

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

WEST GENESEE CENTRAL SCHOOL DISTRICT

For a Declaratory Ruling

DECLARATORY
RULING

72-01

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In the spring of 1983, New York's Senate and Assembly adopted a recommendation of the Governor and determined that the imposition of fees is an appropriate mechanism to pay a portion of the costs of the State's comprehensive environmental regulatory management programs so essential to the protection of the public's health and the State's environmental resources. It was determined that the State's regulated entities should pay a portion of the costs of these regulatory programs in order to advance New York's capabilities in achieving its environmental quality objectives.

Just as these environmental programs are comprehensive, reaching every sector of our society, so too the fee program has a vast reach. As a new law, questions as to its applicability can be expected. Since there has been no occasion for granting any declaratory rulings nor any court cases construing the applicability of the comprehensive regulatory program fee system since its enactment on March 28, 1983, it is in the public interest to entertain this petition.

Petitioner, West Genesee Central School District ("School District"), seeks a declaratory ruling pursuant to §204 of the

State Administrative Procedure Act and 6 NYCRR Part 619, with respect to its eligibility to be assessed air quality control program fees under Article 72 of the Environmental Conservation Law ("ECL"), "Environmental Regulatory Program Fees", L.1983, Ch.15. The regulations promulgated pursuant to Article 72, 6 NYCRR Parts 480-485, specifically authorize petitions to the Department of Environmental Conservation ("Department") for declaratory rulings with respect to the applicability to any person of the provisions of Article 72 or such regulations. 6 NYCRR §481.9.

The Legislature adopted ECL Article 72 with the finding that "those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state". ECL §72-0101. Title 2 of Article 72 "Annual Program Costs and Fees" sets forth the basic regulatory fee mechanism, including the imposition of penalties and interest for failure to pay such fees. ECL §72-0201(1) obliges "all persons" to submit annual fees to the Department if they require a permit or approval pursuant to a State environmental regulatory program such as those for air quality control, hazardous waste, waste transporter and State Pollutant Discharge Elimination System programs, or who are subject to regulation under any of such programs. [Emphasis added]. Liability for the regulatory

program fees commences on or after April 1, 1983. ECL §§72-0103, 72-0201; 6 NYCRR §§481.1, 481.2.

The specific regulated activity at issue here involves fees related to controls on air pollution. Title 3 of Article 72 contains the specific fee schedule for the State air quality control program. ECL §72-0302(1) provides that all persons required to obtain a permit, certificate or approval pursuant to the State air quality control program shall submit specified fees for stationary combustion installations, process air contamination sources and incinerators. ECL §72-0302(1)(f) establishes a fee of \$20.00 for an incinerator with a maximum design charge rate of less than two thousand pounds of refuse per hour. Petitioner has obtained certificates to operate from the Department for nine such incinerators located at its several elementary, junior and senior high schools. By an invoice dated October 3, 1983, the Department required payment by petitioner of \$180.00 as the annual air quality control program fee for these incinerators.

The fundamental issue raised in the instant petition is whether a public school district is a "person required to obtain a permit, certificate or approval pursuant to the state air quality control program" as provided in ECL §71-0201(1). For the following reasons, I conclude that the School District is such a "person", is not exempt from the provisions of Article 72, and is, therefore, subject to New York State's assessment for air quality control program fees.

The plain meaning of the statutes involved here encompasses school districts. The "State air quality control program" is defined in ECL §72-0301(4) as "those activities of the department as specified in titles three and five of article nineteen of this chapter [of the ECL] relating to air pollution and air contamination and any related enforcement activities". The air quality control program is implemented through the Department's regulations for prevention and control of air contamination and air pollution, 6 NYCRR Parts 200-258. Section 201.2(b) provides, inter alia, that no person shall operate an air contamination source* without having a valid certificate to operate issued by the Commissioner.

No definition of "person" is contained in either Title 3 specifically or Article 72 generally (with the exception of Title 4, "Hazardous Waste Program Fee"). ECL §1-0303 provides general definitions which apply whenever the defined terms are used in the Environmental Conservation Law, unless a different meaning clearly appears from the context or unless a different meaning is stated in a definition applicable to only a portion of such law; the general definition of "person" set forth in ECL

* "Air contamination source" is defined as any apparatus, contrivance or machine capable of causing emission of any air contaminant to the outdoor atmosphere. 6 NYCRR §200.1(d). Incinerators fall within this definition. "Incinerator" under ECL Article 72 "means any structure or furnace in which combustion takes place" and refuse is used as a fuel. ECL §72-0301(2). Combustion necessarily involves an emission under the facts of the nine air contamination sources for which permits have been given.

§1-0303(18) is nearly identical to that provided in the air pollution provisions of Article 19 and the air regulations, ECL §19-0107(1) and 6 NYCRR §200.1(tt); this definition provides that "person" shall mean "any individual, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever." "Person" also is defined expressly in Title 4 of Article 72 as an "individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, federal government and any agencies thereof, municipality, commission, political subdivision of a state, or any interstate body". ECL §72-0401(11). This latter definition of "person" has been adopted as §480.2(bb), for use in 6 NYCRR Parts 480 - 485, the regulations promulgated pursuant to Article 72. [Emphasis added.] Insofar as they apply to the instant petitioner's status, these variations between the statutory definitions and the definition of the regulations are immaterial. School Districts are encompassed.

