

Modification and Clarification of the Application of the Special Assessments on Hazardous Wastes

In a recent decision, CWM Chemical Services, LLC v. Roth (CWM)¹, the Appellate Division of the New York Supreme Court, 4th Department, held two exemptions from the special assessments imposed on hazardous wastes under Article 27 of the Environmental Conservation Law (ECL) to be unconstitutional.

This memorandum explains the impact of that decision on the application of the special assessments on hazardous wastes imposed under section 27-0923 of the ECL as of April 1, 2005. The memorandum also explains a 2004 amendment to subdivision 3(c) of section 27-0923 of the ECL clarifying the application of the exemption from the special assessment on hazardous wastes generated at a remediation site in New York State, and it clarifies the application of the special assessments to hazardous wastes generated by the federal government.

General description of the law and the CWM decision

Subdivision 1 of section 27-0923 of the ECL imposes a special assessment on every person who generates hazardous waste in New York State. Subdivision 2 of this section imposes a hazardous waste special assessment on every person in New York State who holds or is required to hold a permit to treat, store or dispose of hazardous waste. The permit is referred to as a treatment, storage and disposal facility (TSDF) permit.

Subdivision 2(d) of section 27-0923 of the ECL provides that no special assessment is to be imposed for the treatment, storage or disposal of hazardous waste if the waste was subject to the special assessment imposed on hazardous waste generated in New York State. Subdivision 3(c) of section 27-0923 provided (prior to the 2004 amendment) that generation of hazardous waste did not include the retrieval or creation of hazardous waste which must be disposed of due to the remediation of an inactive hazardous waste disposal site located in New York State. In addition, subdivision 3(c) was interpreted by the Department to also exclude such waste from the assessment imposed on every person who holds or is required to hold a permit to treat, store or dispose of hazardous waste.

In CWM, the court found the exemption set forth in subdivision 2(d) of section 27-0923 of the ECL to be unconstitutional, and the exemption set forth in subdivision 3(c) of section 27-0923 to be unconstitutional as applied by the Department to a TSDF. These exemptions were unconstitutional because they exempted only hazardous waste generated in New York State from the special assessment imposed on a TSDF.

Hazardous wastes generated in New York State, including wastes from remediation sites, are no longer exempt from the special assessment imposed on a TSDF

As a result of CWM, effective April 1, 2005, a person holding a permit or required to hold a permit to treat, store or dispose of hazardous waste in New York State is subject to the special

¹CWM Chemical Services, LLC v. Roth, 15 AD3d 77, 787 NYS2d 780, 2004 NY Slip Op. 09786 (N.Y.A.D. 4th Dept. December 30, 2004).

assessment imposed under subdivision 2 of section 27-0923 of the ECL on all hazardous waste that it receives from off-site.

Clarification of the application of the exemption from the special assessment on generation for hazardous wastes from a remediation site

Chapter 577, Laws of 2004, amended subdivision 3(c) of section 27-0923 of the ECL to clarify that the exemption from the special assessment on the generation of hazardous wastes at a remediation site applies only to hazardous waste that is created or retrieved for disposal under an order of, or agreement with, the Department of Environmental Conservation (DEC), pursuant to Title 13 (inactive sites) or Title 14 (brownfields) of Article 27 of the ECL, or under a contract with DEC pursuant to Title 5 (environmental restoration projects) of Article 56 of the ECL. Hazardous wastes generated at any other remediation site are subject to the special assessment on generation imposed under subdivision 1 of section 27-0923 of the ECL.

The decision in CWM makes clear that the exemption provided in subdivision 3(c) of section 27-0923 of the ECL only applies to the special assessment on generation of hazardous waste under subdivision 1 of section 27-0923, and that such waste is not exempt from the special assessment imposed on a TSDF under subdivision 2 of such section for receiving such waste. Accordingly, a TSDF that is located in New York State is subject to the special assessment imposed under subdivision 2 of section 27-0923 of the ECL on hazardous waste that is generated at any remediation site, whether in-state or out of state.

Clarification on how the special assessments on hazardous wastes are applied to hazardous wastes generated by the federal government

Because of the Supremacy Clause of the United States Constitution, Article VI, clause 2, the special assessments imposed on the generation, treatment, storage or disposal of hazardous wastes under subdivisions 1 and 2 of section 27-0923 of the ECL cannot be imposed on the federal government. However, the hazardous wastes generated by the federal government are subject to the special assessment imposed under subdivision 2 of section 27-0923 of the ECL when they are received by a TSDF.