

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Petition of

NIAGARA MOHAWK POWER CORPORATION

DECLARATORY RULING
DEC 27-18

For a Declaratory Ruling Pursuant to
Sections 204 and 206 of the
State Administrative Procedure Act and
Part 619 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
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INTRODUCTION

Niagara Mohawk Power Corporation (Petitioner), by its attorneys, Jaeckle, Fleischman & Mugel, has petitioned for a Declaratory Ruling, pursuant to Sections 204 and 206 of the State Administrative Procedure Act (SAPA) and this Department's regulations at Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), on the status of Petitioner's distribution transformers under the Department's hazardous waste program.

The issuance of a Declaratory Ruling is in the public interest in order to advise the industry and the public as to when distribution transformers removed from utility poles become wastes subject to the State's hazardous waste program.

The questions posed by the instant petition are:

- ° Whether, for purposes of the State's hazardous waste regulatory program, Petitioner's distribution transformers containing PCB dielectric fluid are "solid waste" upon removal from utility poles;

- ° Whether Petitioner's practices for management of discarded distribution transformers containing PCB dielectric fluid are in compliance with the State hazardous waste regulatory program; and
- ° Whether Petitioner's practices for management of distribution transformers containing PCB dielectric fluid that are removed from utility poles will be accepted by this Department as compliance with State law, if those practices are in compliance with the federal toxic substances regulatory program.

BACKGROUND

This Department previously issued a Declaratory Ruling on the regulatory status of distribution transformers containing PCB dielectric fluid. In Dowzer Electric (Declaratory Ruling #27-13; July 24, 1984) the Department concluded, in reliance on General Electric Co. v. Flacke, 118 Misc.2d 729, 461 N.Y.S.2d 138 (Sup. Ct., Albany Co., 1982), that because the transformer and dielectric fluid contained therein are subject to being subsequently discarded, they are a solid waste, and so a hazardous waste, upon removal from the utility pole. The Dowzer Electric ruling was annulled by the Supreme Court, Albany County, in Dowzer Electric v. Williams, -- Misc.2d -- (Sup. Ct., Albany Co., 1985), upon the sole ground that it was issued "upon an inadequate administrative record".

General Electric and the Dowzer Electric ruling both relied on the "sometimes discarded" rule in the definition of solid waste at former 6 NYCRR §366.1(c). That definition was recodified to be 6 NYCRR §371.1(c) effective July 14, 1985. Subsequent to the decision in Dowzer Electric, a new definition

of solid waste, identical to the definition adopted by the United States Environmental Protection Agency, was promulgated effective July 1, 1986. Consequently, the facts asserted by Petitioner must be viewed in the light of the new definition.

On February 3, 1987, the Department received from the attorneys for Rochester Gas and Electric Corporation and Dowzer Electric a document entitled a "Proposed Informational Mechanism". In keeping with the Dowzer Electric decision which held that the Department had the burden of gathering the proof necessary to rule upon the issue affecting the entire industry, the Department has considered that document. It is to be noted that the members of the industry which submitted that document were the petitioners in the Dowzer Electric case. That document has been provided by the Department to the instant Petitioner, Niagara Mohawk Power Corporation, for its comment and there has been none received.

FACTS

For the sole purpose of issuing this Declaratory Ruling, the facts set forth in the Petition are assumed to be correct. The binding effect of the Ruling will accordingly be limited by its assumed factual predicates. Power Authority of the State of New York v. NYSDEC, 58 N.Y.2d 427, 461 N.Y.S.2d 769 (1983).

Petitioner supplies electrical power to its customers in an area of 24,000 square miles, covering 37 counties and including the Buffalo, Syracuse and Albany metropolitan areas.

Electrical power is more efficiently transmitted at high voltages. Petitioner transmits its power at voltages of up to 765,000. A distribution transformer is a device to reduce voltage to a level usable by consumers, typically 110 or 220. Petitioner owns approximately 336,000 distribution transformers.

Petitioner's employees responsible for the maintenance of its system are organized in line crews typically consisting of two or three persons. There are over 400 such crews. Most crews are based at headquarters in the three major metropolitan areas served; others are based at nine regional service centers; and still others are based at 66 local crew locations.

Petitioner maintains approximately 300,000 distribution transformers in service. The transformers are placed on utility poles, or pads, or underground vaults and may be removed therefrom for a variety of reasons. Petitioner's experience for 1983 shows the following:

- ° 50 percent of the distribution transformers removed were functional units which were removed in the course of upgrading the capacity of a system serving an area where power demand has expanded;
- ° 25 percent of the distribution transformers removed were functional units which were removed in the course of relocating a system to accommodate highway maintenance and renovation;
- ° 15 percent of the distribution transformers removed were functional units which were removed in the course of upgrading or downgrading service to a specific customer in an instance where power demand had increased or decreased; and

- 10 percent of the distribution transformers removed were damaged units (the damage may have resulted from a variety of circumstances, e.g., vandalism or accident).

