

MAY 28 1987

FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
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In the Matter of the Appeal of the

ENVIRONMENTAL TASK COALITION (ETC)

FILE NO. W-86-006

from an environmental determination by
the Seattle Engineering Department
regarding the closure of the Kent
Highlands Landfill

Introduction

Appellant challenges the adequacy of the environmental impact statement for the closure of the Kent Highlands Landfill.

The appellant exercised the right to appeal pursuant to Seattle Municipal Code Section 25.05.680.

Parties to the proceedings were: appellant, pro se and by Tom Fain of Williams, Kastner and Gibbs; and respondent by assistant City Attorney Dennis McLerran. Intervenor City of Kent was represented by assistant City Attorney Bill H. Williamson.

This matter was heard before the Hearing Examiner on February 19, 20 and April 14, 1987. The record remained open to May 13 for briefs and replies thereto.

After due consideration of the evidence elicited during the public hearing, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Preliminary

1. The City of Kent moved for dismissal of the appeal pursuant to WAC 197-11-800 12(a) and (13) (Seattle Municipal Code Section 25.05.800, Categorical Exemptions). The Motion is Denied.

2. WAC 197-11-800 states that the following proposed actions are categorically exempt from "EIS requirements..."

- (1) Minor New Construction
- (6) Minor Land Use Decisions
- (11) Activities of the State Legislature
- (12) Judicial Activity.

WAC 197-11-800(12)(a) specifically exempts "All adjudicatory actions of the judicial branch."

3. WAC 197-11-800(13)(a) provides that actions taken to enforce a "resolution or prior decision" are exempt, as is "any suspension or revocation of a license for any purpose." WAC 197-11-800(13)(e). The City of Kent urges that the Superior Court's order of September 4, 1986, which required closure of the Kent Highlands Landfill or or before December 31, 1986 pursuant to City of Seattle-City of Kent settlement agreement, was an adjudicatory action which excuses Seattle's compliance with EIS requirements. Alternatively, the City of Kent considers the closure (ergo issuance of the subject EIS) to fall within the WAC 197-800(13)(a) or (e) exemption.

4. Although no Washington case law was presented on this issue, the Hearing Examiner concludes that issuance of the EIS was not equivalent to an adjudicatory "action", to any "action" to enforce a prior decision; nor to suspension of a license as those terms are meant by the WAC. Intervenor's motion to dismiss is without support in the scheme or quality of exemptions exemplified and specified in WAC 197-11-800. See also Citizens for Responsible Area Growth v. Adams 447 F. Supp. 994 (D. N.H.

1979). Having considered the motion to dismiss and the reply thereto, the motion is denied.

5. The Hearing Examiner restates and affirms the preliminary hearing ruling that the challenged information in the Final Environmental Impact Statement (FEIS) constituted responses to Draft EIS comments and were designed to "supplement, improve or modify" the DEIS analysis, Seattle Municipal Code Section 25.05.560(A)(1-3); and/or to make factual corrections." Seattle Municipal Code Section 25.05.560(A)(4). Between the DEIS and FEIS there were no substantial changes to the proposal, nor "significant new information...on a proposal's probable significant adverse environmental impacts." Seattle Municipal Code Section 25.05.405(D). Compliance with the recirculation and other procedures for a Supplemental EIS (SEIS) was therefore not required. Seattle Municipal Code Section 25.05.620; Cf. Seattle Municipal Code Section 25.05.502(H); Seattle Municipal Code Section 25.05.600(D)(3).

6. The Hearing Examiner also restates and affirms pre-hearing conference rulings restricting the focus of the appeal.

Findings of Fact

1. The Seattle Engineering Department, Solid Waste Utility, prepared a final environmental impact statement for a plan to close the Kent Highlands Landfill, operated by the City of Seattle since 1968. Per the fact sheet, the purpose of the closure is

...to provide adequate pollution control measures...to mitigate adverse impacts on public health and the environment from the landfill.

DEIS, p. iii.

2. Following the June 1986 issuance of the DEIS, the Cities of Kent and Seattle entered into a comprehensive Settlement Agreement which was approved by court order of September 4, 1986. Pursuant to the Agreement and court order, Seattle was required to terminate its operation of the Kent Highlands Landfill by December 31, 1986.

3. The DEIS Fact Sheet states that alternatives for disposal of the waste stream are included within the document, and that "the preferred alternative is disposal at King County's Cedar Hills Landfill."

