

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
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Application of

BRIAN MEYER

for a Declaratory Ruling Pursuant  
to Section 204 of the State  
Administrative Procedure Act

DECLARATORY RULING  
DEC 72-05

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INTRODUCTION

This matter has been referred to the New York State Department of Environmental Conservation ("Department") Office of General Counsel by the Department's Office of Hearings for a declaratory ruling pursuant to 6 NYCRR §481.10(f)(4). The sole issue to be decided is whether Brian Meyer ("Meyer") must pay a regulatory fee assessed by the Department in connection with a state pollution discharge elimination system ("SPDES") permit issued to him even though he was not informed when he applied for the permit that there would be an annual fee.

BACKGROUND

On August 21, 1989, the Department sent Meyer an invoice assessing a \$87.57<sup>1</sup> SPDES program fee based on a permit that was issued on June 1, 1988, to Meyer for the discharge of surface water into Lake Ontario through June 1, 1993. In accordance with Environmental Conservation Law ("ECL") §72-0201(5) and 6 NYCRR Part 481, Meyer disputed imposition of

1. The annual fee was increased from \$50.00 per year to \$100.00 per year on April 1, 1989. Thus, the amount has been prorated for periods January 1 to April 1 (\$12.33) and April 2 to December 31 (\$75.34) for a total of \$87.57.

the fee. The dispute was referred to the Department's Office of Hearings. After a prehearing conference, the Administrative Law Judge ("ALJ") determined that no issues of fact were in dispute and, acting pursuant to 6 NYCRR §481.10(f)(4), canceled the hearing, prepared a report summarizing the material facts and disputed issues, and referred the matter to the Office of General Counsel for a declaratory ruling.

According to the ALJ's report, Meyer is a homeowner who needed a SPDES permit for his home's sand filter surface discharge system because the system discharges into surface waters. Meyer applied for and obtained a SPDES permit (No. 0162922) for the treatment and elimination of waste at his residence in Hamlin, New York.

Meyer applied for his SPDES permit in February 1988. The annual fees owed as a result of the permit were not indicated in the application materials furnished to Meyer by the Department. Such materials now indicate that fees are owed. Additionally, Meyer claims that he asked a Department employee if there were any fees in addition to the permit application fee, and he was told that there were none.

Meyer was billed \$87.57 for the year 1989 as a private/commercial/industrial (P/C/I) facility discharging at an annual rate of less than 100,000 gallons per day.

Meyer contends that no program fee should be owed as he was not made aware of the fees when he made his application. He claims that had he known of the fee at the time of the

application, he would have considered other waste disposal options.

ANALYSIS

The SPDES Program fees are set forth in ECL Article 72, Title 6 and its implementing regulations, 6 NYCRR Part 485. ECL §72-0602 states that:

All persons required to obtain a permit or certificate pursuant to this state pollutant discharge elimination system (SPDES) program as defined in section 72-0601 of this title shall submit annually to the department a fee in an amount to be determined as follows:

(a) \$100.00 for any P/C/I facilities having a permit to discharge or discharging at an average daily rate of less than 100,000 gallons...

The statutory language makes it clear that fees are owed by all persons required to obtain a SPDES permit. The question is whether prior notification is required that the fee will be owed.

The statute provides that those who owe fees will be notified through the billing system that a fee is due because fees are payable within 30 days of billing by the Department. ECL §72-0201(4). The statute requires that those subject to a penalty be notified of the preliminary determination of a penalty, right of administrative appeal, and any final determination that a penalty will be assessed. ECL §72-0201(5). But ECL Article 72 does not provide any requirement that a permittee be notified in advance that a fee will be due. Since certain notice requirements were specifically included in ECL Article 72, we must assume that the absence of any other notice

requirements means that the Legislature did not mean to impose them. McKinney's Statutes §240.

An additional general rule with regard to notice requirements is whether the statute, as written, meets constitutional due process requirements. In Turner v. Wade, 254 U.S. 64 (1920), the United States Supreme Court held that if a taxpayer is afforded notice of the imposition of a tax and an opportunity to challenge the tax, even before an administrative agency, at any stage before it is finally fixed, the taxpayer has not been denied due process. Although the charge in question is a fee, and not a tax, the due process requirements could appropriately be considered since both statutes involve the payment of money to a governmental body. Here, Meyer was notified of the fee due in his August 21, 1989, bill and, under the requirements of 6 NYCRR Part 481.9, he was given and he took the opportunity to challenge the fee imposed through the administrative process.

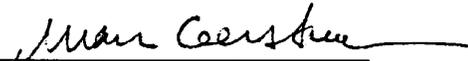
Furthermore, it is a general rule that ignorance of the law can not be raised as a defense. In Hebron v. City of New York, 138 N.Y.S. 1010 (1913), the Appellate Division, Second Department held that, "It is the policy of all countries that requires public laws to be known, and does not receive the excuse of ignorance of their provisions." *Id.* at 1012. Also, "Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon

incorrect information received from Government agents or employees." Flamm v. Ribicoff, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

CONCLUSION

ECL §72-0402 requires that a regulatory fee be paid by all those who have a SPDES permit. This fee is due as billed and there is no obligation of the Department to notify persons undertaking activities which trigger the imposition of such fees that they will be liable for the payment of fees.

DATED: Albany, New York  
September 7, 1990

  
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Marc S. Gerstman