

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter :  
of :  
the Petitions by :  
THE ENVIRONMENTAL DEFENSE FUND, INC. : DECLARATORY  
 : RULING  
for a Declaratory Ruling pursuant to : DEC 17-04  
the State Administrative Procedure Act  
§204 and 6 NYCRR §619.1 concerning (1) :  
the Consolidated Edison Company of New :  
York and (2) Orange and Rockland :  
Utilities :

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INTRODUCTION

Petitioner Environmental Defense Fund ("EDF") seeks two declaratory rulings from the Department of Environmental Conservation ("DEC") that a State Pollutant Discharge Elimination System ("SPDES") permit is necessary for discharges of sulfur and sulfur oxides from the smokestacks of power generating units. The first petition seeks a declaratory ruling (1) that Consolidated Edison Company of New York ("Con Edison") is required to apply for and receive a SPDES permit regulating the discharge of sulfur and sulfur oxides from the stacks of its Arthur Kill 2 and 3 and Ravenswood 3 units into the waters of the State and the United States before being allowed to convert those units from the burning of oil to the burning of coal; and (2) that such permit, although a precondition of coal reconversion, cannot be issued until Con Edison can insure that

its sulfur and sulfur oxides discharges regulated in such permit will not cause the violation of, or exacerbate existing violations of, state water quality standards.

The second petition seeks a declaratory ruling (1) that Orange and Rockland Utilities ("ORU") is required to apply for and receive a SPDES permit regulating the discharge of sulfur and sulfur oxides from the stacks of its Lovett Units 4 and 5 into the waters of the state and the United States before being allowed to convert those units from the burning of oil to the burning of coal; (2) that such permit, although a precondition of coal reconversion, cannot be issued until ORU can insure that its sulfur and sulfur dioxide discharges regulated in such permit will not cause the violation of, or exacerbate existing violations of, state water quality standards.

#### FACTS

For the sole purpose of issuing this Declaratory Ruling, DEC will accept the facts as set forth in the petitions without any formal determination as to their accuracy. We take this position because neither §204 of the State Administrative Procedure Act or Part 619 of the DEC Regulations require the determination by DEC of the accuracy of facts alleged in a petition for a Declaratory Ruling. The Regulations only have a procedure for obtaining sufficient information to issue a declaratory ruling when the original facts submitted are incomplete. The statute permits rulings on any state of facts described by a petition, and the

binding effect of a ruling will be limited by its assumed fact predicate. PASNY v. DEC, \_\_\_\_\_ N.Y.2d \_\_\_\_\_, March 30, 1983.

Furthermore, this assumption of the facts set forth in the two petitions is solely for the purpose of this Declaratory Ruling and is not to be taken as either (1) a modification of any part of the April 13, 1982 Decision of the Commissioner in the matter of the application of Orange and Rockland Utilities concerning coal conversion at the Lovett generating station, or (2) any determination of any of the facts in the pending matter of the application of Con Edison concerning coal conversion at the Arthur Kill and Ravenswood generating stations.

For a detailed statement of the facts the two petitions should be reviewed.

#### CONCLUSION

SPDES permits are not required by the the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. (the "Clean Water Act"), or Article 17 of the ECL for the emission of sulfur and sulfur oxides from smokestacks of electric generating plants all or part of which emission may reach waters of the State and the United States through dry or wet deposition.

Smokestacks do not require SPDES permits because smokestack emissions are emissions into the air, not the water, and because the authority to regulate the environmental problem of acid deposition rests, at the Federal level, with the Clean Air Act (42 U.S.C. §7401 et seq.) and at the State level, with Article 19

of the ECL - Air Pollution Control. Given these statutes the SPDES program cannot be interpreted to either duplicate or augment the air program, or supplant it because of alleged shortcomings.

#### DISCUSSION

EDF argues that even though pollution emitted into the air through smokestacks is diffuse, it will measurably increase sulfur deposition into specific, identifiable water bodies of the state, and thus there is a direct relationship between these smokestacks and the quality of specific receiving waters. This, it is claimed, makes the smokestacks point sources of pollution under the Clean Water Act or the ECL triggering the necessity for a SPDES discharge permit with its requirements.

Although it is arguable that the definitions of "pollutant", "industrial waste", "discharge", "point source" and "disposal system", under the Clean Water Act and the ECL and their regulations could conceivably be applied to the emission of sulfur oxides from smokestacks, the EDF argument cannot withstand analysis (1) when these terms are interpreted in context, (2) when there is no legislative history or case law supporting such a construction, and (3) when the Clean Water Act is construed in pari materia with the Clean Air Act.

Taken in isolation and out of the context of the statutes and the regulations, the definitions of "pollutant" and "industrial waste" could conceivably be interpreted to include

sulfur oxides. Also the definitions of "point source" and "disposal system" could conceivably be interpreted to include smokestacks. This is because the terms "pollutant" and "industrial waste" do not specifically exclude sulfur oxides (in air emissions), and the terms "point source" and "disposal system" do not specifically exclude smokestacks (or indirect point sources discharging into the air). Out of context too, even the broad definition of the term "discharge" could conceivably be read to cover transport through the air to a receiving stream.

An interpretation of these terms in context, however, must lead to the conclusion that the statute is meant to control, via permits, direct discharges of wastewater into a receiving stream, not emissions into the air which may reach waters of the State. The Clean Water Act (in its present form since 1972) sets forth a comprehensive water pollution abatement program including federal construction grants for publicly owned treatment plants (Title II), requirements for effluent standards based on technology and on water quality (Title III), and permits for discharges into receiving streams (Title IV). Nowhere does the Clean Water Act, expressly or by implication, cover emissions into the air.

