

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Application of :
VILLAGE OF BROCKPORT :
BOARD OF WATER COMMISSIONERS : DECLARATORY RULING
: DEC 17-06
for a Declaratory Ruling Pursuant :
to Section 204 of the State :
Administrative Procedure Act :
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INTRODUCTION

This matter has been referred to the New York State Department of Environmental Conservation ("Department") Office of General Counsel for a declaratory ruling by the Department's Office of Hearings pursuant to 6 NYCRR §481.10(f)(4). The sole issue to be decided is whether the Village of Brockport's water treatment plant is an "industrial facility" or a "municipal facility" for purposes of calculating the appropriate State Pollutant Discharge Elimination System ("SPDES") Regulatory Program Fee pursuant to Environmental Conservation Law ("ECL") Article 72, Title 6.

BACKGROUND

The Village of Brockport Board of Water Commissioners has disputed the \$1,500.00 SPDES Regulatory Program Fee assessed by the Department for discharges from the Village's water treatment plant during fiscal year 1983-84. The dispute was

first referred to the Department's Office of Hearings. After it became apparent that no issues of fact were in dispute, the Administrative Law Judge ("ALJ"), acting pursuant to 6 NYCRR §481.10(f)(4)¹, canceled the hearing and prepared a report which summarized the material facts and disputed issues and referred the matter to the Office of General Counsel for a declaratory ruling.²

According to the ALJ's report, the Village operates a water supply treatment plant which provides water to seven towns, three villages and the State University of New York at Brockport. The Village is paid a fee for the water used by the consumers in the municipalities served. The treatment plant obtains approximately 3.5 million gallons of water per day from Lake Ontario and, as a SPDES permittee, discharges

¹ 6 NYCRR §481.10(f)(4) provides:

If, as a result of the [prehearing] conference the ALJ determines that there are no disputed issues of fact, but only issues involving the interpretation or application of either the regulations or Article 72 of the ECL, the ALJ shall prepare a report summarizing the material facts and disputed issues and refer the matter to the General Counsel for a declaratory ruling, in accordance with Part 619 of this Title. A copy of this report will be served on the parties and the hearing will be canceled. The parties may file briefs with the General Counsel on the issues set forth in the report.

² See, In the Matter of Disputed Regulatory Program Fee of the Village of Brockport Board of Water Commissioners for the Brockport Water Treatment Plant, NYSDEC Hearing Report, Susan J. DuBois, ALJ, March 30, 1988.

approximately 100,000 gallons of backwash water per day into the Lake. The Village contends that it is a "municipal facility", as opposed to an "industrial facility", and therefore should have been assessed an amount equal to \$150.00 instead of the disputed \$1,500.00.

ANALYSIS

The SPDES regulatory program fees are set forth in ECL Article 72, Title 6 and its implementing regulations, 6 NYCRR Part 485. Fees under this program are the responsibility of all persons required to obtain a SPDES permit. ECL §72-0602. There is no dispute that the Village is subject to a SPDES program fee. The requisite fee to be assessed is based on the type of facility and the average daily rate of discharge in gallons. The Village of Brockport water treatment plant discharges 100,000 gallons per day. Consequently, the correct fee to assess the Village depends, in this case, on whether the water treatment plant is characterized as an industrial facility or a municipal facility.

ECL §72-0601(2) defines an "industrial facility" as "any manufacturing operation including, but not limited to animal feeding operations, aquatic animal production facilities, mining and silviculture operations, and solid waste management facilities." (Emphasis added.) "Municipal facility" is

defined in ECL §72-0601(3) as a "publicly owned treatment works, including raw discharges and combined sewer overflows." This definition, unlike that of an "industrial facility", is specifically limited and all inclusive.

While neither the ECL nor the Federal Clean Water Act ("CWA") expressly defines a "publicly owned treatment works", that term has origins in §201(g) of the Federal Water Pollution Control Act (FWPCA, now the CWA) Amendments of 1972 (P.L. 92-500, §2; 86 Stat. 839; 33 U.S.C.A. §1281(g).

CWA §1292(2)(A) and (B) define "treatment works" as

(2)(A) The term "treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping power, and other equipment, and their appurtenances; extensions improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment.

(B) In addition, to the definition contained in subparagraph (A) of this paragraph, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines

published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such works, the most cost efficient alternative to comply with sections 1311 or 1312 of this title, or the requirements of section 1281 of this title.

The regulations promulgated pursuant to the Clean Water Act define a POTW as:

any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality". This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

40 CFR §122.2. See also 40 CFR §125.58(p). Thus, federal law and regulations establish that the term POTW is limited in application to publically owned sewage treatment facilities, and not to facilities supplying drinking water.

Article 17 of the ECL, New York's statutory provisions for water pollution control, similarly defines "treatment works" as:

any plant, disposal field, lagoon, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary landfills, or other works not specifically mentioned, installed for the purpose of treating, neutralizing, stabilizing or disposing of sewage, industrial waste or other wastes.

ECL §17-0105(9). The emphasis on "sewage" and "wastes" in this provision is consistent with the express legislative purpose behind ECL Article 17, Title 8, which establishes the SPDES regulatory program. One of the stated goals of the program is to assure conformity with "all applicable requirements of the Federal Water Pollution Control Act [CWA] . . . and rules, regulations, guidelines, criteria, standards and limitations adopted pursuant thereto" ECL §17-0801.

While the regulations implementing ECL Article 17 do not contain a definition of POTW, the Department's hazardous waste regulations specifically adopt the definition of POTW provided by 40 CFR §122.2. 6 NYCRR §370.2(b)(117). Thus, the Department has consistently interpreted the term POTW as including only those publicly owned facilities which relate to the treatment of sewage or industrial wastes.

Because the Brockport water supply treatment plant does not treat sewage or industrial waste, it cannot properly be considered a POTW. Therefore, it cannot, by operation of ECL §72-0601(3), be classified as a "municipal facility". The Brockport plant treats raw water and distributes it, for a price, as a manufactured product. This type of operation, while not specifically enumerated in the definition of an "industrial facility", is reasonably encompassed by the rather broad and expressly not all-inclusive definition.

CONCLUSION

For purposes of ECL Article 72, Title 6, the Brockport water supply treatment plant is an "industrial facility". It must pay program fees accordingly.

DATED: Albany, New York
June 20, 1989


Marc S. Gerstman
Deputy Commissioner and
General Counsel