

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

In the Matter of the Disputed Regulatory
Program Fee

- of -

CIMATO ENTERPRISES, INC.,

Permittee,

And 13 Other Permittees.

**RULING AND SUMMARY
REPORT OF THE
CHIEF
ADMINISTRATIVE LAW
JUDGE**

DEC Case No.
OHMS 2015-69821

SPDES Permit Nos.
NYR10T740,

and 17 other SPDES
permits.

Appearances of Counsel:

-- Barclay Damon, LLP (Jeffrey D. Palumbo and Corey A.
Auerbach of counsel), for permittees Cimato Enterprises,
Inc., et al.¹

¹ The SPDES permits and permittees involved in this proceeding
include:

NYR10T740 - Cimato Enterprises, Inc.,
NYR10T761 - Cimato Enterprises, Inc.,
NYR10T859 - CL & F Development,
NYR10U277 - David Homes Energy Solutions, Inc.,
NYR10T633 - DJC Land, Inc.,
NYR10T746 - DJC Land, Inc.,
NYR10T148 - Dockside Development Corp.,
NYR10T751 - Fairway Hills Development, LLC,
NYR10T087 - Hamlet of Clarence LLC,
NYR10T695 - K & D Development, LLC,
NYR10T611 - The Marrano/Marc Equity Corp.,
NYR10T768 - The Marrano/Marc Equity Corp.,
NYR10T891 - The Marrano/Marc Equity Corp.,
NYR10S912 - Pleasant Acres West, LLC,
NYR10T614 - Pleasant Meadows Associates, LLC,
NYR10T556 - T.K. Property Holdings, LLC,
NYR10S900 - Vanderbilt Properties, Inc., and
NYR10T824 - 1000 Queen's Grant, LLC.

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Mary vonWergers of counsel), for staff of the Department of Environmental Conservation

**RULING AND SUMMARY REPORT OF THE
CHIEF ADMINISTRATIVE LAW JUDGE**

Permittee Cimato Enterprises, Inc., and 13 other permittees (collectively "permittees") have requested a hearing to challenge the State Pollutant Discharge Elimination System (SPDES) construction stormwater general permit program fees assessed for 2011 by staff of the Department of Environmental Conservation (Department) on 18 SPDES permits. During a pre-hearing conference conducted by telephone conference call on April 8, 2015, I granted permittees' request to conduct discovery pursuant to 6 NYCRR 481.10(e)(6). Department staff moves for reconsideration of the rulings made during the conference call or, in the alternative, for leave to appeal to the General Counsel for a declaratory ruling. For the reasons that follow, Department staff's motion for reconsideration is granted and, upon reconsideration, permittees' request for discovery is denied. Because no factual issues remain in dispute, pursuant to section 481.10(f)(4), the matter is referred to the General Counsel for a declaratory ruling.

PROCEEDINGS

The 14 permittees and 18 SPDES permits involved in this proceeding are listed in Appendix A (attached). The SPDES permits involved are permits for stormwater discharges from construction activity.

Permittees timely challenged the SPDES program fees assessed by Department staff pursuant to ECL 72-0602 for the 2011 calendar year (see NYSDEC OHMS Document No. 201569821-00001 [Doc 001]; see also 6 NYCRR 481.9[c]). The program fees assessed for each permit are also listed in Appendix A. The program fees assessed for each permit include an assessment pursuant to ECL 72-0602(q), which Department staff refers to as a one-time initial authorization fee,² and a \$100 per facility

² ECL 72-0602(q), as amended in 2009, requires that all persons seeking to obtain a SPDES permit to submit to the Department an annual fee in the amount

assessment pursuant to ECL 72-0602(t), which staff refers to as the annual program fee. In their challenges, permittees only dispute the initial authorization fees assessed pursuant to ECL 72-0602(q), and not the \$100 per facility annual fees assessed pursuant to ECL 72-0602(t). The disputed amounts for each permit are also listed on Appendix A.

By letter dated December 10, 2012, and served December 14, 2012, Department staff denied the challenges pursuant to 6 NYCRR 481.9(d)(2) (see Doc 002). After a conference held pursuant to 6 NYCRR 481.9(g) failed to result in a settlement, the parties executed summary statements on each permit pursuant to 6 NYCRR 481.9(h) (see Doc 003). Department staff then referred the matter to the Office of Hearings and Mediation Services for hearing procedures pursuant to 6 NYCRR 481.10.

Upon referral for hearings, the matter was assigned to me as presiding Administrative Law Judge (ALJ). I issued a notice of hearing pursuant to 6 NYCRR 481.10(b) scheduling a section 481.10(f) prehearing conference for March 27, 2015 (see Doc 004).