4. Appellant group, ETC, is comprised of homeowners and residents who live near the Cedar Hills Landfill. The essence of their appeal is that the EIS fails to adequately disclose groundwater, surface water, air quality, land use, housing and traffic other impacts on the Cedar Hills environment.

5. By way of illustration, appellant directed the Hearing Examiner's attention to Table B of the DEIS. The chart of comparative impacts generally indicates no significant impacts to Cedar Hills on listed environmental elements. By contrast, the column for Kent Highlands Expansion alternative includes a synopsis of elevation, leachate generation and other anticipated impacts. Appellant is not critical of the quality of EIS disclosure regarding impacts on the Kent Highlands area.

6. It is projected that in 1987, the first year of the Kent Highlands closure, that the Kent Highland waste would comprise 27 percent of the total Cedar Hills waste stream, but that the figure would decline to 9 percent by the year 2010 "due to greater projected growth in the suburbs." DEIS p. I-31 through I-33. Approximately 320,000 tons of solid waste were deposited

annually at the Kent Highlands Landfill.

7. Referring to one impact of solid waste disposal on the Cedar Hills environment, the Pollution Control Hearings Board indicated that

Despite the current attempts to manage the site to achieve waste coverage, some notorious odors emanate from the landfill...either from new garbage or decomposing garbage...

Exhibit 2A, p. 3 (November 30, 1984).

8. The Cedar Hills Regional Landfill encompasses approximately 920 acres, but lease agreements, buffer stipulations and other requirements leave approximately 400 acres for disposal use.

9. The general process is that direct tonnage (from private carriers) and indirect tonnage (from King County trucks) are brought onto the Cedar Hills site, dumped, spread and compacted to fit a "cell". The exposed portion is to be covered daily. DEIS p. I-33.

10. There is no dispute that the former Kent Highlands waste stream would add more than 1000 tons per day on a 5 day/week basis to Cedar Hills. The DEIS projected impacts included a six-year reduction in the remaining life of the landfill, increased cell measurements, increased truck traffic and delays. DEIS I-34.

11. According to the DEIS,

King County is in the process of preparing a Site Development Plan for Cedar Hills...The draft EIS for the Site Development Plan, which is expected to be issued in late 1986, will consider the impacts of continued operation of Cedar Hills under the various development alternatives.

pp. II-68-69; FEIS, p. I-4.

12. However, under the category of "Affected Environment, Significant Impacts, and Mitigation Measures," DEIS Section II.B.1, there is a discussion of the "significant adverse effects of diverting the Kent Highlands waste stream" to Cedar Hills. DEIS p. II-68. Specifically excluded were leachate production and the impact on ground and surface water.

13. Included were the discussion and projection that while there would be increases in truck traffic and emissions, the levels would remain below state and federal standards and there would be no significant change in local air quality from transfer of wastes to Cedar Hills. DEIS p. II-71. The FEIS concludes that the incremental increase in odor from the additional Seattle garbage would not increase the site's ultimate odor-producing potential and would not be discernible. FEIS, pp. I-4 through I-5.

14. The DEIS discussion of Cedar Hills noise and traffic impacts at pp. II-71 through II-87 is supplemented by the FEIS at pp. I-5 through I-19, and I-19 through I-43. Specifically, SR 169, a principal route to the Cedar Hills site, is a two-lane road which already exceeds carrying capacity. Seattle will add an average of 47 one-way truck trips/day to the traffic, roughly 20 percent of the total truck traffic. The overall traffic impact will range from +.9 to +1.3 percent.

15. SED "scoped out" or eliminated EIS discussion of the issue of ground and surface water contamination because in its

opinion any impacts would be neither significant nor probable. One of the bases for the conclusion was the Cedar Hills process for receiving Seattle's solid waste.

16. Seattle garbage will go a new central pit, operational since September 1986. The pit conforms to state and local standards.

17. The floor of the pit will consist of 2 ft. of sand, beneath which will rest a 80 ml. thick floor of polyethylene. Two feet of bentonite clay lies beneath the polyethylene layer. The sloped sides of the pit have liner 20 ml. thick.

18. The central pit mechanism includes a built-in leachate control and disposal system which is designed to direct the liquid to the Metro sewer system. A gas control system is also included.

19. The Hearing Examiner finds that there will be no relative increase in the amount of leachate produced since there is no increase in the square footage of area to be used for solid waste.

