

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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: In the Matter of the Petition of the :
: :
: ANOPLATE CORPORATION :
: : DECLARATORY :
: : RULING :
: For a Declaratory Ruling Pursuant to :
: Section 204 of the State Administrative :
: Procedure Act : 72 - 09 :
: :
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INTRODUCTION

This matter has been referred to the New York State Department of Environmental Conservation ("Department" or "DEC") Office of General Counsel by the Department's Office of Hearings for a Declaratory Ruling pursuant to 6 NYCRR §481.10(f)(4) and Part 619. Anoplate Corporation ("Anoplate") is disputing a \$3,000 hazardous waste program fee which has been assessed by the Department during each of the calendar years 1990 to 1993. This fee is assessed annually for "generators of equal to or greater than fifteen tons per year of hazardous wastewater," pursuant to Environmental Conservation Law ("ECL") §72-0402(1)(e). As agreed to by Anoplate and the Department staff, legal issues exist as to the interpretation of ECL §72-0402(1)(e) and whether that section applies to the Anoplate operation. Those issues, as stated in Administrative Law Judge (ALJ) Edward Buhrmaster's January 14, 1994, hearing report, are:

1. Given that its process water is treated on-site and is not hazardous at the point of its discharge from the facility, is it properly classified as "hazardous waste"?
2. Given the same considerations, does Anoplate "generate" hazardous wastewater?

BACKGROUND

By invoice, the Department assessed a \$3,000 fee against Anoplate for each of the calendar years 1990 to 1993. These fees have been assessed for the generation per year of more than 15 tons of hazardous wastewater.

Anoplate's argues that it does not generate hazardous wastewater because the wastewater that results from the various Anoplate processes, and which is discharged to the Onondaga County metropolitan sewage treatment plant, is not hazardous after treatment and therefore should not be subject to fees.

The following relevant facts, as set forth in ALJ Buhmaster's January 14, 1994 report, have been accepted by both parties. They are as follows:

1. Anoplate is located at 459-475 Pulaski Street, Syracuse.
2. Anoplate's facility performs electroplating and metal finishing processes.
3. During each of the calendar years 1990 to 1993, Anoplate's processes created more than 15 tons of process water identified as "hazardous" pursuant to ECL Article 27, Title 9.
4. This process water was then treated on-site prior to being discharged to a treatment works owned and operated by Onondaga County.
5. The on-site treatment removed excess heavy metals from the process water and rendered it non-hazardous at the point of its discharge from the facility.

In addition, Anoplate, in its March 10, 1994, Brief, amplified the Findings by stating, inter alia, on page 5:

The processes include the use of chemical baths at the concluding phase of the operation. In the last several years major portions of the chemical bath rinses have become "closed-looped," as these rinses have become reusable and thus have been reinserted back into the processes.

A portion of the chemical rinses has not been reutilizable by [Anoplate], and this portion of the rinse bath is further processed at the Syracuse plant in order for [Anoplate] to meet Federal Pretreatment Effluent Standards under the Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. 1251 et seq.

DISCUSSION

Since hazardous wastes are a subset of solid wastes, the initial question is whether the process water is a solid waste pursuant to 6 NYCRR §371.1(c), *i.e.*, whether it is a discarded material, and not otherwise excluded from the definition of solid waste. The process water is initially a solid waste because, as indicated by Fact #4, it is a discarded material since it is sent for pretreatment as wastewater and then discharged into the Onondaga County sewer system. See 6 NYCRR §§371.1(c)(1), (c)(2)(i), (c)(3)(i) and (iii).

According to the regulations [6 NYCRR §371.1(d)] a solid waste which is not excluded from regulation is a hazardous waste if it meets any of the hazardous waste criteria [as set forth in either 6 NYCRR §371.3 (characteristic hazardous waste) or 6 NYCRR §371.4 (listed)]. Fact #3, although it does not specify why the process water is identified as "hazardous", concedes that "Anoplate's process created more than 15 tons of process water identified as 'hazardous' pursuant to ECL Article 27, Title 9."