Upon removal of a functional unit, the line crew either immediately reinstalls the unit at another location or retains the unit in inventory for subsequent reuse. Petitioner's inventory of distribution transformers consists of approximately 36,000 units which are maintained at storage facilities in the three major metropolitan areas served, and also at 78 service centers and crew locations. Shipments occur among petitioner's facilities on virtually a daily basis.

Upon removal of a damaged unit, the line crew will send it for evaluation to one of three of Petitioner's shops located in Buffalo, Syracuse and Albany, or its bulk storage facility in Solvay. Petitioner's employees thereupon have three courses of action available:

- Repair of the unit and return to inventory;
- Shipment of the unit for repair by Petitioner's contractor (Dowzer Electric Co.) and eventual return to inventory; or
- Disposal (in certain instances units may be disposed of by Petitioner's contractor).

Although distribution transformers are not now designed to utilize PCB dielectric fluid, a small percentage of all transformers in use nationwide contain low concentrations of

PCBs. Petitioner's experience is that approximately 8 percent of its stock of transformers contain PCBs at concentrations greater than 50 parts per million. After evaluation of a distribution transformer at a transformer shop, the dielectric fluid is tested for PCB content, unless PCB content is already known. Fluid containing PCBs at concentrations greater than 50 parts per million is removed to storage at the bulk storage facility or at the treatment/storage/disposal facility associated with each such shop. Petitioner's transformer shops are designed to meet the storage for disposal requirements of 40 C.F.R. Part 761. Each of the three transformer shops also includes a facility designed to meet the treatment/storage/disposal requirements of 6 NYCRR Subpart 373-2 (former 6 NYCRR Part 360).

Distribution transformer dielectric fluid containing PCBs at concentrations greater than 50 parts per million is typically treated to remove the PCBs and then reused. Shipments of waste are manifested in accordance with the requirements of 6 NYCRR Part 372 (former 6 NYCRR Part 365).

Distribution transformers may also be evaluated at the facility of Petitioner's contractor, Dowzer Electric Co., and thence shipped for destruction if found to contain PCBs at concentrations greater than 50 parts per million.¹

¹ The significance of the concentration of PCBs is that (except in the instance of a lower concentration achieved by dilution) only solid waste having a PCB concentration of 50 parts per million or greater is regulated as a hazardous waste. 6 NYCRR §371.4(e)(1). This parallels the scheme of the federal program under the Toxic Substances Control Act. See 40 C.F.R. §761.1(b).

DISCUSSION

An extensive and complex body of law -- both statutes and regulations at both the federal and State levels -- is applicable to the questions concerning regulation of PCBs posed by the instant petition. A brief discussion of the federal and state programs is necessary to an understanding of how they relate and differ.

The two applicable federal statutes are the Resource Conservation and Recovery Act ["RCRA"], 42 U.S.C. §§6901 et seq., and the Toxic Substances Control Act ["TSCA"], 15 U.S.C. §§2601 et seq.

It is to be noted that, though RCRA and TSCA are fundamentally different, the two statutory schemes overlap. RCRA is intended to provide for the regulation of the management of "hazardous waste", a subset of "solid waste" which is

... any garbage, refuse, ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities

42 U.S.C. §6903 (5) and (27). Conversely, TSCA is intended to provide for the regulation of certain manufacture, processing, distribution in commerce, use or disposal of any "chemical substance", which is "... any organic or inorganic substance of a particular molecular identity" 15 U.S.C. §2602(2). RCRA does not authorize the regulation of a material prior to its

achieving the status of a "waste". Although it does not utilize the term "waste", TSCA authorizes the regulation of a material after becoming a "waste", inasmuch as it authorizes the regulation of disposal.

The applicable State statute, Environmental Conservation Law ("ECL") Article 27, Title 9, establishes the hazardous waste regulatory program and is implemented by regulations at 6 NYCRR Parts 370 et seq. The State program has received final authorization in accordance with RCRA §3006, 42 U.S.C. §6926. 51 Fed. Reg. 17737 (1986).

ISSUE 1: Whether, for purposes of the State's hazardous waste regulatory program, Petitioner's distribution transformers containing PCB dielectric fluid are "solid waste" upon removal from utility poles

The State's definition of solid waste is at 6 NYCRR §371.1(c) and replicates the federal definition at 40 C.F.R. §261.2. See Rulemaking Action, 50 Fed. Reg. 614 et seq. (1985). Under that definition, for purposes of the hazardous waste program, a material is a solid waste if it is a "discarded" material that is "inherently waste-like", "abandoned", or "recycled".