The keystone of the argument that the Clean Water Act and Article 17 of the ECL require a permit for smokestack emissions is that smokestacks are "point sources". However we conclude that this is not the case.

The Clean Water Act defines a point source as follows:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture. 33 U.S.C. §1362(14)

This definition of "point source" does not include smokestacks or anything remotely resembling smokestacks. Also the examples given in the definition show that "point source" means a structure which conveys an aqueous discharge to a receiving stream, and the definition cannot be read to include structures which convey an emission into the ambient air (some of which may eventually reach a receiving stream). Thus point sources discharge directly into water whereas smokestacks discharge directly into air. Similarly the term "disposal system" under ECL §17-0105.10 must be read in context to apply only to aqueous discharges.

Also "pollutant" under the Clean Water Act and the ECL, and "industrial waste" under the ECL, though applicable to the contents of smokestack emissions (merely because there is nothing in the language that clearly rejects the notion that they should) cannot be applicable to air emissions given their context. Finally, the term "discharge", when read in context, applies only to the addition of a pollutant directly to a receiving stream.

Thus the Clean Water Act and Article 17 of the ECL do not regulate smokestack emissions since smokestacks are not "point sources" and do not directly "discharge" wastewater ("pollutant" or "industrial waste") into "waters of the State".

In addition, even if these terms could be applied to sulfur oxide emissions from smokestacks there is nothing in the legislative history of either the Clean Water Act or the ECL that remotely indicates that these terms were to be applied to smokestacks or air emissions. On the contrary, the stated purpose of the SPDES legislation was to create a permit system for "wastewater discharges" (McKinney's Session Laws of New York 1973, p.2268) not to regulate emissions into the air.

Against the background of the Clean Air Act, arguments that the Clean Water Act and the ECL can be interpreted to regulate air emissions are even less convincing. The Clean Air Act of 1970 preceded the Clean Water Act of 1972, and sets forth a comprehensive program for regulating air quality and air emissions. Of particular significance is the requirement, in 42 U.S.C. §7409(b), for primary and secondary national ambient air quality standards (NAAQS). Primary NAAQS are to protect human health. Secondary NAAQS are to protect the public welfare. It is significant to note that the secondary NAAQS are to account for effects other than human health, including the effects on water, weather and climate:

All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. 42 U.S.C. §7602(h) (emphasis added).

Such Secondary NAAQS for sulfur oxides have been promulgated in 40 CFR §50.5, and are also incorporated into the State

regulations (6 NYCRR Subpart 257-2). Furthermore, just as water quality standards are one of the key components of regulating water discharges, the NAAQS are one of the key components of regulating air emissions.

From this it is clear that the Clean Air Act is not restricted only to abating the primary effects of air pollution (human health) but goes beyond those primary effects to abating the secondary effects. It is also clear that the impacts of air pollution are not restricted to the immediate ambient air impacts of air pollution but include the downwind (time and place) impacts that result from air pollution emissions. The Clean Air Act thus, in its design, was clearly intended to focus on the secondary effects of air pollution.

To conclude that the Clean Water Act required the Federal Government to regulate, via NPDES, emissions from smokestacks necessarily implies that Congress was amending the comprehensive program under the Clean Air Act of 1970 by passage of the Clean Water Act of 1972. No indication of this intent to cover air emissions in the Clean Water Act of 1972, or to amend the Clean Air Act, can be found in the legislative history.

In addition, since the Clean Water Act of 1972, Congress has neither amended the Clean Water Act to clarify that it wishes smokestack emissions regulated by the Clean Water Act instead of, or in addition to, the Clean Air Act nor expressed concern that the Federal Environmental Protection Agency has failed to use NPDES to control air emissions. This is especially true today

when proposals to control acid rain are proposals to amend the Clean Air Act, not the Clean Water Act. (See, e.g. S.768, S.145 and S.769 of 1983 which would require reductions of 8, 10 and 12 million tons respectively of sulfur dioxide emissions from power plants in states east of and bordering the Mississippi.)

Rather, it is clear that Congress intended the CWA and the CAA to be in pari materia, and consequently each should be construed in the light of the other. From this perspective, the applicability of the Clean Water Act and the NPDES program to air emissions cannot be considered in a vacuum, but in relation to the Clean Air Act.

When viewed in pari materia the Clean Water Act and Article 17 of the ECL are concerned with direct discharges into water, while the Clean Air Act and Article 19 of ECL are concerned with emissions into the air. An excellent example of this dichotomy can be seen by comparing the definition of "pollutant" under the Clean Water Act,

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water .... 33 U.S.C. §1362(6) (emphasis added)

with the definition of "air pollutant" under the Clean Air Act,

The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by-product material) substance or matter which is emitted into or otherwise enters the ambient air. 42 U.S.C. §7602(g) (emphasis added).

It is thus clear on the face of these statutes (on either the state or federal level) that they regulate the disposal of wastes into two different media.

Consequently, the permit programs of the Clean Water Act and Article 17 of the ECL regulate point-source discharges of wastewater directly and totally into one receiving stream. They do not regulate emissions of pollutants directly into the air and indirectly into a multitude of potential receiving streams.

Date: May 20, 1983

  
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