

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

---

Application of

AUTOMATION GAGES, INC.

DECLARATORY  
RULING

DEC 72-06

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

---

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). Automation Gages, Inc. ("Automation") is disputing an assessment of a hazardous waste regulatory program fee for calendar year 1987. The issues to be decided are whether (1) Automation operated as a treatment, storage or disposal facility ("TSDF") in 1987; (2) the 1988 Order on Consent precludes the Department from collecting the program fees; and (3) the Order on Consent effects a waiver of such fees.

BACKGROUND

According to the stipulated facts set forth by the Administrative Law Judge ("ALJ") in her report, Automation owns and operates a facility at 850 Hudson Avenue, Rochester, New York. Automation has conducted operations at this facility involving the generation of hazardous waste, as defined in ECL §27-0901(3) and 6 NYCRR Part 371, and is therefore subject to New York State laws and regulations governing the generation of hazardous waste.

The Department is responsible for the enforcement of ECL Article 27, Title 9, and, to assure compliance with the law, the Department conducted a hazardous waste

management compliance inspection at Automation's facility on November 17, 1987. Various violations pertaining to hazardous waste management compliance were found.

On May 18, 1988, the Department and Automation entered into an Order on Consent, RCRA #C8-0001-88-01, ("Order") pertaining to the Department's allegations and resolving the violations. The Order noted a number of claimed violations, including the storage of hazardous wastes for more than 90 days. Automation agreed to pay a penalty of \$3,600.00 for the alleged violations noted in the Order.

On May 9, 1988, the Department issued Automation an invoice assessing a \$24,000 TSDF program fee for the period January 1, 1987, to December 31, 1988, based on evidence that Automation was operating as a TSDF. Under Environmental Conservation Law ("ECL") §72-0201(5) and 6 NYCRR Part 481, Automation submitted a Fee Recalculation Request on July 14, 1988, claiming that the Department's imposition of a fee based on classifying Automation as a TSDF was erroneous, and that as a generator of hazardous waste, below the tonnage thresholds specified in 6 NYCRR §483.1(a)(1)-(4), no regulatory fees were owed.

The Department issued Automation a Regulatory Fee Recalculation Request Determination form on July 27, 1988, lowering the program fees from \$24,000 to \$12,000. Since closure of Automation's facility was not required during 1988, the \$12,000 was assessed based on the Department's determination that in 1987 Automation was "operating in a manner 'required to obtain a permit,' and thus [was] liable for the TSDF fee for 1987 according to 6 NYCRR Subpart 483.1(b)."

Automation alleges it has never operated as a TSDF so it has never applied to the Department or the United States Environmental Protection Agency for a TSDF permit. On August 2, 1988, Automation submitted a Regulatory Fee Determination "Continued Disagreement Card" challenging the Department's 1987 TSDF Program Fee Assessment of \$12,000 plus interest and penalties. Automation contends it should not be required to pay

a 1987 TSDf program fee and asserts the Department has no basis for the assessment. Automation argues that it did not, and never intended to, operate as a TSDf in 1987; that its storage in excess of 90 days was inadvertent and an act for which it already has paid a penalty. Furthermore, Automation asserts the Order disposes of all the Department's claims which are related to the factual allegations described in the Order that arose through the date of the Order, so that the Department is precluded from assessing any additional penalties or fees.

#### ANALYSIS

Authority to impose hazardous waste regulatory program fees is set forth in ECL Article 72, Title 4 and its implementing regulations, 6 NYCRR Part 483. ECL §72-0402(2) states that:

All facility operators required to obtain a permit or certificate for the treatment, storage or disposal of hazardous waste pursuant to title nine of article twenty-seven of this chapter shall submit annually to the department a fee.... (Emphasis added.)

In addition, ECL §72-0201(1)(a) states that:

... 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 shall submit a fee as authorized under this article.... (Emphasis added).

