

"required to obtain a permit" for the treatment, storage or disposal of hazardous waste pursuant to ECL Article 27, Title 9, and thereby subject to ECL §72-0402(2) fee assessment? (3) Finally, is the Hyde Park site somehow exempt from the fee assessment because it is subject to the remediation requirements of a Federal consent decree?

Since there have been neither declaratory rulings nor court decisions addressing these questions of first impression arising under the regulatory program fee system established in ECL Article 72, it is in the public interest to entertain this petition. For the following reasons, Article 72 requires OCC, as both a hazardous waste generator and an operator of a facility required to obtain a permit under ECL Article 27, Title 9, to pay the specified hazardous waste program fees. It is not exempt from this obligation.

The response to OCC's questions necessarily entails a close reading of the Regulatory Fee statute and rules. In essence, OCC falls within the relevant definitions, as a generator, and as a waste facility operator required to obtain a permit and thus obliged to pay the specified fees, whether or not OCC ever in fact obtains such a permit. The fees are to support the regulatory program itself, and are not tied to issuance of a specific permit.

ECL Article 72 provides for payment of annual fees to the Department of Environmental Conservation ("Department") by "all persons who require a permit or approval pursuant to a state environmental regulatory program, or who are subject to

regulation under a state environmental regulatory program". ECL §72-0201(1). A "State environmental regulatory program" includes, inter alia, hazardous waste and waste transporter permit programs. ECL §72-0103. Article 72 directs the Commissioner to "promulgate regulations necessary to effectuate the purposes of this article." ECL §72-0201(8). The Department has promulgated such regulations at 6 NYCRR Parts 480-485.

Title 4 of ECL Article 72 governs fees related to the "state hazardous waste program" which is defined in ECL §72-0401(12) as "those activities of the Department as specified in titles three, seven, nine and eleven of article twenty-seven of this chapter [of the ECL] and any related enforcement activities". Hazardous waste program fees apply to generators of specified amounts of hazardous waste and to operators of hazardous waste treatment, storage or disposal facilities including an additional fee for specified methods of treatment, storage or disposal such as landfills, incinerators and surface impoundments. ECL §72-0402. Fees are required of all facility operators "required to obtain a permit or certificate for the treatment, storage or disposal of hazardous waste" pursuant to ECL Article 27, Title 9, ECL §72-0402(2) (emphasis added). The regulatory program fee regulations at 6 NYCRR §480.2(ii), defines the term "required to obtain a permit" for purposes of the hazardous waste program fees as "any hazardous waste management facility which has a permit, is deemed to have a permit pursuant to §360.3, has interim status, or conducts any hazardous waste management activity not

exempted by paragraph 360.1(f)" (6 NYCRR Part 360, described further infra contains the Department's regulations for solid and hazardous waste management facilities.)

Although OCC is the owner and operator of the Hyde Park Landfill located in the Town of Niagara, New York, OCC has not used the landfill to dispose of hazardous wastes since 1975. OCC has been collecting leachate⁽¹⁾ generated at the site since 1978 and storing it in two lagoons located on the landfill.⁽²⁾

Lagoons are expressly listed as a type of "surface impoundment"⁽³⁾ as that term is defined in both the state and federal hazardous waste regulations. 6 NYCRR §360.1(d)(95); 40 CFR §260.10. OCC does not have the requisite Department permit specified in 6 NYCRR Part 360 to operate these lagoons; instead, the Hyde Park landfill is the subject of a "Stipulation and Judgment Approving Settlement Agreement" ("Settlement Agreement"), approved on April 30, 1982 by the federal District Court for the Western District of New York, in settlement of United States of America and State of New York v. Hooker Chemicals and Plastics Corp. et al.,⁽⁴⁾ Civil Action No. 79-989.

The Settlement Agreement requires OCC to undertake remedial activities in and about the Hyde Park landfill and adjacent drainage area. These remedial activities include surveys and studies to determine the extent of chemical migration from the landfill and containment, monitoring and maintenance programs.

By invoice dated October 3, 1983, the Department required payment by OCC of a \$20,000 generator fee as a generator of 1000

or more tons per year of hazardous waste, a \$6,000 base facility fee, and \$12,000 special facility fee for operation of surface impoundments. OCC maintains that it should not be subject to these hazardous waste program fees for the Hyde Park landfill "since the site has been inactive for several years, is not a generator of hazardous waste, has no Part 360 permit, and is covered by a Court approved settlement agreement". Petition of OCC, p.2.

