

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X
In the Matter of the Petition of :
WESTCHESTER COUNTY : DECLARATORY
For a Declaratory Ruling : RULING
: DEC 72-2
-----X

Westchester County's Department of Public Works ("County") seeks a Declaratory Ruling under §204 of the State Administrative Procedure Act and 6 NYCRR Part 619 determining the applicability of the State's Environmental Regulatory Program Fees, Article 72 of the Environmental Conservation Law ("ECL"), to the water discharge permit issued for the County's Peekskill Resource Recovery Facility. The institution of such fees is a new requirement, enacted this year, L.1983, Ch.15, and described previously in the Declaratory Ruling issued for the Petition of West Genesee Central School District, DEC 72-1 (December 1, 1983).

ECL Article 72 mandates that all persons "who require a permit or approval pursuant to a state environmental regulatory program" must submit annual fees to the Department of Environmental Conservation ("Department"). ECL §72-0201(1). "State environmental regulatory program" includes those for air quality control, hazardous waste, waste transportation, as well as the State Pollutant Discharge Elimination System regulatory and

permit programs for water discharges such as those of the County. ECL §72-0103.

Fees related to the controls on water pollution are governed by Title 6 of ECL Article 72 which contains specific fee schedules for the State Pollutant Discharge Elimination System ("SPDES") program. "SPDES program" is defined in ECL §72-0601(6) as "those activities of the department as specified in titles seven and eight of article seventeen of this chapter [of the ECL] related to discharges into the waters of the state and any related enforcement activities." ECL §72-0602 provides that all persons required to obtain a permit or certificate pursuant to the SPDES program shall submit specified fees for "industrial", "municipal", "private/commercial/institutional" and "power plant" facilities. ECL §72-0602(h) establishes a fee of \$15,000.00 for industrial facilities capable of discharging at an average daily rate of 10,000,000 gallons or more.

The County has applied for and been granted a SPDES permit (ID No. NY0109690, effective date February 1, 1982) by the Department for its Peekskill Resource Recovery Facility ("Facility"). The SPDES permit authorizes the discharge of 55 million gallons per day of condenser cooling water from the Facility into the Hudson River. By an invoice dated October 3, 1983, the Department required payment by the County of \$15,000.00 as an annual SPDES program fee for the Facility. As a solid waste management plant, the Peekskill Resource Recovery Facility is within the meaning of "industrial facility" as that term is

defined in ECL §72-0601(2). The County's Facility presently is under construction and not yet in operation; it has no discharges. The County petitions for a ruling to determine whether or not it is "the County's responsibility to remit the Regulatory Fee prior to the Facility becoming operational".

Whether or not a person possessing a SPDES permit and construction authority for a facility which is not yet actually discharging any wastewater must pay a fee under ECL §72-0602 is a question of first impression. Since there have been neither declaratory rulings nor court decisions addressing this aspect of the comprehensive regulatory program fee system embodied in ECL Article 72, it is in the public interest to entertain this petition. For the following reasons, I conclude that the County must pay the specified SPDES program fee, whether or not such facility is actually constructed and operational.

ECL Article 72 plainly states on the face of the statute that persons issued construction permits under the State environmental regulatory programs do incur regulatory program fee liability. The SPDES program expressly includes those activities of the Department specified in Titles 7 and 8 of ECL Article 17 on "Water Pollution Control", related to discharges into the waters of the State, ECL §72-0601(6). ECL §17-0701(1) enumerates those activities for which SPDES permits are required; it provides, inter alia, that "it shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner ... to construct or operate and use a disposal

system for the discharge of sewage, industrial waste, or other wastes or the effluent therefrom, into the waters of the state". ECL §17-0701(1)(b) (emphasis added). ECL §72-0602 mandates submission of specified fees by all persons required to obtain a permit pursuant to a SPDES program. Under the express terms of ECL §17-0701, Petitioner is required to obtain, and has in fact obtained, a SPDES permit to construct the Peekskill facility. As a person required to obtain a permit under the SPDES program, Petitioner must submit the specified annual fee.

Additional language in ECL Article 72 corroborates the interpretation that the fee requirement extends to persons holding permits to construct. Title 2 sets forth the basic operative requirements; ECL §72-0201(1) provides that all persons who require a permit, approval, or are subject to regulation pursuant to a state environmental regulatory program, must submit the annual specified statutory fees. ECL §72-0201(3) requires that "Liability for fees authorized by this chapter [by the ECL] for persons receiving new permits, certificates or approvals shall equal the annual fee established pursuant to this chapter and prorated from the date of issuance" (emphasis added). Under the explicit terms of ECL §72-0201(3), new permittees incur regulatory fee liability before any actual occurrence of the activity authorized by the permit, e.g., the discharge, emission or disposal of pollutants.