The only remaining question is when the process water becomes a solid and a hazardous waste. Pursuant to 6 NYCRR §371.1(d)(2), a solid waste becomes a hazardous waste when, in the case of a waste listed in 6 NYCRR §371.4, it first meets the listing description, or when the waste exhibits the characteristics identified in 6 NYCRR §371.3 (ignitibility, corrosivity, reactivity, toxicity). While it is not explicit from Fact #3 why the Anoplate process water is

identified as "hazardous", there is no factual question that it is, and no question when it is created -- when it leaves the rinse tanks intended for pre-treatment and disposal. The federal cases cited by Department staff in their Brief confirm that wastewater that is not part of an on-going industrial process (e.g., a closed loop) is considered discarded. See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987); American Petroleum Institute v. U.S.E.P.A., 906 F.2d 729 (D.C. Cir 1990); American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir 1990). Consequently, the process wastewater is properly classified as a solid and hazardous waste when it leaves the rinse tanks and is sent to the pretreatment unit. At this point, it has been discarded from the process.

Second, I also conclude that Anoplate "generates" hazardous wastewater. The statutory provisions governing the determination of whether a hazardous waste program fee is imposed are found in ECL Article 27, Title 4 (Hazardous Waste Program Fee). Two potential regulatory fees apply to an operating manufacturing facility: a generator fee under ECL §72-0402(1) and a treatment, storage or disposal (TSD) facility fee under ECL §72-0401(2). (Irrelevant for our purposes is the post-closure care fee under ECL §72-0401.3.) There are approximately 197 generators in the State who are both a generator and a TSD. They pay a fee under each program; consequently such status is not unique. In fact, 6 NYCRR §483.1(c) explicitly states that:

A person may be liable for both generator fees and treatment, storage or disposal facility fees depending upon the activities engaged in.

The issue here is whether Anoplate is subject to the generator fee, and consequently whether Anoplate is a generator. For purposes of the hazardous waste program fee (and also for the hazardous waste program), "generator" means

any person, by site, whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation.

[ECL §72-0401.5; see also 6 NYCRR §480.2(o).]

Under the facts as stipulated and amplified, Anoplate is a generator of hazardous waste as a result of its processes. Fact #3 is directed solely at the Anoplate process when it states that "During each of the calendar years 1990 to 1993, Anoplate's processes created more than 15 tons of process water identified as 'hazardous' pursuant to ECL Article 27, Title 9." Fact #4 clearly speaks not to the manufacturing process but to the subsequent and separate treatment process when it states that "This process water was then treated onsite prior to being discharged to a treatment works owned and operated by Onondaga County." Also, in the additional statements made by Anoplate to amplify the facts Anoplate states that in the last several years major portions of the chemical baths have become "closed-looped", as the rinses have become reusable and have been reinserted back into the processes. Anoplate is thus confirming that a portion of its process water does not leave the process and is not yet subject to regulation as a solid or hazardous waste.

Anoplate argues that a facility subject to regulation under the program for pretreatment of wastewater (§307 of the federal Clean Water Act) should not be assessed a separate fee for the pretreatment of hazardous waste. As explained herein, this exemption from certain other fees for the treatment of hazardous waste does not affect liability for fees for the generation of hazardous waste.

The regulatory fee in question for Anoplate is for the generation of hazardous waste under ECL §72-0402(1) [see also 6 NYCRR §483.1(a)], not for facility operators required to obtain a permit or certificate for the treatment storage or disposal (TSD) of hazardous waste under ECL §72-0402(2) [see also 6 NYCRR §483.1(b)]. The statutory exemption claimed by Anoplate, part of the definition of "treatment, storage or disposal facility," states "For purposes of this title, a facility subject to regulation under section 307(b) of the Clean Water Act shall not be assessed a separate fee for the pre-treatment of hazardous waste." ECL §72-0401(16). The reference to §307(b) of the federal Clean Water Act is a reference to the pretreatment program for wastewater entering a sewer system.

