

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of Delaware Solid Waste Authority to Modify the Solid Waste Management Post-closure Permit for the Pigeon Point Landfill, New Castle, New Castle County

DATE: January 23, 2012

I. PROCEDURAL HISTORY

This Report considers an administrative record and makes recommendations to the Secretary of the Department of Natural Resources and Environmental Control (Department) on Delaware Solid Waste Authority's (Applicant) January 10, 2010 permit application. The permit application was submitted to the Department's Division of Waste and Hazardous Substances, Solid and Hazardous Waste Management Branch (SHWMB) in order to modify the post-closure solid waste management permit the Department issued jointly to Applicant and the City of Wilmington for the ongoing management of the closed Pigeon Point Landfill (PPL) located at 1101 Lambson Lane, New Castle, New Castle County.¹

On March 2, 2011, the Department published public notice of DSWA's permit application, and received a timely meritorious request for a public hearing. On May 23, 2011, the Department held a duly noticed public hearing at the Rose Hill Community Center, 19 Lambson Lane, New Castle, New Castle County. Several persons attended the public hearing and provided written and oral comments.

¹ The Permit was approved by Secretary's Order No. 2008-A-0026 issued April 27, 2008. DSWA appealed the Permit, and the Department and DSWA entered into a settlement agreement.

This hearing officer requested additional technical assistance from SHWMB, which was provided in a technical response memorandum attached hereto as Appendix A, including a draft permit should the Department decide to issue the permit.

This Report considers the recommended record, including all public comments, and the Department's technical expertise, and applies the applicable laws and regulations.

II. SUMMARY OF THE RECOMMENDED RECORD

This Report considers the record developed by public comments received during the public comment period and the Department's expert advice referenced in this Report. The record contains the verbatim transcript of the public hearing and the documents introduced as exhibits as set forth in Appendix A hereto.

State Senators the Hon. Margaret Henry and the Hon. David McBride made introductory comments.

SHWMB's Robert Hartman introduced into the hearing record² the permit modification application, the settlement agreement of the appeal of the current solid waste management permit, and other relevant documents from the Department's files, including the public notices, and the written public comments the Department received. Mr. Hartman reviewed the history of the PPL and discussed the settlement agreement that started the application process. He reviewed the proposed modifications.

DSWA's facility manager for PPL, Robin Roddy, P.E., made a presentation that also reviewed PPL's history and the proposed permit modifications.

Todd Coomes of the law firm of The counsel for the permittee City of Wilmington made a presentation.

² The Department does not have an obligation to develop the public hearing record and remains neutral on the merits of a pending permit application until after the public hearing, but the Department nevertheless develops a basic public hearing record for the public's benefit.

In response to some issues raised, I requested the technical assistance from experts within SHWMB, and SHWMB's Bob Hartman provided the attached technical response memorandum (TRM) and a draft permit.

III. DISCUSSION OF RECOMMENDED FINDINGS AND REASONS

Based upon the record, I recommend that the Department issue Applicant and the City the modified permit, as drafted by SHWMB.

The public comments did not raise any information that warranted further discussion in this Report except for the comments presented by the City's counsel. The City claims that it should be removed as a permittee, but the Department considers the joint permittee appropriate under the circumstances as the best way to effectively regulate PPL by a post-closure permit.

The applicable Department regulation for review of DSWA's permit modification application is Regulation 1301 of *Delaware Regulations Governing Solid Waste* (DRGSW), 7 DE Admin. Code Regulation 1301. Section 4.1.7 of Regulation 1301 provides that "a permittee may request modifications to a permit." DSWA and City are both permittees and the City's position is that should not be a permittee. It contends that the City did not agree to Applicant's permit modification, which should prevent the Department from even considering the application absent the City's agreement.

I find that the Department followed proper procedures as set forth in the DRGSW. SHWMB allowed a permit modification without City's consent because Section 4.1.7 does not require all permittees to agree to seek a permit, which would support the City's position. I recommend rejecting the City's contention that the consent of both permittees is needed before a permittee may seek a permit modification.

The City's position also is based upon SHWMB's past decision that rejected the City's application to modify the Permit in order to remove the City as a permittee. I find that

SHWMB's past action to reject the City's application to unilaterally seek to amend the permit was a final agency action by an official with delegated authority to reject application. Consequently, this rejection of the City's application could have been challenged.

The City did not appeal SHWMB's action. I do not consider SHWMB's rejection of City's application as providing any ground to support for rejecting the DSWA application. The regulation allows a permittee to seek a permit modification, as DSWA, as one of two permittees, as sought a permit modification in order to settle the litigation with the Department pending before the EAB. Moreover, this Report does not want to open up the record from SHWMB's prior decision because only DSWA's application is pending. SHWMB may have had other reasons for rejecting City's application, and SHWMB also does not want to remove City as a permittee at this time. Nevertheless, the regulation does not prohibit the City from seeking a permit modification in the future without DSWA's consent, but then the Department will oppose any removal of the City from the permit because of the City's land ownership of portions of PPL.

Another reason to consider the permit modification application is that the modification was sought as a result of the settlement agreement. Indeed, the Department could have originated the permit modification without any action by one or both of the permittees. The DRGSW allow the Department to modify a permit, and it is clear from the record that the Department wanted the permit modification as part of the settlement agreement. Indeed, SHWMB recommends permit modifications that were not sought by DSWA, and which may even be opposed by DSWA. Nevertheless, I find sufficient legal authority to act on a permit modification either commenced by SHWMB or DSWA.

Finally, I will consider City's argument that it be removed from the Permit as an application as well to avoid the City submitting a new application that then will be denied. I find that SHWMB's TRM provides sufficient support for continuing the joint permittee regulation

until the underlying legal issues between City and DSWA are resolved, which are issues not within the authority of the Department to decide. Both DSWA and City applied for the Permit and were issued the Permit, and I see nothing in the record to support any change in the Department's regulation of PPL based upon authority over both DSWA and City as joint permittees even if one of the permittees no longer wants to be regulated as a permittee. .

SHWMB prepared a draft permit for consideration and I recommend approval of the draft modifications. SHWMB's TRM provides ample support for the permit conditions, and I find that the conditions are reasonable. The issuance of the draft amended permit as a final permit is recommended because the permit reflects best management practices for PPL's post-closure maintenance, repair and monitoring as a closed landfill.

IV. RECOMMENDED CONCLUSIONS

Based on the record developed, I conclude that the record supports approval of the modified post-closure solid waste management permit for PPL and retaining the joint permittees DSWA and City. I recommend the Secretary adopt the following:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department considered all timely and relevant public comments in making its determination;

5. The Department shall issue Permittees the modified post-closure permit for PPL, subject to the reasonable general and specific permit conditions recommended by SHWMB, as outlined in SHWMB's technical response document;

6. The Department shall issue a permit to Applicants within the time period provided by Department regulations; and that

7. The Department shall publish the Order on its web site and shall provide such other notice as required by law or regulation.



Robert P. Haynes, Esquire
Senior Hearing Officer