The Legislature has mandated in ECL §72-0201(3) that it is the authorization to use the State's resources for discharging,

emitting or disposing of pollutants that is the controlling factor in assessing regulatory program fees under ECL Article 72. In deciding whether to grant or to deny such authorization, the Department of Environmental Conservation devotes substantial resources to assure compliance with environmental standards and criteria, thereby performing one of the Department's major regulatory functions and duties: the protection and preservation of the State's natural resources and environment. ECL §3-0301, §19-0103; 17-0101-17-0801; section 1, L.1973, Ch.399, §2, L.1978, Ch.639 (relating to hazardous waste regulation). This essential regulatory function is most efficiently administered if done at the inception of regulating a new source. Accordingly, all activities for which Article 72 fees are assessed expressly include the construction of new sources of pollution, for which the Department may issue a required permit only upon a finding that the proposed source will comply with applicable standards, criteria, limitations and regulations. See ECL §19-0301(1), §17-0701, §§27-0707, 27-0913; only the waste transporters, a mobile activity not relevant to construction, are outside this comprehensive coverage of the fee program.

In enacting Article 72, the Legislature unambiguously determined that persons who use the State's natural resources should bear some of the expense of protecting the common public interest in those resources. "Regulatory fees are an appropriate mechanism to pay a portion of the costs of the department's regulatory functions and programs and ... such fees should be

borne by the state's regulated entities in order to further strengthen the state's capabilities to achieve environmental quality objectives." ECL §72-0101.

SPDES permits for discharges of pollutants from new or existing point sources are required to provide that such discharges will conform to all applicable state and federal* statutory and regulatory requirements, guidelines, criteria, standards and limitations relating to effluent limitations and water quality. ECL §§17-0801 to 17-0819, and 6 NYCRR Parts 750-757. Pursuant to its SPDES permit, the County is authorized to discharge 55 million gallons per day into the Hudson River. Although the County's facility may not be capable presently of discharging any amount, the Department had to evaluate all the relevant factors to arrive at the authorized limit of 55 million gallons per day, and the Department must consider this limit in regulating proposed and existing discharges to the river from all other dischargers in order to safeguard the water quality and fish resources of this important section of the Hudson River estuary. Therefore, the assessment against this Petitioner for the SPDES program fee under ECL §72-0602, utilizing as its base the discharge limitations authorized by the County's SPDES Permit, bears a reasonable relationship in fact to the actual expenses incurred by the

* As delegated to New York under a federally preempted regulatory program, the SPDES discharge permits must meet the requirements of the Federal Water Pollution Control Act, as amended 33 U.S.C. 1251 et seq.

Department in meeting the Department's statutory mandates. The legislative policy findings have been reasonably and specifically implemented.

While ECL §72-0602 uses the word "discharging" in setting forth the schedule of SPDES program fees, the County's reliance on this active form of the verb for purposes of construing a statutory exemption from the SPDES fees is misplaced. The express terms of the regulatory fee article in the ECL are to the contrary, as set forth above. A particular statutory provision, such as the use of one word, should not be accepted in "its sheer literalness" without regard to the purpose for which the statute has been designed. See McKinney's Statutes §§96, 97. A literal, narrow interpretation of "discharging" to create exemptions contravenes the statutory framework to recover regulatory fees from both new and existing sources, as is clearly set forth in Title 2 of Article 72.

Moreover, the regulations promulgated pursuant to ECL Article 72,* utilize the limitations authorized in permits to determine regulatory program fees for new facilities, 6 NYCRR §485.2(a)(1) (SPDES program). In promulgating Part 485 of the regulations, the Department specifically rejected reliance on actual flows for determination of the SPDES fee choosing instead to rely on the permitted flows. (See 6 NYCRR §485.2). Neither in the Department's original draft regulations (Proposed Agency

* ECL §72-0201(8) provides that the "commissioner shall promulgate regulations necessary to effectuate the purposes of this article. (emphasis added)

Action # ENV-26-83-00017-P, dated June 29, 1983) nor in the final regulations promulgated effective October 1, 1983,* is reliance on actual discharge flows contemplated. The decision to base regulatory charges on the permitted flows was made notwithstanding suggestions to the contrary by some regulated sources during the rulemaking process.** The promulgation of these rules as part of the administration of the SPDES regulatory fee program necessarily involved the knowledge and expertise of the Department in administering the SPDES program. The Legislature requires this Department in the SPDES program to evaluate all relevant factual matters to arrive at a permitted effluent discharge, whether or not the permittee uses the full volume or meets the limitations. The costs of the SPDES program far exceed simply the processing of permits; water quality standards must be established and reviewed and a wide range of activities undertaken.