The Regulatory Fee Act does not sustain OCC's position. In enacting ECL Article 72, the Legislature declared that "comprehensive environmental regulatory programs are essential to protect New York State's environmental resources and the public's health and welfare", and that "regulatory fees are an appropriate mechanism to pay a portion of the costs of the department's regulatory functions and programs". ECL §72-0101. The scope of New York's comprehensive environmental regulatory programs establishes the Department's regulatory fee jurisdiction. See ECL 72-0201(1). The components of New York's hazardous waste regulatory program are found in ECL Article 27, Title 9; ECL §27-0900 states that "It is the purpose of this title to regulate the management of hazardous waste (from its generation, storage, transportation, treatment and disposal) in this state and to do so in a manner consistent with Public Law 94-580, the Federal Resource Conservation and Recovery Act of 1976 hereinafter referred to as RCRA".⁽⁵⁾ The Title 9 regulatory scheme includes, inter alia, the promulgation of regulations for the

identification and listing of hazardous wastes (ECL §27-0903, 6 NYCRR Part 366); and the promulgation of regulations establishing standards applicable to generators of hazardous waste (ECL §27-0907, 6 NYCRR Part 365). ECL §27-0911 directs that standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities shall be those established in Title 7 of ECL Article 27 and the regulations promulgated thereunder (ECL §§27-0703, 27-0707, 6 NYCRR Part 360). Pursuant to ECL §27-0913 "no person shall engage in storage, treatment, or disposal including storage at the site of generation, of hazardous wastes without first having obtained a permit pursuant to title seven of this article [of ECL Article 27]." (emphasis added).

An inactive hazardous waste landfill, such as OCC's Hyde Park Landfill, continuously produces hazardous waste in the form of leachate when rain water falling in the site percolates through the wastes OCC placed on the site, producing a liquid which can contain various dissolved and suspended components. 6 NYCRR §360.1(d)(54); see 40 CFR §260.10. The regulations for the identification and listing of hazardous waste, 6 NYCRR Part 366, specifically provide, that "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 ... is a hazardous waste." (Emphasis added; there are also certain exceptions which are not applicable here). 6 NYCRR §366.1(d)(4); see 40 CFR §261.3(c)(2). Thus, as rain

water percolates through the hazardous waste contained in the Hyde Park Landfill, leachate is produced which is a hazardous waste as that term is defined by the applicable regulations.

Examination of the definition of "generator" reveals that OCC is a "generator" of hazardous waste by producing such hazardous waste leachate at its Hyde Park Landfill. OCC is, therefore, subject to the generator fees of ECL §72-0402(1). The terms hazardous waste "generator" and "generation" are defined broadly in the hazardous waste regulations and the hazardous waste program fee statute. "Generator" is defined as "any person, by site, whose act or process produces a hazardous waste or whose act first causes a hazardous waste to become subject to regulation". ECL §72-0401(5); see 6 NYCRR §§360.1(d)(38), 365.1(c)(16), 366.1(e)(12); 40 CFR §260.10. "Hazardous waste generation" is defined as "the act or process of producing hazardous waste". ECL §72-0401(7), §27-0901(5). In promulgating the present definition of "generator" in the RCRA regulations, the Environmental Protection Agency ("EPA") clarified that the "act" referred to in the definition of "generator" extends well beyond manufacturing processes that produce hazardous waste. See generally, 45 Fed.Reg. 72026-72027 (October 30, 1980). For example, EPA pointed out that the operator of a facility storing raw materials becomes a "generator" by virtue of the mere act of containment, if such containment enables heavy fractions of materials to settle producing hazardous waste sludges. Id. at 72026. Similarly, since OCC's containment of hazardous waste at

its Hyde Park Landfill results in the production of hazardous waste leachate, OCC is a hazardous waste "generator" as that term is defined in ECL §72-0401(5) for purposes of the hazardous waste program fee statute.

In view of these definitions, the regulatory fee article expressly includes sites such as the Hyde Park Landfill. OCC's status as a generator is further demonstrated by OCC's own admission in submitting its "Generator Annual Reports" to the Department, as required by 6 NYCRR §365.2(c) for generators of hazardous waste.⁽⁶⁾ The "Waste Description" section of OCC's Generator Annual Report, dated February 28, 1983, specifically includes "Aqueous Landfill Leachate". The plain language of these relevant statutory and regulatory provisions, acknowledged by OCC's own reporting, obliges Petitioner to pay hazardous waste program fees as a generator of hazardous waste pursuant to ECL §72-0402(1).