A public school district is a state function, organized and maintained as an institution of the state. N.Y. Const. Article XI, §1; see generally the discussion in Lanza v. Wagner, 11 N.Y.2d 317 at 326, 229 N.Y.S.2d 380, 183 N.E.2d 670, ap dismd 371 U.S. 74, cert. den 371 U.S. 901 (1962); and 52 N.Y. Jur., "Schools, Colleges and Universities", §§1-2, 35. School districts have been described as "civil divisions" of the state.

Herman v. Board of Education, 234 N.Y. 196, 24 A.L.R. 1065 (1922). As an agency of the State, whether characterized as a political subdivision or a government corporation, a school district is within the Environmental Conservation Law's definitions of "person" for both the air quality control program of Article 19 and the air quality control program fees established in Article 72.

In order to operate its several incinerators as air contamination sources, the School District is required by 6 NYCRR §201.2(b) to obtain, and has obtained certificates to operate from the Department. These are DEC Certificate ID numbers 312000-0628, 0673, 0674, 0675, 0677, 0689, 0683, 0738 (2 emission points and certificates for facility 0738). Since the express terms of ECL §72-0302 require that all persons with a certificate pursuant to the State air quality control program must pay specified fees to the Department, the School District as such a "person" must submit the specified statutory fee.

ECL Article 72 makes no provision for any exemptions from this required fee payment, either for school districts specifically or for any other public entity. Any exemption from the payment of environmental regulatory program fees would be contrary to the statutory scheme adopted by the Legislature in enacting Article 72.

There is express legislative direction that all regulated entities are subject to fee assessments, regardless of any pre-existing exemptions from other assessments. ECL §72-0201.

Subdivision (1) of ECL §72-0201 directs payment of regulatory program fees by persons needing Department permits or approvals, or who are subject to regulation under state environmental regulatory programs, "notwithstanding any general or special law to the contrary". [Emphasis added.] By this language, the Legislature unambiguously expressed its intent to supersede any previously enacted exemptions from the assessment of State fees. Accordingly, whatever prior exemptions from fee assessment the Legislature may have granted to a school district could not relieve it from the payment of Article 72 fees. Principles of statutory construction instruct that "the fact that an act contains no exceptions or saving clause creates a strong presumption that the Legislature intended none." See McKinney's Statutes §213.

Review of the legislative history of Article 72 confirms this statutory construction. After finding that "regulatory fees are an appropriate mechanism to pay a portion of the costs of the Department's regulatory functions and programs and that such fees should be borne by the state's regulated entities" (ECL §72-0101), the Legislature enacted Article 72 as part of the 1983 State Budget. L.1983, Ch.15. This legislation was initiated and sponsored by the Governor. The Governor's Memorandum in Support of the proposed fee legislation, "Memorandum In Support, Art. VII Bill #9-1983, a Budget Bill" (copy attached hereto), explains in relevant part that:

"enactment of this bill is necessary to implement the Executive Budget. Budget recommendations for the Department of Environmental Conservation are contingent upon receipt of approximately \$11.5 million in environmental regulatory user fees to finance agency costs in 1983-84. Failure to adopt this proposal will result in a corresponding imbalance in the State fiscal plan."

Exemptions from fee payment were not contemplated, since to do so would eliminate necessary funding for the several environmental regulatory permit programs resulting in a budgetary imbalance.

The two grounds upon which Petitioner School District challenges its fee assessment are inapposite. The contention that a public school system does not fall within the definition of "municipal facility" as provided in the fee regulations (at §480.2(x)) is not relevant to the applicability of air pollution regulatory fees under Article 72. A School District is not a municipal corporation. Section 2, General Municipal Law. ECL §72-0601(3) defines "municipal facility" for purposes of the State Pollutant Discharge Elimination System Fee; this covers "a publicly owned treatment works, including raw discharges and combined sewer overflows". Within ECL Article 72, the term "municipal facility" relates solely to point source discharges to waters of the State by a publicly owned treatment facility utilized for the treatment of sewage and other wastewater. Since the applicability of water pollution program fees is not at issue in the instant petition, the School District's assertion that it is not a "municipal facility" is irrelevant.

Petitioner also asserts, without explanation or authority, that "discussions with representatives of the State Education

Department indicate that the applicability of this fee for a public school system may be questionable". As discussed in detail above, school districts are within the statutory definition of "person" subject to the payment of fee, and Article 72 contains no exemptions from the regulatory fee assessment while explicitly superseding any prior exemption from such assessment.

The West Genesee Central School District is subject to Article 72 of the Environmental Conservation Law. The incinerator fees have been lawfully assessed and the School District is obliged to pay the billing for its incinerators.

DATED: Albany, New York
December 1, 1983



Nicholas A. Robinson
Deputy Commissioner/General Counsel