* The proposed regulations defined "average daily rate" as "annual wastewater design flow of the facility" and the adopted regulations defined "average daily rate" as the "annual total established flow of the facility". (§480.2(c)).

** See letters from: Erie County Department of Environment and Planning dated August 4, 1983; Comstock Foods dated July 27, 1983; Bath Electric, Gas and Water Systems dated July 28, 1983; Atlantic Cement Company dated July 28, 1983; Bethlehem Steel Corporation dated August 3, 1983; Barton and Logndice dated August 4, 1983; NY Water Pollution Control Association dated August 5, 1983; Eastman Kodak dated August 3, 1983; Business Council of NY State dated August 12, 1983; Onondaga County Department of Drainage and Sanitation dated July 25, 1983; General Motors Corp. dated August 12, 1983; Village of Chateaugay dated July 19, 1983.

Where, as here, the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data, the Department has the acknowledged discretion to interpret the statute in the fashion reasonably suited to implement the law. See Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980), cf. Ostrer v. Schenck, 41 N.Y.2d 782, 786 (1977).

Pursuant to the provisions of both Article 72 and the regulations promulgated thereunder, Petitioner has been properly assessed a SPDES program fee based upon the 55 million gallon per day discharge authorized in its SPDES permit. The County's "understanding", as explained in its Petition, that ECL Article 72 was enacted "to support the regulatory function of your Department for operating facilities, and the Uniform Procedures Act fees were for plan and construction review" is simply incorrect. The County offers no authority in support of this interpretation. There are several reasons why the County's position is not sound.

First, neither the plain language nor express legislative purpose of ECL Article 72 evince any intent to restrict cost recovery through the fee mechanism to Department regulatory functions related only to operating facilities. As described in detail above, the regulation of proposed sources of pollution is a critical portion of the Department's regulatory programs and functions.

Second, the Regulatory Fees are distinct from the Uniform Procedures Act fees. Fees specified in the Uniform Procedures Act ("UPA"), ECL Article 70, are charged for a narrow purpose, i.e., the processing of applications under Article 70. ECL §70-0117(5). Article 70 was enacted for the express purpose of establishing uniform review procedures and time periods regarding Department action on permits under specified regulatory programs. ECL §70-0101. Therefore, the UPA fees are considered a permit processing charge which meets only those Department costs incurred in meeting the uniform, timely review requirements of the statute. This construction is supported by the requirement in ECL §70-0117(5) that the Department report annually on the degree to which UPA fees "meet the department's additional costs for implementation for this article" (emphasis added).*

Legislative memoranda in the bill jacket accompanying UPA (L.1977, Ch.723), submitted by the Department and the Division of Budget, further indicate that the UPA fees were intended to offset the increased Department costs of complying with the requirements of UPA. See, DEC "Memorandum in Support", drafted July 25, 1977 by Langdon Marsh; Division of the Budget "Report on Bills", dated July 14, 1977, recommending approval.

In contrast to the limited purpose of the UPA processing fees, the ECL Article 72 regulatory fees are specifically

* See "The Uniform Procedures Act: Towards a Comprehensive Permit Review System for the Department of Environmental Conservation" by Richard Booth and Rosemary Nichols, who were both active in the passage of UPA. 44 ALBANY L. REV. 542 (1980).

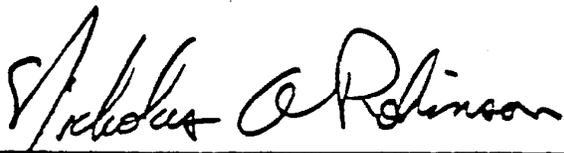
intended to finance major portions of the Department's air, water and hazardous waste regulatory programs. ECL §72-0101. These Fees were enacted as part of the 1983 State Budget, L.1983, Ch.15. Governor's "Memorandum in Support, Art. VII Bill #9-1983 a Budget Bill," in support of the proposed fee legislation, acknowledges the limited purpose and inadequacy of the UPA fees:

"Current law (sec. 70-0117 of the ECL) establishes specific fees that can be imposed for processing environmental permit applications for municipal and industry pollutant discharges into the air or water. These fees, however, do not equal the full cost of permit issuance and do not address the costs of permit monitoring and enforcement."

As the significant differences, described above, between UPA and Article 72 fees illustrate, the Article 72 regulatory fees, and not the UPA processing fees, are intended to cover a portion of the costs of the Department's "plan and construction review".

Accordingly, Westchester County, as a regulatory program permittee for its Peekskill Resource Recovery Facility, is subject to Article 72 of the Environmental Conservation Law. The SPDES fee has been lawfully assessed and the County is obligated to pay the billing for its Facility.

DATED: Albany, New York
December 16, 1983



Nicholas A. Robinson
Deputy Commissioner/General Counsel