ECL §72-0402(2) mandates fee payment by "all facility operators required to obtain a permit or certificate for the treatment, storage or disposal of hazardous waste" pursuant to ECL Article 27, Title 9, and imposes an additional fee for specific types of treatment, storage or disposal facilities including "surface impoundments", ECL §72-0402(2)(iv). As described above, the regulatory scheme established in ECL Article 27, Title 9, prohibits the operation of a hazardous waste treatment, storage or disposal facility without first having obtained a permit pursuant to ECL Article 27, Title 7, and its

accompanying regulations, 6 NYCRR Part 360. ECL §§27-0913, 27-0707. As expressly provided for in 6 NYCRR Part 360, and as reflected by the special facility fee requirement in ECL §72-0402(2), a "surface impoundment" is a type of "treatment, storage and disposal facility" (6 NYCRR §360.1(d)(105)).

Accordingly, the operation of a surface impoundment for the treatment, storage or disposal of hazardous waste is prohibited unless the operator first obtains a 6 NYCRR Part 360 permit from the Department. ECL §27-0913; 6 NYCRR §360.2(b). At the same time, operation of such surface impoundment is not within the exemptions to the Part 360 permit requirements listed in §360.1(f); thus, the operation of a surface impoundment falls within the definition of "required to obtain a permit" set forth in 6 NYCRR §480.2(ii). Therefore, OCC, as the operator of surface impoundments at its Hyde Park landfill, constitutes "a facility operator required to obtain a permit" pursuant to ECL Article 27, Title 9 and, therefore, is obligated to pay the hazardous waste program fees specified in ECL §72-0402(2).

These technical definitions are a part of a comprehensive policy determination embraced by New York's Legislature and Governor. The explicit legislative purpose of the regulatory program fee system established in ECL Article 72 is to require regulated entities to pay a portion of the costs of the Department's regulatory functions and programs. ECL §72-0101. ECL Article 72, both in the basic fee mechanism set forth in Title 2 and in the specific hazardous waste program fees of

Title 4, imposes fee liability on operators "required to obtain a permit", i.e., those persons within the Department's permit jurisdiction established under the ECL. ECL §72-0201; §72-0402. The regulatory program fee regulations reflect the fact that the term "required to obtain a permit" is not limited to those operators who have Department permits, but encompass all hazardous waste facility operators not specifically exempted from the Part 360 permit requirement. 6 NYCRR §480.2(ii).

The hazardous waste regulatory program involves the "cradle to grave" tracking of all hazardous wastes in New York State, ECL §27-0900, 45 Fed.Reg. 33066 (May 19, 1980), and the review, and enforcement of standards which are applicable to facility operators (whether or not such facilities are actually operating under a valid Part 360 permit). ECL §27-0911; see, generally, L.1978, Ch.639, §2. Regardless of the actual permit status of the various hazardous waste facilities operating in the State, the Department must devote substantial resources to regulatory and enforcement activities with respect to these entities. The Legislature purposely included the assessment of hazardous waste program fees under ECL §72-0402(2) against operators of facilities that are required to obtain Department permits, but do not actually possess such permits, within the overall statutory fee framework as a reasonable component of the State's program to control hazardous wastes.

Thus, the provisions of Article 72 do not restrict regulatory program fee liability, as Petitioner suggests, to

persons actually possessing such permits.⁽⁷⁾ Such a restriction would frustrate the statutory cost recovery goals and would encourage facility operators to avoid applying for required permits in order to escape fee liability.

The fact that an inactive hazardous waste disposal site is the subject of a consent order directing a respondent to perform remedial activities, does not remove actively operating treatment, storage or disposal facilities located at such inactive site from the Department's regulatory jurisdiction established in ECL Article 27, Title 9. The existence of an administrative or judicial order relating to a hazardous waste facility has no bearing upon whether an operator is "required to obtain a permit", as that term is defined for purposes of implementing the hazardous waste program fees. 6 NYCRR §480.2(ii). Although OCC will close the lagoons after it constructs permanent leachate storage facilities,⁽⁸⁾ OCC presently operates the lagoons for the storage of hazardous waste continually generated by its inactive Hyde Park landfill. See, U.S., State of New York v. Hooker Chemicals and Plastics Corp., et al., Decision and Order approving Settlement Agreement, p.18 and p.iii, note 4 (W.D.N.Y., April 30, 1982). OCC submitted to the Department on February 28, 1983 the "Facility Annual Hazardous Waste Report", which 6 NYCRR §360.8(c)(4)(iii) requires of treatment, storage and disposal facility operators, for the Hyde Park surface impoundments. As illustrated by this regulatory reporting requirement, OCC's operation of the lagoons

necessitates review by the Department's regulatory staff, separate and apart from the Department staff assigned to the supervision of the Settlement Agreement. These are the very type of Departmental undertakings which ECL Article 72 revenues are designed to underwrite.

