STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233

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Re: Declaratory Ruling: DEC #19-07

Dear Messrs. Grant and Page:

This responds to your request on behalf of Central Hudson Gas & Electric Corporation ("Central Hudson") concerning the legal authority of the Department of Environmental Conservation ("DEC" or "the Department") to require Central Hudson to reimburse DEC for its regulatory expenses incurred in oversight of the air monitoring network operated by Central Hudson in the vicinity of the Roseton and Danskammer Point Steam Electric Generation Plants ("Roseton and Danskammer"). We conclude that DEC has the authority to require a regulated entity to reimburse DEC for its oversight costs through imposition of permit conditions.

The Department has, through Environmental Conservation Law (ECL) Articles 1, 3 and 8, the authority to impose permit conditions upon regulated entities for purposes of protecting the environment.

ECL §1-0101(1) provides that:

> The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and control ... air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.

ECL §3-0301(1)(b) provides that the Commissioner of Environmental Conservation has the power, responsibility and mandate to:

> promote and coordinate management of ... air resources to assure [their] protection, enhancement, provision, allocation and balanced utilization consistent with the environmental policy of the state and to take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action ..." (emphasis added).

Article 8 mandates that environmental impacts must be considered in conjunction with the approval of a project by DEC. ECL §8-0101 et seq.

Article 19 directs the Department to protect the air resources of the State from pollution by requiring the use of all available practical and reasonable methods to prevent and control air pollution in the State of New York. ECL §19-0103 et seq.

It is clear from the above-cited provisions of the law that the Commissioner must consider information regarding the environmental impacts and the degree of air pollution emitted by a facility in connection with issuing a permit for construction and/or operation of a facility. In issuing a permit, the Commissioner is authorized to impose as permit conditions requirements which minimize those impacts provided they are reasonably related to the purpose of environmental protection. C.I.D. Landfill, Inc. v. New York State Department of Environmental Conservation, 561 N.Y.S.2d 936; Flacke v. Onondaga Landfill System, 69 N.Y.2d 355, 362; 514 N.Y.S.2d 689 (1987); Town of Henrietta v. Department of Environmental Conservation of the State of New York, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dept., 1980).

Central Hudson was issued, under 6 NYCRR Part 201, certificates to operate Danskammer and Roseton which included special conditions requiring monitoring of the ambient air (air quality and meteorological parameters) so that data would be collected, indicating the facility's impact on air resources. The special conditions of the certificates to operate did not include an explicit provision that Central Hudson pay for the Department's costs of overseeing the data collected by the monitors.

The Department required Central Hudson to perform monitoring of emissions of sulfur dioxide from Roseton and Danskammer since the emissions are of such magnitude and duration as to require a demonstration by the facility of maintenance of attainment of the national ambient air quality standard ("NAAQS") for sulfur dioxide,

in the ambient air in the facility's vicinity. The NAAQS is a federal standard promulgated pursuant to 42 U.S.C. §7409 to maintain the degree of air quality necessary to protect the public health and welfare. Emissions of sulfur dioxide from Roseton and Danskammer had resulted in violations of the NAAQS in the past (three exceedances of the standard in 1983), and the Department is charged by law with the responsibility of preventing such exceedances in the future. These past violations were addressed through Central Hudson's entering a consent order with the Department in which Central Hudson agreed to use fuel oil with a lower maximum sulfur content.

Department oversight of the raw data (air quality and meteorological) concerning emissions of sulfur dioxide from Roseton and Danskammer is critical to monitor compliance with the federal health-based NAAQS and with other federal and state laws. The data must be verified to determine baseline ambient air quality levels for prevention of significant deterioration as required by 40 CFR 52.21. The Department's review of the data and utilization of quality assurance and quality control protocols will ensure this objective is achieved. (See Exhibit I - Air Guide 19.) This approach is consistent with DEC's regulatory activities throughout New York State for the purpose of protecting public health and the environment. For example, the Department has exercised oversight of raw data monitored at the following facilities pursuant to a permit condition or provision in an enforcement order: Orange and Rockland Utilities, Inc.'s Lovett Generating Station (for emissions of sulfur dioxide and nitrogen oxide), Kodak Industries (for meteorological conditions) and Chemical Waste Management's hazardous waste landfill (for meteorological conditions and emissions of volatile organic compounds, metals, and particulates).

Central Hudson argues that Article 72 of the ECL precludes payment of such costs and that such payment would constitute an illegal tax. This argument ignores the case law which, as here, provides that the payment of oversight costs may be required to cover the specific (as opposed to the general) costs of services rendered to Central Hudson. (see, C.I.D. Landfill, Inc., 561 N.Y.S.2d at 937, Suffolk County Builders Association v. County of Suffolk, 46 N.Y.2d at 618-619, Jewish Reconstructionist Synagogue of North Shore v. Incorporated Village of Roslyn Harbor, 40 N.Y.2d at 162).

