waste Authority approved the Wetzel County Commercial Solid Waste Facility Siting Plan tentatively prohibiting compost facilities utilizing sludge and/or paper wastes.
8. On August 21, 1996, DEP issued Order No. SW-MX-017-96 requiring LTC to immediately cease and desist accepting sewage sludge for composting because it was violating its effluent discharge limits.
9. On April 13, 1998, DEP issued permit renewal No. SWF-1021/WV0109185 to LTC for a Commercial Solid Waste Landfill and Sewage Sludge Processing Facility, allowing LTC "to construct and operate a sewage sludge composting facility". The permit required all sewage sludge processing to be done within a fully enclosed sewage sludge processing building.
10. On August 3, 2001, DEP and LTC entered into Consent Order No. SW-0020 authorizing LTC to build and operate a sewage sludge composting facility. LTC did not obtain a Certificate of Need ("CON") from the Public Service Commission ("PSC") because LTC claimed the facility was considered "grandfathered" under W. Va. Code § 24-2-1c(a) based on operation in 1989 and a CON from the PSC dated February 27, 1992.
11. Item No. 13 under the "Requirements of the Order" section of Consent Order No. SW-0020 states: "The Secretary may at any time, in his sole discretion, modify or terminate all composting activities authorized by this order. Further, Lackawanna and Valero waive any rights they may have to challenge the Secretary's decision."
12. On September 17, 2001, a formal complaint was filed with the PSC against LTC, alleging that LTC should be required to obtain a CON for a sewage sludge composting facility authorized by an August 3, 2001 DEP Consent Order.
13. On May 9, 2003, the PSC entered an order requiring LTC to obtain a CON pursuant to a hearing regarding the September 17, 2001 formal complaint.
14. On March 15, 2004, a cover letter accompanying the facility's renewal permit stated "Please note that the Lackawanna Transport Company has applied to the WV Public Service Commission for a Certificate of Need for the composting facility located at the Wetzel County Sanitary Landfill. The PSC has not issued a final order in this case, Case #01-1273-SWF-C. Also, pending before the WV Supreme Court is case, Docket #031210, seeking a determination on the requirement for a C.O.N. for the composting facility. This permit will be modified to reflect the final rulings in these pending judicial cases."
15. On December 23, 2004, LTC filed a request with the Wetzel County Solid Waste Authority seeking a re-designation of the facility site from a tentatively prohibited zone to an authorized zone for compost facilities utilizing sludge.
16. On May 5, 2005, the Wetzel County Solid Waste Authority denied LTC's request for re-designation.

17. In August, 2005, LTC filed in Wetzel County Circuit Court (Civil Action No. 05-C-43K) an appeal of a decision of the Wetzel County Solid Waste Authority not to amend its 2001 facility siting plan.
18. On August 19, 2005, the PSC issued an order denying LTC's application for a CON to operate a commercial sewage sludge compost facility at the site of the Wetzel County Sanitary Landfill. The PSC order stated:

As a result of the Commission order [of May 9, 2003], LTC asked the Authority to amend the County Siting Plan. The Authority denied LTC's request. Based upon the Authority's decision, the Commission is statutorily prohibited from granting the requested CON. The Commission recognizes that LTC is pursuing an appeal of the Authority's determination. In the event LTC's appeal is successful or in the event the Facility site becomes "authorized" by the County Siting Plan, LTC may seek a re-opening of this proceeding.

The West Virginia Division of Environmental Protection has jurisdiction to monitor and enforce the applicable environmental regulations. LTC has pending appeals of the Authority's siting decision (Circuit Court of Kanawha County) and the issue of whether LTC is required to have a CON at all (Supreme Court of Appeals of West Virginia). The Commission views the issue before it to be whether to grant the certificate as requested in the application. By this order, the Commission denied the certificate. By virtue of *W. Va. Code* § 25-5-1, the Commission would expect the applicant to seek review of this order by the State Supreme Court. Thus, all of the pieces of this puzzle will be in the State court system. The Courts are better positioned to determine whether or not LTC should cease and desist operations requested by the Authority.
(August 19, 2005, Commission Order, p.6)

19. On November 10, 2005, the PSC denied an LTC petition for reconsideration because the facility would be in a tentatively prohibited zone.
20. LTC appealed both the requirement for a CON and the denial of the CON to the West Virginia Supreme Court of Appeals.
21. On March 2, 2006, the Supreme Court issued orders denying both LTC's petition for appeal of the May 9, 2003 order requiring a CON and the company's petition for appeal of the November 10, 2004 order denying the application for a CON.

ORDER FOR COMPLIANCE

And now, this 8th day of May, 2006, LTC is hereby ORDERED by the Director as follows:

1. Within ten (10) days of the effective date of this Order, LTC shall cease and desist acceptance of sewage sludge for composting.
2. Within sixty (60) days of the effective date of this Order, LTC shall complete the composting and removal of all sludge and other composting material on-site. As an alternative to removal, LTC may consider disposal in accordance with its permit within the timeframe specified herein.

3. No later than thirty (30) days after the final resolution of the issues raised in Wetzel County Civil Action No. 05-C-43K, LTC shall submit to DEP for approval a plan for use or removal of the composting structure. The plan shall be submitted to:

**Chief Inspector
Environmental Enforcement
WV-DEP
601 57th Street SE
Charleston, WV 25304**

4. During the pendency of the Wetzel County Circuit Court litigation, LTC may utilize the composting structure for alternative purposes as approved by DEP.

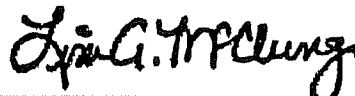
OTHER PROVISIONS

1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving LTC of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject LTC to additional enforcement action in accordance with the applicable law.
2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
3. This Order is binding on LTC, its successors and assigns.
4. This Order shall terminate upon LTC's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal any terms and conditions of this Order by which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Section 16, Article 15, Chapter 22 of the Code of West Virginia within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.



Lisa A. McClung, Director
Division of Water and Waste Management