The regulatory fee regulations make this distinction between the generator fee and the TSD fee explicit. After discussing generator fees under 6 NYCRR §483.1(a), and when addressing treatment, storage or disposal facility (TSDf) fees under 6 NYCRR §483.1(b), it is stated that:

(v) as used in this subparagraph, the amount of waste that a TSDf receives is the amount of waste first generated by the facility operator on land contiguous to the TSDf and managed in one or more units required to obtain permits or certificates pursuant to title 9 of article 27 of the ECL, plus the amount of wastes received from off-site generators and managed in one or more units required to obtain a permit pursuant to title 9 of article 27 of this ECL. . . .

However, 6 NYCRR §483.1(b) also states that

(iv) the amount of waste managed exclusively in a pretreatment wastewater treatment unit as defined in these regulations and not managed in any other unit as defined in these regulations and not managed in any other unit required to obtain a permit or certificate pursuant to title 9 of article 27 of the ECL shall not be included in the total amount of waste on which the fee is determined under this paragraph. . . .

(Emphasis added.) This regulatory provision thus implements the prohibition in ECL §72-0401(16) against a TSD regulatory fee for the pretreatment of hazardous waste.

However, the outcome of one regulatory fee review does not necessarily determine the outcome of the other, and this exemption from the TSD fee does not exempt the facility from any applicable generator fee. To the contrary, since the specific statutory exemption from the TSD fee was necessary, it confirms the analysis that generation takes place in the manufacturing process unit, leading to generator fee liability, and that subsequent TSD fee liability does exist if TSD activity takes place onsite.

Other provisions of the hazardous waste regulations confirm that the determination of whether a solid or hazardous waste has been generated is made prior to material leaving the facility. First, if the process water, instead of being discharged into the Onondaga County sewer system, were a surface water point source discharge of industrial wastewater subject to a State Pollutant Discharge Elimination System permit (under Article 17 of the ECL) it would be excluded from the definition of a solid waste (and potentially from the definition of a solid waste) at that point pursuant to 6 NYCRR §371.1(e)(1)(ii). But the Note to 6 NYCRR §371.1(e)(1)(ii) points out that the analysis of whether process water is a solid or hazardous waste occurs while the material is still on-site--

This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.

Second, certain hazardous waste is exempt from certain regulations while it is still in the unit in which it was generated pursuant to 6 NYCRR §371.1(e)(3) which states:

- (3) Hazardous wastes which are exempted from certain regulations.

A hazardous waste which is generated in a product or raw material storage tank, in a product or raw material transport vehicle or vessel, in a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste treatment manufacturing unit, is not subject to regulation under Parts 372 [Hazardous Waste Manifest System and Related Standards for Generators, Transporters and Facilities], 373 [Hazardous Waste Management Facilities], and 376 [Land Disposal Restrictions] of this Title until it leaves the unit in which it was generated....

Also confirming the meaning of the current statute was the introduction of legislation, A.4154 (February 25, 1993), by Assemblyman William L. Parment that would have amended ECL §72-0402(e) to read:

\$3,000 for generators of equal to or greater than fifteen tons per year of hazardous wastewater discharged from the premises of the generator, payable in addition to fees for hazardous wastes, other than wastewater, as required by paragraphs a, b, c and d of this subdivision.

This in essence would have converted the point at which a hazardous waste generator fee would be assessed for wastewater from the point of actual generation to the point at which the wastewater leaves the facility. According to the memorandum in support of A.4154 the purpose of the bill was

To encourage environmentally responsible hazardous wastewater management practices by eliminating the discharge fee for those generators who treat and recycle their wastewater.

(Emphasis added.)

The memorandum submitted by the sponsor in support of the bill also stated that it

Repeals existing paragraph e of section 72-0402 which provides for a \$3,000 fee to be paid by hazardous wastewater generators who discharge such wastewater from their premises.

(Emphasis added.)

The justification for the bill was that

The current paragraph "e" provides for a \$3,000 fee for all who create hazardous wastewater as part of their industrial process regardless of whether they treat, recycle or otherwise process their wastewater in an environmental responsible manner.

