

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Petition of

INDEPENDENT CEMENT CORPORATION

**DECLARATORY RULING
72-12**

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

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INTRODUCTION

This matter has been referred by the New York State Department of Environmental Conservation ("the Department") Office of Hearings and Mediation Services to the Department's Office of General Counsel pursuant to 6 NYCRR §481.10(f)(4) for the issuance of a declaratory ruling pursuant to State Administrative Procedure Act §204 and 6 NYCRR Part 619. Independent Cement Corporation ("ICC") is disputing the assessment of an operating permit program fee ("the fee") for the calendar year 1994. The issue to be decided is whether, under the facts as described below, ICC is liable for payment of the fee.

DECLARATORY RULING

ICC is liable for payment of the fee. ECL §72-0303 contains very specific provisions which detail how the Department must calculate and assess the fee. The Department performed these tasks exactly as mandated by the statute.

STATEMENT OF FACTS

The relevant facts are as follows:

1. ICC operates a facility on Route 9W in Catskill, Green County, New York which produces emissions of regulated air contaminants at a level exceeding the regulatory thresholds for a major source.
2. The facility is permitted under DAR ID No. 1926000026, and is subject to the requirements of Title V of the Federal Clean Air Act Amendments of 1990 and ECL §72-0303, as established by the New York State Clean Air Compliance Act of 1993 (Laws of 1993, chapter 608, §22, effective August 4, 1993).

3. ECL §72-0303 established the fee commencing January 1, 1994 and every year thereafter. The law provides that the fee and method of calculation shall be established as a rule by publication in the Environmental Notice Bulletin ("the ENB") no later than July first of the year such fee will be effective. The Department published the "Notice of Adoption of Rule" in the June 29, 1994 issue of the ENB, with the regulations in 6 NYCRR Part 482-2 becoming effective on July 1, 1994. For 1994, the fee required of entities subject to this regulation was set at \$25.69 per ton up to six thousand tons annually for each regulated air contaminant.

4. ICC provided its 1993 fuel use/emissions information to the Department. This information was used by the Department as the basis for determining the total tonnage of each regulated air contaminant that was subject to the 1994 fee.

5. On August 14, 1994, the Department issued a fee invoice in the amount of \$178,158.10 for calendar year 1994. As required by ECL §72-0303.2, the invoice was based on the facility's actual emissions of regulated air contaminants during 1993. The invoice itemized the facility's regulated air contaminants and multiplied the reported tonnage of each by the 1994 fee of \$25.69 per ton as follows:

Particulates	451.93 tons	\$ 11,610.08
Sulfur dioxide	1,904.95 tons	48,938.17
Nitrogen oxides	4,578.04 tons	<u>117,609.85</u>
1994 total fee:		\$178,158.10

6. In September 1994, the Department received payment from ICC in the amount of \$178,158.10 for the 1994 fee.

7. On September 14, 1994, ICC submitted a fee recalculation request to the Department, disputing the entire 1994 fee billed and requesting a refund. On March 9, 1995, after conducting a review, the Department notified ICC that the original invoice was correct.

8. On March 22, 1995, ICC notified the Department of its "Continued Disagreement" with the Department's fee determination. On June 14, 1995, the Department notified ICC that its March 22, 1995 challenge to the fee was invalid.

9. On June 23, 1995, ICC submitted to the Department another "Continued Disagreement" form and requested a conference with Department staff to consider the dispute. The Department did not schedule a conference to consider the dispute.

10. On April 17, 1996, the Department's Office of Hearings and Mediation Services received the request from the Regulatory Fee Determination Unit to conduct a hearing in this matter.

11. A pre-hearing conference to consider this matter was held on May 9, 1996.

12. On September 11, 1996, ICC submitted a letter to Administrative Law Judge Robert P. O'Connor which set forth its position in this dispute. The Department did likewise on February 7, 1997.

13. Judge O'Connor issued his summary report on February 14, 1997 which was intended to constitute a petition for a declaratory ruling. Judge O'Connor wrote that "there was no dispute regarding the material facts pertaining to this case. Rather, there is a dispute as to what the Federal Clean Air Act Amendments ("CAAA") and the ECL require and an interpretation of how the law should be applied to the facts of the instant case."

RATIONALE

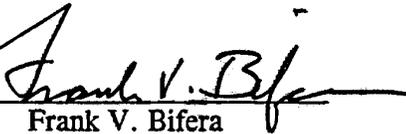
ICC has not been represented by counsel during the course of this administrative dispute process. It is somewhat difficult to understand on what factual or legal basis ICC is relying in challenging the fee assessment in this administrative proceeding. Nonetheless, the Department has decided to liberally construe ICC's papers for purposes of this declaratory ruling to determine the basis for its challenge.

It appears that ICC is contending that since the Department's operating permit program, as established at ECL §19-0311, had not been fully implemented during 1994, no fee should have been collected from ICC for support of the program. ICC seems to argue that the Department's authority to collect the fee is dependent upon the Department's ability to show a precise accounting that the Department's activities in developing and implementing the operating permit program during 1994 corresponded directly with the precise amount assessed. In other words, the Department could only collect a fee which exactly covered the costs incurred to finance the operating permit program during the 1994 calendar year. In its June 23, 1995 Continued Disagreement submittal, ICC expressed that the State has "the right to collect up to \$25.00 per ton if necessary to start the permit program before 1995. In the event the state required less than \$25.00 per ton to get the permit program started then the fee would be reduced to reflect those costs."

The Department assesses the fee pursuant to ECL §72-0303. This statute requires that all air pollution sources regulated under the operating permit program "submit to the department a fee not to exceed twenty-five dollars per ton up to six thousand tons annually of each regulated air contaminant." ECL §72-0303.1. This fee is to be adjusted annually to reflect any increases in the consumer price index. See ECL §72-0303.3. While this fee is meant to financially support the operating permit program through the development phase and beyond, the Department must, for 1994 and every succeeding year, collect this fee regardless of the nature or extent of its operating permit program implementation activities. The assessment of the fee is mandated by the statute. The Department is obligated to carry out the provisions of the statute.

While the \$25 per ton fee amount represents an original ceiling on the assessment for 1994, it also represent a floor. Pursuant to Clean Air Act §502(b)(3)(B)(i), 42 USC §7661a(b)(3)(B)(i), the State must charge sources subject to the operating permit program "not less than \$25 per ton of each regulated pollutant, or such other amount as the Administrator [of the Environmental Protection Agency ("EPA")] may determine adequately reflects the reasonable costs of the permit program." EPA did not change the \$25 per ton floor. See 40 CFR §70.9. Thus, the Department has no authority to lower the fee below \$25 per ton for 1994.

Department staff explained in detail to ICC the calculation used to arrive at the \$25.69 per ton fee for 1994 as well as the statutory and regulatory context surrounding the fee assessment. The Department performed the calculation required by ECL §72-0303.1 and arrived at a figure of \$30.18 per ton to support the legislative appropriation for operating permit program activities for the 1994-95 State fiscal year. However, the fee actually assessed was finally set by reference to the mandatory minimum/maximum fee of \$25.00 per ton which was adjusted, pursuant to ECL §72-0303.3, to reflect the increase in the consumer price index. As the correspondence containing the details of the fee calculation is part of the administrative record, the details will not be repeated here. The record amply demonstrates that the Department correctly determined the fee amount for the 1994 year. ICC was legally required to pay the fee that was assessed.


Frank V. Bifera
Acting General Counsel

Dated: June 16, 1997
Albany, New York