20. It is possible that garbage could tear or puncture the central pit's lining. If such occurs, it is possible that an attenuated leachate would find its way through the clay, into the soil and into the aquifer. This assumes that the leachate control system breaks down or becomes dysfunctional. The probability and impact of such a sequence of events was not established and is found by the Hearing Examiner to be unlikely. The system includes a shut-off valve which will operate to store water in the pit in the unlikely event of a leachate overload.

21. Many of the concerns with the contamination of ground and surface water relate to an older, nonconforming section of the Cedar Hills landfill. Seattle-King County Health Department's Greg Bishop testified credibly that leachates were not adequately controlled from an old pit area that was closed in September 1986.

22. The older, nonconforming section of the Cedar Hills Landfill is being updated and brought into compliance. Daily covering, ground and surface water monitoring and other activities are being undertaken pursuant to federal court order. Final cover for the old pits is programmed for no later than 1990.

23. According to Rod Hansen, King County Manager of the Solid Waste Division, all Seattle waste has gone into the new central pit, and King County would "honor" Seattle's request that the City's garbage be deposited only in the central pit. Hansen did indicate, however, a possibility that some Seattle garbage would go into a nonconforming area, possibly to finish off a mound.

24. The Hearing Examiner finds that while it is "possible," the probability of a break or tear in particularly the 80 ml. central pit liner, accompanied by a retention system failure, is "extremely remote." Testimony of Morck.

25. Appellant contends that the leachate (and air quality) would be significantly impacted by the change in quality of the new waste stream. In this regard appellant relies heavily on Exhibit 4, a Puget Sound Council of Governments study entitled "Characterization and Impacts of Nonregulated Hazardous Waste in the Solid Waste of King County (December 1985)." Table 32 of that study shows that while Cedar Hills and Kent Highlands are affected by similar chemical species, the Kent Highlands waste stream also contained lead, (described as very neuro-toxic), benzene, tetrachloroethene and chlorobenzene. SED discredits the use of the samples from the report as erratic, and as a

one-time snapshot view.

26. Appellant also asserted a higher degree of volatile organics in the Kent Highlands waste stream, and that the impact is significant when considering that the chemicals could be airborne or transferred to the ground e.g. by rainfall.

27. With respect to air, appellant's Dr. Shearer testified that trucks' crushing and smashing would release neurotoxics en route to the fill, significantly impacting neighborhood air quality. Shearer pointed to the absence of EIS discussion of ambient air effects as evidence of the EIS inadequacy. Neither party presented data on the availability of data addressing this topic.

28. Seattle's use of the Cedar Hills Landfill will not affect elevation changes except that the time frame for newer pit construction will be shortened due to the increased amount of waste.

29. Issaquah's water supply comes from the deep water aquifer beneath Cedar Hills.

30. The ultimate amount of waste to be contained by the Cedar Hills Landfill is not affected by the Kent Highlands waste stream.

Conclusions

1. The Hearing Examiner has jurisdiction of this appeal pursuant to Chapter 25.05, Seattle Municipal Code.

2. The adequacy of the subject EIS was challenged by appellant. Seattle Municipal Code Section 25.05.680(B)(3) provides that such appeals "shall be considered de novo and limited to the issues cited in the notice of appeal." With respect to the burden of proof Seattle Municipal Code Section 25.05.680(B)(3) provides that

The determination appealed from shall be accorded substantial weight and the burden of establishing the contrary shall be upon the appealing party.

3. According to Cheney v. Mountlake Terrace, 87 Wn. 2d 338, 552 P.2d 184 (1976),

The mandate of SEPA does not require that every remote and speculative consequence of an action be included in the EIS. The adequacy of an EIS must be judged by application of the rule of reason.

at p. 344.

4. The quintessence of this ETC appeal is the alleged failure of the EIS to properly consider impacts of the closure plan upon the Cedar Hills Landfill and environs. ETC's Memorandum of Law and Summary of Evidence specifies surface water resources; air quality; traffic; and land use, housing, aesthetics as specific areas of concern.

5. Testimony and argument on these subcategories were received via a liberal interpretation of the lay appeal letter.

6. Per the DEIS, King County is in the process of developing a Site Development Plan for King County. The DEIS further indicates that a draft EIS on anticipated long range impacts was expected to be issued in late 1986, and that this subsequent EIS is to address specific Cedar Hills impacts. There nevertheless are some pointed disclosures in the subject EIS of

anticipated noise and traffic impacts on the Cedar Hills environment. The discussion of these impacts lacks the detail of the Kent Highlands focus. Nevertheless, this part and the whole of the challenged EIS are adequate within the "rule of reason."