In C.I.D. Landfill, Inc., the Appellate Division, Fourth Department upheld the Supreme Court's dismissal of an Article 78 petition seeking to annul the imposition of a special permit condition requiring the petitioner to pay a portion of the costs of an onsite environmental monitor. The Fourth Department recognized the Department's authority to impose any permit condition that is rationally related to protecting the environment, citing, inter alia, ECL §§1-0101, 3-0301 and Flacke v. Onondaga Landfill System. The court stated that the imposition on the petitioner of a portion

of the costs of an environmental monitor did not constitute an illegal tax because the permit condition was not imposed to generate revenue or to offset the cost of governmental functions generally. The cost was assessed as a fee against petitioner to cover the specific cost of services rendered to the petitioner.

In Suffolk County Builders Association v. County of Suffolk, a builders' association brought suit challenging regulations setting fees for inspection by the Suffolk County Department of Health Services with respect to the issuance of health permits for water services and sanitary facilities for new construction. One of the issues on which the builders sought declaratory judgment was whether the County Board of Health (Board) was empowered to levy fees for health permits. The plaintiffs' claimed the Board lacked either express or implied statutory authority to impose fees.

The Court of Appeals found that although the statute did not explicitly provide for the imposition of permit fees by the Board, the power to impose reasonable fees in connection with effective regulation has been implied from broad delegations (referring to a grant of authority in Public Health Law §347(1) to all county boards of health to "formulate, promulgate, adopt and publish rules, regulations, orders and directions for the security of life and health ... not ... inconsistent with the provisions of this chapter and the sanitary code"). Id. at 823. The court further stated that the power to enact fees, if implied, must be "circumscribed by a similarly implied limitation that the fees charged be reasonably necessary to the accomplishment of the regulatory program" (citing Jewish Reconstructionist Synagogue of North Shore v. Incorporated Village of Roslyn Harbor, 40 N.Y.2d at 163).

In Jewish Reconstructionist Synagogue of North Shore, the Court of Appeals upheld a village's ordinance imposing fees for a variance and permit and the actual costs of the zoning appeals board's consideration of an application. The Court's holding was based on recognition that fee structures can be justified as a "visitation of the costs of special services upon the one who derives a benefit from them". Id. at 162.

Imposition of the costs of Department oversight on Central Hudson is appropriate and is supported by the rationale of the Fourth Department in C.I.D. Landfill, Inc. and of the Court of Appeals in Suffolk County Builders and Jewish Reconstructionist Synagogue. The costs are specific costs for services rendered by the Department to verify that emissions of sulfur dioxide from operation of Roseton and Danskammer do not cause a violation of the NAAQS. It is the Department's legislative mandate in ECL Articles 1, 3, 8, and 19 to take steps to ensure that the air resources of the State are protected. Pursuant to that mandate and in accordance with federal law, the Department performs monitoring and associated oversight functions statewide to ensure the

compliance of the State's air quality with the NAAQS in light of air contaminant emissions from thousands of mobile and stationary sources. It is unusual that emissions from one facility, as is the case here, are so significant as to individually violate the NAAQS. Consequently, the Department is obligated to impose permit conditions which are appropriate to minimize the impact of the facility in question. In this instance, those permit conditions included monitoring of emissions.

Where monitoring and/or oversight of monitoring data is imposed as a condition of a permit (or enforcement order), the Department has fiscal policies and procedures which ensure that the permit holder is assessed no more than the actual costs of the monitoring and/or oversight. The dollar estimate of those costs is approved each year by the Legislature as part of the Executive Budget (See Exhibit II). Department employees in the monitoring program record the time spent in reviewing the facility's data and auditing the performance of the ambient monitors. Through these time records, the Department accounts to the permit holder for money spent from an account which the permit holder establishes by the prepayment of three-quarters of the projected cost. Any funds remaining in the account are refunded, together with any interest earned, to the permit holder upon termination of the monitoring effort. (See Exhibit III - Organization and Memorandum #89-31 Policy: On-Site Environmental Monitors).

DEC has an appropriation for expenditure of moneys deposited with the Department to fund monitoring activities (see Exhibit IV, from the Budget for State Operations). Each year, the Department seeks an appropriation in the budget to pay for the actual cost anticipated to be incurred by the Department for environmental monitoring activities at specific sites. The revenue's source is not derived from the General Fund, but from a Special Revenue Other account which receives funds from the regulated entities themselves.

The appropriation language gives the Department the authority to use moneys collected for environmental monitoring activities, notwithstanding any law to the contrary, for any facilities in the State subject to the jurisdiction of the Department. This language provides DEC with the authority to utilize funds Central Hudson will be required to submit for Department oversight of the Roseton and Danskammer monitoring network.

Accordingly, I rule that the Department has the authority to impose permit conditions requiring Central Hudson to pay for the Department's costs in overseeing collection of and reviewing the data collected by the Roseton Danskammer monitoring network. However, payment of these costs is not currently a condition of the certificate to operate or any enforcement order or other agreement. Therefore, Department staff have been directed to initiate

proceedings to modify Central Hudson's Certificate to Operate Roseton and Danskammer to require payment of these costs in the future.

Sincerely,

Marc S. Gerstman
Deputy Commissioner and
General Counsel