

New York State Department of Environmental Conservation
60 Wolf Road, Albany, New York 12233



Robert F. Flacke
~~Robert F. Flacke~~
Commissioner

December 27, 1979

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Post Office Box 1051
Rochester, New York 14603

Attention: Ragna Henrichs, Esq.

Re: Declaratory Ruling on
Renewal of NPDES Permits
DEC 17-01

Gentlemen/Ladies:

In your letter to me, dated October 18, 1979, you requested, on behalf of your client, Rochester Gas and Electric Corporation (RG&E), that the New York State Department of Environmental Conservation (DEC) issue a declaratory ruling that (1) DEC possesses sole jurisdiction to renew the Clean Water Act §402 permits for RG&E's Beebee, Russell and Ginna electric generating stations, and (2) RG&E's present EPA-issued NPDES permits are SPDES permits which will continue in force under the New York State Administrative Procedure Act (SAPA) §401 beyond their March 30, 1980 expiration date if RG&E makes timely and sufficient renewal application to DEC and if DEC does not issue renewal permits by March 30, 1980.

There is a threshold problem with your request for DEC, and not EPA, to issue such a ruling. Pursuant to §204 of SAPA and Part 619 of the DEC's regulations, any State agency may issue a declaratory ruling with respect to any rule or statute enforceable by it. In this instance, at least with regard to the first question concerning DEC's jurisdiction to renew NPDES permits, the question may more properly be posed to EPA since it is the federal statute and federal regulations which will control a response to this question. DEC's response may not be controlling. Nevertheless because state law and regulation must comport with federal law and regulation if New York is to be an approved state for NPDES purposes, I will address the questions you have raised.

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- I. DEC possesses primary authority to renew, as SPDES permits, the expiring NPDES permits for RG&E's Beebee, Russell and Ginna stations.

You have requested a declaratory ruling that DEC possesses "sole jurisdiction" to renew the expiring NPDES permits. For the reasons stated, I reject the contention that DEC has "sole" authority and state that DEC has "primary" authority.

While it is true that Section 101(b) of the Clean Water Act states that "[i]t is the policy of Congress that the States...implement the permit programs under Section 402 and 404 of this Act" and Section 402(c)(1) states that the Administrator of EPA shall suspend the issuance of NPDES permits when a state NPDES program is approved, this does not mean that EPA no longer has any permitting authority. Specifically, Section 402(d)(4) of the Clean Water Act, as added by Section 65 of the Federal Water Pollution Control Act Amendments of 1977, sets forth a procedure whereby EPA, after objecting to and preventing the issuance of a state permit under Section 402(d)(2), may issue a permit instead.

The language of Article I, Paragraph 3 of the 1975 Memorandum of Agreement ("After the date upon which the Administrator approves the State's permit program, the Commissioner shall have sole responsibility for the issuance of NPDES permits within the State of New York....") cannot be controlling since it predates the addition of Section 402(d)(4) to the Clean Water Act in 1977, which amendment was clearly added to authorize EPA to issue a permit where a state-issued permit is inadequate (See; Conference Report, House of Representatives Report No. 95-830, p. 96-97). The regulations (40 CFR Section 123.23) now detail the procedures to be followed in issuing such EPA permits and effectively supersede the language of the 1975 Memorandum of Agreement.

Nevertheless it is clear that state permits under an approved State program, are to replace federal NPDES permits as they expire. Section 402(c)(1) of the Clean Water Act requires the suspension of the EPA issuances. 40 CFR Section 123.7(b)(1) states, in part, that "[w]here existing permits are not transferred, Section 123.1(d) applies." 40 CFR Section

123.1(d) implies that EPA has no authority to reissue permits since it speaks of retention of jurisdiction only over EPA issued permits (unless the state assumes responsibility for such permits pursuant to a memorandum of agreement) and that such retention of jurisdiction includes various enumerated activities (processing of permit appeals, modification requests or variance requests, conduct of inspections and the receipt and review of self-monitoring reports) without mention of the processing of a renewal application. In addition, the sentence in 40 CFR Section 123.1(d), "If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA...when agreed to by the state, may continue to retain jurisdiction until the matter is resolved" implies that EPA cannot issue a renewal.

II. RG&E's present EPA- issued NPDES permits are deemed SPDES permits which will continue in force under Section 401 of SAPA if RG&E makes timely and sufficient renewal application to DEC and if DEC does not issue renewal permits by March 30, 1980.

Although expired Federal permits are continued in effect by operation of law [Administrative Procedure Act §9(b); 5 USC §558(c)] pending a decision by a Federal agency, and under New York State Law, State permits are accorded the same treatment (SAPA §401), there is a problem when the Federal permit is to expire to be replaced by a State permit. Neither the federal nor state law specifically continues the effectiveness of the federal permit pending the state decision. In addition, 40 CFR §122.12(b)(4) states:

"[an expiring NPDES permit] is not continued under Federal law where EPA originally issued the permit, but the State is the permitting authority at the time the permit expired. In such case, the discharger is discharging without a permit, from the time the EPA-issued permit expires to the time that the State-issued permit is effective."

However, the New York State SPDES regulations allow a NPDES permit to be deemed a SPDES permit for the purposes of satisfying the state requirement for a permit. Section 17-0803 of the

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Environmental Conservation Law states, in part, that "[r]ules and regulations adopted hereunder may provide that in lieu of issuance of such [SPDES] permit the Department may accept as compliance herewith a permit duly issued by the Federal Government or agency thereof pursuant to the provisions of the Act." Such rules and regulations were promulgated in 1975 and state, in 6 NYCRR §751.1 (c) that:

"All permits for discharges into navigable waters issued by the Federal government pursuant to the act shall be deemed to be permits issued under this Article, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Article."

Under such regulation, the NPDES permit served a dual function. First, it was the permit required by the Federal Water Pollution Control Act of 1972. Second, it would have been necessary, in the absence of Section 17-0803 and 6 NYCRR Section 751.1(c), to require a second permit, while the NPDES permit is now deemed by 6 NYCRR Section 751.1(c) to be that second, or State, permit.

Since the expiring NPDES permits were deemed to be State permits and Section 401 of SAPA continues expiring State permits in effect until the renewal application is determined, RG&E's present EPA-issued NPDES permits are continued in effect until the SPDES application is determined.

Very truly yours,



Richard A. Persico
General Counsel/
Deputy Commissioner

RAP: PJM:pmc

cc: Richard Tisch, Esq.

bcc: Anthony Adamczyk
Paul F. Schmied
Mitchell Goroski ✓