First, a material is "inherently waste-like" when it is listed as hazardous waste (e.g., F020, F021, F022, F023, F026 or F028 wastes) at 6 NYCRR §371.4(b). Petitioner's distribution transformers are not solid waste by being classified as "inherently waste-like" because they are not so listed.

Second, a material is "discarded" by being "abandoned" if it is disposed of, burned or incinerated, or accumulated, stored or treated (but not recycled) before or in lieu of being "abandoned" by being disposed of, burned or incinerated, 6 NYCRR §371.1(c)(3). Simply stated, materials that are "abandoned" are those that are thrown away or are being thrown away. See discussion under Part II, item II.B., at 50 Fed. Reg. 627 (1985). Since the Petitioner asserts that, at the time of removal, it does not remove distribution transformers from their locations for the purpose of throwing them away, they are not solid waste under the classification of "abandoned". However, this conclusion is limited to the status of the transformer at the time of removal from the utility pole or pad or vault. Just like any other material, a transformer (and its dielectric fluid) is a solid waste when it is actually disposed of, or when it comes to be accumulated or stored prior to or in lieu of actual disposal. 6 NYCRR §371.1(c)(3). This conclusion merely recognizes that reemployment of the unaltered transformer -- whether at the original location or elsewhere and whether or not any storage intervenes between removal and reemployment -- is not abandonment within the spirit of the pertinent regulation.

Third, a material is "discarded" by being "recycled" if it is used in a manner constituting disposal (e.g., applied to the land, burned for energy recovery, reclaimed, speculatively

accumulated, or otherwise accumulated, stored or treated before being so "recycled"), 6 NYCRR §371.1(c)(4), except that:

(i) Materials are not solid waste when they can be shown to be recycled by being:

(a) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

(b) used or reused as effective substitutes for commercial products; or

(c) returned to the original process for which they are generated, without first being reclaimed. The material must be returned as a substitute for raw material feedstock, and the process must use raw materials as principal feedstocks.

6 NYCRR 371.1(c)(6)(i). See also 40 C.F.R. §261.2(c)(1). The exceptions from recycling proceed from the recognition that "[n]ot all recycling activities involve waste management." Certain activities are not regarded as waste management activities because they are practically indistinguishable from "ordinary production operations or ordinary usage of commercial products." See discussion under Part I, item III.B, at 50 Fed. Reg. 619-20 (1985). The reemployment of an unaltered distribution transformer is the kind of recycling activity which falls within the intent of the exemption.

Transformer dielectric fluid is discarded by being "recycled" when it is reclaimed through the removal of the contaminating PCBs. Transformer dielectric fluid which is being reclaimed is a solid waste within 6 NYCRR §371.1(c)(4)(iii) because it is a spent material. Therefore it is a hazardous

waste within §371.1(d)(1)(ii)(b) because it is listed at §371.4(e). With respect to a waste or discarded distribution transformer as to which there exists no data showing the PCB content of the contained dielectric fluid, the pertinent regulation requires that it be assumed to have a PCB content of between 50 and 500 parts per million, and thus is assumed to be a hazardous waste. 6 NYCRR §371.4(e)(1). This represents no additional State-imposed burden on the regulated community, inasmuch as a like rule exists in the definition of "PCB-Contaminated Electrical Equipment" in the pertinent federal regulation implementing TSCA. 40 C.F.R. §761.3; cf. the limited presumption created by Public Service Law §66(23).

However, after the reclamation process the fluid which has been decontaminated is no longer a solid waste when it is beneficially reused, per the parenthetical exception at 6 NYCRR §371.1(d)(3)(ii)(a):

Any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation run-off), is a hazardous waste. (However, materials that are reclaimed from solid waste and used beneficially are not solid waste and hence are not hazardous waste under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.)

To reiterate, Petitioner's act of removing a distribution transformer from its location at a pole or pad or vault does not per se render the transformer a solid waste, and thus a hazardous waste, even if it contains dielectric fluid containing PCBs at a

concentration of 50 parts per million or greater.² However, a distribution transformer, and its contained dielectric fluid, becomes subject to regulation as a solid waste, and thus a hazardous waste, if the dielectric fluid contains or is deemed to contain PCBs at a concentration of 50 parts per million or greater and it is 1) abandoned by being disposed of or accumulated or stored prior to or in lieu of being disposed of, or 2) recycled by being reclaimed, or speculatively accumulated in anticipation of being reclaimed.