The provisions of ECL Article 72 thus do not restrict regulatory program fee liability to persons actually possessing permits. Such a restriction would encourage facility operators to avoid applying for required permits in order to escape fee liability. Petition of Occidental Chemical Corporation, DEC 72-3 (January 23, 1984). Rather, ECL Article 72 requires the assessment of program fees against operators of both facilities which have permits and facilities which are required to obtain permits.

Thus, it is necessary to determine if Automation is required to obtain a permit under ECL Article 27 and its implementing regulations. ECL §27-0913(1), as it existed at the time here in question, stated:

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 ....

The implementing regulations, 6 NYCRR Subpart 373-1, contain exemptions to the permitting requirements for certain TSDFs. Specifically, 6 NYCRR §373-1.1(d) provides:

The owners or operators of the following facilities or portions of facilities are exempt from this Part ....

....

(iii) The storage in containers or tanks of hazardous waste that is generated on-site, for a period not exceeding 90 days.... The time period for the 90-day exemption starts when the generator accumulates at any time more than 1,000 kilograms of hazardous waste.... [6 NYCRR §373-1.1(d)(1)(iii).]

Likewise, 6 NYCRR Part 372, which establishes standards for hazardous waste generators, transporters and facilities, provides:

[A] generator may accumulate hazardous waste on-site of generation for a period of 90 days or less under the provisions of section 373-1.2(d)(1)(iii) ... of this Title. The time period for the 90 day accumulation starts when the generator accumulates at any time more than 1,000 kilograms of hazardous waste .... [6 NYCRR §372.2(a)(8)(ii)]

This regulatory language makes it clear that to be considered solely a generator of hazardous waste, and not a TSDF, a facility cannot store a quantity of hazardous waste for more than 90 days after having accumulated more than 1,000 kilograms. A generator who accumulates more than 1,000 kilograms of hazardous waste, generated onsite, is subject

to the rules and regulations that apply to TSDF if any portion of this accumulation remains onsite for a period greater than 90 days.

When the Department conducted a hazardous waste inspection at Automation's facility, it found various conditions pertaining to hazardous waste management, including that a quantity of hazardous waste exceeding 1,000 kilograms had been stored for longer than 90 days. This period of time exceeded that which would have entitled Automation to an exemption under 6 NYCRR §373-1.1(d) and 6 NYCRR §372.2(a)(8)(ii); and accordingly Automation engaged in the storage of hazardous waste for which a permit is required. Since Automation engaged in an activity for which a permit is required, liability for regulatory program fees is created.

The purpose of the Order on Consent, entered into between the Department and Automation, was to resolve the violations of the rules and regulations contained in 6 NYCRR Parts 370 et seq. The \$3,600.00 penalty, which Automation agreed to pay, only concerned violations set forth in the Order pursuant to the Department's authority under ECL §71-2705 to impose civil, administrative and criminal sanctions for hazardous waste offenses.

That the Order was not intended to resolve all of the Department's claims against Automation is evidenced by paragraph XIII of the Order which states:

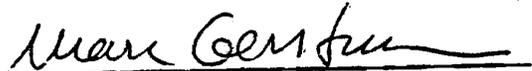
This Order does not absolve [Automation] of any obligation to pay any Environmental Regulatory Program fees which may be due pursuant to ECL Article 72, and the Department reserves its right to seek payment of such fees as may be authorized by law.

Clearly the parties chose to exempt environmental regulatory program fee disputes from the Order; i.e., the Department reserved the right to assess regulatory fees and Automation remained free to challenge those fees in accordance with 6 NYCRR Part 481.

CONCLUSION

ECL §72-0402(2) requires that a regulatory fee be paid by all those who are required to obtain a permit or certificate to treat, store or dispose of hazardous waste. Since the Automation facility engaged in hazardous waste storage of over 1,000 kilograms for over 90 days in 1987, Automation was required to obtain a TSDF permit, and the applicable regulatory fee of \$12,000, plus interest and penalties must be paid.

DATED: Albany, New York  
April 17, 1992



Marc S. Gerstman  
Deputy Commissioner and  
General Counsel