

N.D.A.G. Letter to Slorby (Nov. 28, 1990)

November 28, 1990

Mr. Tom P. Slorby
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

Dear Mr. Slorby:

Thank you for your October 25, 1990 letter requesting my opinion concerning the authority of state agencies and the Governor to declare a moratorium on the disposal of solid waste.

For the reasons stated below, it is my opinion that the Governor may issue a moratorium if an emergency is declared under N.D.C.C. ch. 37-17.1, the North Dakota Disaster Act of 1985. However, no state agency, including the Department of Health and Consolidated Laboratories, may issue a moratorium per se regarding disposal of municipal solid waste ash within the state.

The Department of Health and Consolidated Laboratories has received a permit modification application from Municipal Services Corporation (MSC) for the MSC Beeter Special Use Disposal site. The Department issued a permit to operate a special use disposal site to MSC on May 24, 1990. The permit was issued to MSC as a result of their purchase of the Beeter disposal site, located approximately eight miles south of Sawyer in Ward County. The permit allowed MSC to continue to operate the disposal site in accordance with the standards and requirements that the Beeter disposal site had been required to meet.

MSC has also requested approval to make engineering improvements to the existing landfill and to expand the types and volumes of waste to be disposed at the site. These wastes include combined bottom and fly ash generated by combustion of municipal solid waste at a facility located in Hennepin County, Minnesota. The Department has made no recommended findings regarding the proposed landfill. The Department has noticed a public comment period and scheduled a public hearing for November 28, 1990, at Sawyer (notice attached).

The appropriate entities to review land use concerns regarding siting a solid waste facility are the township and county as described in N.D.C.C. chs. 11-33 and 58-03. For purposes of this opinion, I assume that the proposed application for disposal of solid wastes is in concert with N.D.C.C. ch. 58-03 regarding township zoning authority and N.D.C.C. ch. 11-33 regarding county zoning authority.

As to the actual disposal of the waste itself, the Governor has not become directly involved in any environmental permit within this state. A review of N.D. Const. art. V and N.D.C.C. ch. 54-07 and ch. 37-17.1 reveals the Governor has direct authority to issue a moratorium regarding municipal ash waste disposal only in the event an emergency is declared under N.D.C.C. ch. 37-17.1.

In specific circumstances involving emergencies the North Dakota Disaster Act of 1985, N.D.C.C. ch. 37-17.1 may provide the authority for issuance of moratoriums. N.D.C.C. § 37-17.1-04(3) defines emergency as any situation which is determined by the governor to require state or state and federal response or mitigation actions to immediately supplement local governments to protect lives and property, to provide for public health and safety, or to avert or lessen the threat of a disaster. N.D.C.C. § 37-17.1-05(2) provides that the governor may issue executive orders and proclamations, and amend or rescind them. Executive orders, proclamations, and regulations have the force of law.

The Governor may also:

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations, of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency.

N.D.C.C. § 37-17.1-05(6)(a).

If the activity to be conducted under the proposed application constitutes an emergency as defined above because of a threat to the state's environment or public health, the Governor may have the authority to issue a moratorium under N.D.C.C. ch. 37-17.1.

Discussion with the office of the Governor indicates that the Governor is concerned that any action taken by the state comply with the Commerce Clause of the U.S. Constitution. There have been many recent court decisions regarding a state's attempt to restrict out-of-state waste disposal within their jurisdiction. The most recent is Nat'l Solid Waste Management Ass'n and Chemical Waste Management, Inc. v. Alabama Dep't of Env'tl. Management et al., No. 90-7047 (11th Cir. Aug. 8, 1990). In this case the United States Court of Appeals for the 11th Circuit held that Alabama's law attempting to limit the shipment of hazardous waste into the state for disposal violated the Commerce Clause of the U.S. Constitution. The Governor is concerned that any action taken meet the requirement of the Commerce Clause. Consequently, any decision must be based upon the impact of the solid waste disposal on the environment and health.

Under applicable statutes, the Department may only consider potential environmental and health impacts when conducting its permit review. Although the Department may only consider information concerning the environmental or public health impact, a request for

delay of a project based on environmental data or the lack of environmental data is valid evidence to be considered by the Department during the comment period or at hearing.

The Department of Health and Consolidated Laboratories must review any permit application for solid waste management activity in accordance with N.D.C.C. ch. 23-19, Solid Waste Management and Land Protection Act and N.D. Admin. Code art. 33-20 Solid Waste Management rules. The Department also considers other environmental statutes and rules within its jurisdiction when reviewing permit applications. This typically includes review of the application in accordance with the N.D.C.C. chs. 61-28 Control, Prevention, and Abatement of Pollution of Surface Waters, 61-28.1 Safe Drinking Water Act, 23-20.3 the Hazardous Waste Management Act, and Public Health statutes contained in Title 23. None of the statutes referenced above authorize the Department to make a policy judgment regarding the disposal of municipal waste ash within the state.

In conclusion, states must be careful that their regulatory actions are taken for the purpose of protecting health and environment and not merely for the purpose of restricting out-of-state waste disposal. Although no state agency including the Department may impose a moratorium, any state agency may provide input during the public comment period or at the hearing or, if the agency determines an emergency exists, it could approach the Governor for action under the North Dakota Disaster Act of 185.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

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Enclosure

PUBLIC NOTICE OF OPPORTUNITY TO COMMENT
ON AN APPLICATION FOR DISPOSAL OF MUNICIPAL WASTE COMBUSTER
ASH

TAKE NOTICE that Municipal Services Corporation (MSC) of Kennesaw, Georgia, and Sawyer, North Dakota, owns a landfill site for disposal of non-hazardous industrial solid waste. MSC has applied for a modification of its permit to include changes in the construction, operation, closure, and post-closure maintenance of the site. MSC also proposes to dispose of municipal waste combustor (incinerator) ash in the modified and upgraded landfill.

The Department has not made a determination to grant or deny the proposed permit application. The decision to grant, deny, or grant with conditions will be made entirely on the record as developed during a public comment period and during a public hearing. Any party aggrieved by the decision made by the Department shall have redress as outlined in Chapter 28-32 of the N.D.C.C. (Administrative Agencies Practice Act) and Article 33-22 of the N.D.A.C. (Practice and Procedure before the Department). The Department has prepared performance criteria and limitations according to North Dakota Administrative Code Article 33-20 which would be utilized if a permit were issued.

The potential performance criteria will be available for public review and comment for a period of 30 days ending December 3, 1990. During that period, any person may submit written comments on the proposal. The Department will consider all comments, including those already received, prior to taking action on the permit application. Comments and written communications should be directed to:

Martin R. Schock, Director
Division of Waste Management
State Department of Health and
Consolidated Laboratories
P.O. Box 5520
Bismarck, ND 58502-5520

The potential performance criteria, a review analysis of the application, and the permit application are available for review during the hours of 8:30 a.m. to 4:00 p.m., Monday-Friday at the Department's Division of Waste Management, 1200 Missouri Avenue, Room 302, Bismarck, ND, or at the office of the Ward County Auditor, Minot, ND.

A public hearing has also been scheduled to allow direct testimony by interested persons. This hearing is scheduled for Wednesday, November 28, 1990, at 1:30 p.m., CST, in the gymnasium of the Sawyer Public School. The hearing will remain open until at least 9:00 p.m., CST, to allow full opportunity for the public to comment. Additional information regarding procedures to be utilized at hearing should be directed to William Delmore, Assistant Attorney General, Office of the Attorney General, State Capitol, 600 E. Blvd. Avenue, Bismarck, ND 58505.