ISSUE 2: Whether Petitioner's practices for management of discarded distribution transformers containing PCB dielectric fluid are in compliance with the State hazardous waste regulatory program

The second issue raised by the petition is whether Petitioner's practices for management of discarded distribution transformers containing PCB dielectric fluid are in compliance with the State hazardous waste regulatory program.

Petitioners' affidavits do not present adequate details to form the basis for a ruling on this issue. The affidavits submitted in support of the Petition contain conclusory assertions to the effect that Petitioner's present practices for managing waste distribution transformers are in compliance with

² It should be noted that dielectric fluid which has leaked from a transformer while on a utility pole, as well as any cleanup debris, is considered a solid waste at that point, and is a hazardous waste if the PCB concentration exceeds 50 parts per million.

the State hazardous waste regulatory program.³ Essentially, the petition seeks an environmental audit of Petitioner's practices. However, a declaratory ruling is not an appropriate forum for adjudicating issues of compliance with the State's environmental laws and regulations. Moreover, a declaratory ruling is not the appropriate procedural device for fact-finding. Therefore, we decline to rule under authority of 6 NYCRR §619.3(d), because a declaratory ruling is an inappropriate means of resolving this issue.

ISSUE 3: Whether Petitioner's practices for management of distribution transformers containing PCB dielectric fluid that are removed from utility poles will be accepted by this Department as compliance with State law, if those practices are in compliance with the federal toxic substances regulatory program,

The third issue is whether Petitioner's practices for management of distribution transformers containing PCB dielectric fluid that are removed from utility poles, whether or not subsequently discarded, will be accepted by this Department as compliance with State law if the practices are in compliance with applicable federal law.

The federal statute providing for regulation of PCBs has as its purpose the regulation of the manufacture, processing,

³ March 13, 1985, affidavit of James W. Beaver, at paragraph 38; August 26, 1986, affidavit of Stephen Lavranchuk, Jr., at paragraphs 11-12. December 12, 1986, affidavit of Stephen Lavranchuk, Jr., at paragraphs 8, 13, 23.

distribution in commerce, use and disposal of toxic substances, including PCBs. TSCA §§2(a), 6(e); 15 U.S.C. §§2601(a), 2605(e).

Without undertaking to determine whether or not State regulation of the manufacture, processing, distribution in commerce or use of PCBs would be preempted pursuant to TSCA §18(a)(1); 15 USC §2617(a)(1), it is noted that Potomac Electric Power Corp. v. Sachs, 639 F.Supp. 856 (D. Md., 1986), rev'd, other grounds, 802 F.2d 1527 (4th Cir., 1986), holds only that state regulation of the disposal of waste PCBs is not preempted. This Department does not contend that its hazardous waste regulatory program is applicable to Petitioner's utilization and storage of distribution transformers that are not solid waste by virtue of their still being in service.⁴ The State statute providing for regulation of PCBs has as its purpose the regulation of the management (including disposal) of hazardous waste, including PCBs which are categorized as toxic wastes. ECL §27-0900. This purpose is to be accomplished consistently with another federal statute, RCRA, which was intended to provide for waste management. RCRA §1002, (a)-(b); 42 U.S.C. §6901, (a)-(b). In addition, ECL Article 27, Title 9, has among its purposes the environmentally sound transportation of hazardous waste. ECL §§27-0900, 27-0909. In those respects, the purpose of

⁴ It is noted that Petitioner itself has asserted that the regulatory program does not apply to transformers in its inventory system. December 12, 1986, affidavit of Stephen Lavranchuck, at paragraphs 13-14.

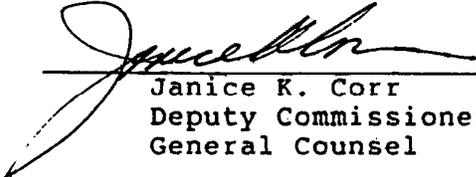
ECL Article 27, Title 9, is more extensive than the purpose of TSCA, and compliance with the latter program would not wholly satisfy the purposes of the former.

Based upon the foregoing, we rule pursuant to SAPA §206(3) that even if Petitioner's waste transformers practices are in compliance with TSCA, that would not satisfy all of the relevant provisions of ECL Article 27, Title 9. In addition, the petition and its accompanying affidavits do not supply adequate detail to determine whether specific components of Petitioner's management practices which may be in compliance with TSCA also satisfy portions of the State program. Since the device of a declaratory ruling is not appropriate for fact-finding, I decline to rule on this issue pursuant to 6 NYCRR 619.3(d).

In light of the determination issued above in response to Issue 1 of the Petition, the Petitioner may wish to consider resubmission of requests on Issues 2 and 3 after a review of this Ruling and a subsequent review of management practices.

Dated: July 13, 1987

Albany, New York



Janice K. Corr
Deputy Commissioner and
General Counsel