Moreover, the Hyde Park Settlement Agreement specifically requires OCC to store liquids and other materials (i.e., leachate) collected at the site "in accordance with applicable federal and state statutes and regulations". Settlement Agreement, ¶E(8)(a). By this requirement the parties to the Settlement Agreement recognize that leachate generation and storage at the Hyde Park landfill is fully subject to state and federal hazardous waste regulatory programs. Since the entire site is closely monitored and since closure of the lagoons will be accomplished in the near future, the Department has exercised its prosecutorial discretion not to require OCC to seek permits; the Department has the right to do so for operating the surface impoundments at Hyde Park under ¶E(8)(a) of the Settlement Agreement and under the permit requirements of ECL §27-0913. See, Gaynor v. Rockefeller, 15 N.Y.2d 120, 131-132, (1965); see also, People ex rel. Dew v. Reid, 82 Misc.2d 583 (1975); see, generally, K. Davis, Administrative Law Treatise, Chap.9 (2d ed. 1979). However, this reasonable forbearance of enforcement does not remove the lagoons from the reach of the Department's regulatory permit jurisdiction established in ECL Article 27, Title 9. Thus, the lagoons remain "facilities required to obtain

a permit" and OCC as operator must pay the specified fee pursuant to ECL §72-0402.

As Petitioner points out, the Settlement Agreement does require OCC to pay \$1.5 million to the State of New York for, inter alia, research and supervision of remedial activities. Settlement Agreement, ¶11. The Department's portion of this fund, which it shares with the New York State Departments of Health and Law, is intended to cover, in part, each agency's costs of supervising the implementation of the Settlement Agreement. This fund is not, however, applied to the Department's cost of regulating the existing surface impoundments pursuant to the State hazardous waste regulatory program. See Memorandum of Understanding dated December 9, 1982, between State governmental parties to the Settlement Agreement delineating oversight responsibilities.

Accordingly, as a hazardous waste generator and a facility operator of surface impoundments at its Hyde Park landfill, OCC is subject to Article 72 of the Environmental Conservation Law. The hazardous waste program fee has been lawfully assessed and OCC is obligated to pay the sums billed for its Hyde Park facility.

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FOOTNOTES

- (1) "Leachate" is defined as "a liquid, including any suspended components in the liquid, which has been in contact with or passed through solid waste, including "hazardous waste". 6 NYCRR §360.1(d)(54); 40 CFR §260.10.
- (2) OCC (then called Hooker Chemicals and Plastics Corp.) built a single lagoon in 1974 in the southwest corner of the landfill to collect leachate at the site. In 1978-79, this single unit was reconstructed into the two lagoons at issue here. (See generally, Transcript Hyde Park Settlement Agreement Hearings, pp.1240-41, 1245, 1267-68; Decision and Order, p.18 and footnote 4).
- (3) "Surface impoundment" is defined as "a facility or part of a facility which is a natural topographical depression, man-made excavation or diked area formed primarily of earthen materials (although it may be lined with man-made materials) which is designed to hold an accumulation of solid waste in semi-solid or liquid form, and which is not an injection well." ECL §72-0401(14). See also §360.1(d)(95) and 40 CFR §260.10.
- (4) "Hooker Chemicals and Plastics Corp." is the former name of OCC.
- (5) RCRA is the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 86901 et seq. RCRA hazardous waste regulations are found at 40 CFR Parts 260-267.
- (6) The regulations promulgated pursuant to Article 72, 6 NYCRR Parts 480-485, explain that the Department relies upon these Generator Annual Reports to determine the estimated annual program fee for generators. 6 NYCRR 483.2.
- (7) The comments submitted by OCC on the proposed program fee regulations indicate a recognition by OCC that fee liability attaches to those required under statute to obtain, but do not actually possess applicable Department permits; specifically, OCC notes that "Section 481.2(a) requires fee payment by any person required to obtain (or in possession of) a permit, certificate or approval pursuant to a State environmental regulatory program". See OCC comments dated August 3, 1983.
- (8) OCC has submitted applications for federal and state permits pursuant to RCRA regulations and 6 NYCRR Part 360, to construct and operate such leachate storage facilities at its Hyde Park landfill site.