This language offers positive reinforcement to those who mitigate the hazardous conditions of their industrial process water by not imposing the \$3,000 fee.

This proposal was not enacted into law in either the 1993 Session or the 1994 Session. Had it become law the generator fee would not be owing by Anoplate, at least prospectively. I note that this bill has been reintroduced for the 1995 Session as A. 653.

In Point 1 of its Brief, Anoplate argues that the purpose of the regulatory fee program is to offset part of the Department's regulatory management costs, but since the pretreated wastewater is not subject to permit or regulation by the Department under the hazardous waste program, and therefore DEC has no regulatory costs associated with this pretreatment operation, Anoplate should not be subject to the fee. However, this is an incorrect statement of the purpose of the regulatory fee program, and an incorrect statement of the nature of the fee -- it is imposed on the generation of hazardous waste not on the subsequent pretreatment, as discussed above. Moreover, hazardous wastewater, as a hazardous waste, is subject to regulation by DEC.

Anoplate is not correct in stating that, because no permit or approval by the Department of the pretreatment system is required, regulatory fees were not designed to cover such activities and the fee should not be imposed unless the wastewater is hazardous as it leaves the site. This is too narrow a view of the regulatory fee program. Fees are to partially cover not only the permitting and approval functions of the Department but also other regulatory activities. As stated by ECL §72-0201(1)(a):

Notwithstanding any general or special law to the contrary, 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 annually to the department, on such forms and at such times as specified by the department.

(Emphasis added.) While "generators" of hazardous waste do not need permits or approvals per se they are subject to a substantial regulatory program. This includes the following:

- generator standards under ECL §27-0907 and 6 NYCRR §372.2;
- identification and listing of hazardous waste program under ECL §27-0903 and 6 NYCRR Part 371;
- manifest program under ECL §27-0905 and 6 NYCRR Part 372;

- preferred statewide hazardous waste management practices hierarchy under ECL §27-0105; and
- hazardous waste reduction plan requirements under ECL §27-0908.

All the documents cited by Anoplate to argue that the sole purpose of the regulatory fee program is to partially reimburse the Department for the costs of its hazardous waste program (and that pretreatment is a component of that program) predate two critical changes to Article 72.

First, in 1985 the Legislature changed the nature of the fee program to double and then earmark one-half of all hazardous waste program fees (Title 4) and waste transporter program fees (Title 5) for deposit in the Hazardous Waste Remedial Fund (State Superfund) for use to remediate inactive hazardous waste sites (see ECL §72-0201(1)(b), as added by §6 of Chapter 38 of the Laws of 1985). Consequently, a portion of regulatory fees from generators and hazardous waste management facilities is to assist remediation of inactive sites contaminated by prior activity.

Second, the instant statutory provision, ECL §72-0402(1)(e), was added in 1989 to reduce the fees that would otherwise apply to the generation of hazardous wastewater, and it is not a fee on the treatment or pretreatment of hazardous waste (§§76 and 77 of Chapter 82 of the Laws of 1989). Prior to April of 1989 there was no separate "wastewater" category, and consequently wastewaters that met the definition of hazardous waste (even though it was a high volume of water and low concentration of constituents) were subject to a sliding scale of generator fees. Generators of hazardous wastewater could be subject to generator fees as high as \$40,000. As a result of the amendments a ceiling of \$3,000 was imposed for hazardous wastewater, a potential savings of as much as \$37,000 per year.

CONCLUSION

For purposes of ECL Article 72 (Environmental Regulatory Program Fee) Anoplate's process wastewater, which is treated on-site and thus is not hazardous at the point of its discharge from the facility, is properly classified as "hazardous waste" when it leaves the rinse tanks and is sent to the pretreatment unit. As a generator of hazardous wastewater Anoplate is subject to the regulatory fee imposed by ECL §72-0402(1)(e).

DATED: Albany, New York
February 15, 1995

Marc S. Gerstman

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