7. It was not proved that the challenged EIS improperly excluded a more detailed review of surface and ground water impacts. The evidence was woefully insufficient to prove that the existing (nonconforming) landfill problems would be exacerbated by the additional solid waste.

8. The Seattle Waste stream will principally be directed to a central pit which has built-in gas and leachate control systems. There is some possibility that the central pit's liner system will puncture, tear or otherwise fail. However, the evidence shows the probability to be extremely remote. The evidence also shows that any leakage that would accompany such an unlikely failure event would be attenuated by the clay flooring and intervening soils. The relative degree and impact of such an occurrence was not shown to be significant. Therefore, the failure to include a discussion of Cedar Hills ground water impact was not fatal to the EIS adequacy.

9. In this connection, Seattle Municipal Code Section 25.05.408 provides that the lead agency is to narrow the scope of the EIS "to the probable significant adverse impacts..." While it is undisputed that groundwater contamination would be adverse, the record fails to prove in this instance that the impact would be "probable," Seattle Municipal Code Section 25.05.782 or "significant," Seattle Municipal Code Section 25.05.794. In consonance is Cheney v. Mountlake Terrace, supra, which holds that remote and speculative consequences of an action are not required discussions of an EIS. at pp. 344-345.

10. The same result obtains with respect to surface water and air quality. While Seattle-origin toxics may be released in the air in and around the Cedar Hills Landfill and add chemicals to the ambient air quality which may be rained down to surface water carriers, no availability of data on specifics was presented. These impacts are also highly speculative and remote per this record and were not required EIS discussion topics.

11. The additional solid waste will have no discernible impact on air quality, housing, aesthetics or land use. While the Kent Highlands waste stream will cause pit useful life to be shortened by some six years, it is clear that the Cedar Hills Landfill would have been filled by some solid waste regardless of the Kent Highlands Landfill closure. The Hearing Examiner is therefore unpersuaded that the subject EIS should be ruled inadequate because of the amount and level of discussion in these areas.

12. The language of Seattle Municipal Code Section 25.05.080 suggests that an environmental document shall include a worst case analysis when relevant vital information on significant impacts is unknown or unavailable. The record is unpersuasive that the ground water, surface water or air quality impacts rise to the level of "significant." Seattle Municipal Code Section 25.05.794.

13. Applying the "rule of reason" to this case, the EIS must be considered adequate. Exclusive of remote or speculative impacts, (Cheney, supra), the EIS adequately addresses the challenged impacts on the Cedar Hills environment. Segmentation or phasing of the EIS process therefore becomes a moot issue.

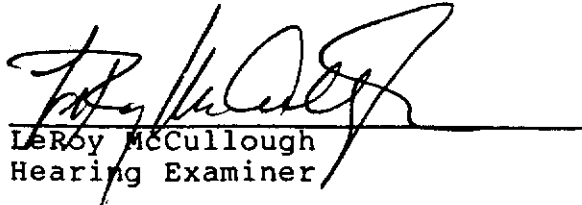
14. As the challenged impacts were proved to be improbable, insignificant or adequately addressed, the Hearing Examiner cannot conclude that the nonconformity of the existing Cedar Hills Landfill would be exacerbated by the new waste stream such

that the EIS should be declared inadequate.

Decision

The lead agency's determination that the EIS is adequate is affirmed.

Entered this 28th day of May, 1987.


Leroy McCullough
Hearing Examiner

CONCERNING FURTHER REVIEW

Judicial review under SEPA shall without exception be of the decision on the underlying governmental action together with its accompanying environmental determinations. RCW 43.21C.075(6)(c). SEPA issues may be added to the request for review of the underlying decision within 30 days after the date of official notice of that decision if a notice of intent to seek judicial review of SEPA issues is filed with the Director, Department of Engineering, 910 Municipal Building, Seattle, Washington 98104, within the time limit set for appealing the underlying governmental action. Seattle Municipal Code Section 25.05.680(D)(4).

If the Superior Court orders a review of the decision, the person seeking review must arrange for and bear the cost for preparing a verbatim transcript of the hearing but will be reimbursed if successful in court. Instructions for preparation of the transcript are available in the Office of Hearing Examiner, 400 Yesler Building, 5th Floor, Seattle, Washington 98104. In the alternative, RCW 43.21C.075(6)(b) provides that a tape may be used for the court review. If a taped transcript is to be reviewed by the court the record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of taped transcript relating to issues on review.