The prehearing conference was convened as scheduled by telephone conference call. Participating in the conference call were Jeffrey Palumbo and Corey A. Auerbach, Barclay Damon, LLP, for permittees; and Mary vonWergers, for Department staff. The prehearing conference was digitally recorded.

During the conference call, the parties stipulated to corrections to the disputed amounts for each assessment. The conference was adjourned to allow Department staff to further supplement the documentary record, and for preparation of an ALJ summary report pursuant to section 481.10(f)(4).

of "\$100.00 per acre disturbed plus \$600.00 per future impervious acre for any facility, not owned or managed by a local government, or a state department, agency, or authority, discharging or authorized to discharge pursuant to a SPDES permit for stormwater discharges from construction activity. For purposes of this subdivision, acres disturbed are acres subject to clearing, grading, or excavating subject to SPDES permitting and future impervious acres are acres that will be newly paved or roofed during construction." Fees collected pursuant to ECL 72-0602 are paid into the environmental conservation special revenue fund to the credit of the environmental regulatory account (see ECL 72-0201[11]).

Under cover email dated March 30, 2015, Department staff supplemented the record by forwarding copies of the original challenge letters filed by permittees. Staff also noted further corrections to some of the disputed amounts, and corrections to the acreage involved for one permit (see Chart, Doc 001).

A telephone prehearing conference was reconvened on April 8, 2015, and digitally recorded. The purpose of the reconvened conference was to confirm that the parties agreed with the further corrections proposed by staff. During the conference call, the parties stipulated to the corrections, which are reflected in Appendix A.

Another purpose of the reconvened conference was to determine whether a dispute existed concerning the factual basis for permittees' challenge to the initial authorization fees assessed pursuant to ECL 72-0602(q). In permittees' challenge letters and the section 481.9(h) summary statements, permittees challenged the assessed ECL 72-0602(q) fees on the ground that they allegedly constituted an unconstitutional tax. Permittees asserted that the fees charged are not reasonably necessary to accomplish the statutory command, are not assessed or estimated on the basis of reliable factual studies or statistics, and are open ended and potentially unlimited. Permittees contended that the fees could not be imposed to generate revenue for the State's general fund and represent an unconstitutional tax because they have no correlation to the expense to the State in administering the program or to the benefits received by the permittees who make the payments. Permittees further asserted that to the extent the fees exceeded the cost to carry out the specific program for which they are assessed, they must be returned to permittees.

Prior to the reconvened conference call, review of the record revealed that the parties had stipulated to facts concerning the amount of fees assessed, the amount of disturbed and future impervious acres involved, and the amount of the fees disputed. However, nothing in the record indicated agreement regarding the facts supporting permittees' challenge, including the costs to the State of administering the SPDES permit program, or the benefits to permittees. Accordingly, during the conference call, I asked whether permittees intended to develop the factual record in support of their challenge, and whether

the facts supporting their challenge were disputed or undisputed.

During the conference call, permittees cited Jewish Reconstructionist Synagogue v Incorporated Vil. of Rosyln Harbor (40 NY2d 158 [1976]) in support of their challenge. Permittees confirmed that they intended to develop the factual record supporting their challenge and requested discovery to do so.

Department staff objected to proceeding on permittees' as-applied constitutional challenge. I overruled the objection on the ground that settled New York law requires permittees to develop the factual record on their as-applied constitutional challenge at the administrative agency level (see Matter of Schultz v State of New York, 86 NY2d 225, 232, cert denied 516 US 944 [1995]; Matter of Leogrande v State Liq. Auth. of State of New York, 19 NY2d 418, 424-425 [1967]; Matter of Vasquez v Senkowski, 186 AD2d 847, 848 [3d Dept 1992][referring to this principle as the general rule]). Accordingly, I granted permittees' request for discovery pursuant to 6 NYCRR 481.10(e)(6). Department staff requested that I issue a memorandum ruling documenting my rulings.

Before a ruling was issued, however, Department staff filed a notice of motion and motion for reconsideration or, in the alternative, leave to appeal to the General Counsel, dated May 8, 2015. In response, permittees filed an attorney affirmation in opposition to the motion for reconsideration or leave to appeal (Attorney Affirmation in Opposition).

A further conference call was convened on October 28, 2015, for oral argument on the motion for reconsideration. In its papers on the motion, Department staff indicated that pursuant to ECL 72-0203, the Department is required to submit to the Governor and the Legislature annual reports summarizing and analyzing all moneys paid into the environmental regulatory account by regulated permittees pursuant to ECL article 72, and moneys paid out pursuant to article 72 for the cost of regulation by permit category, among other things. During the conference call, I asked whether production of the Department's annual report for 2011 would render discovery in this proceeding unnecessary. Permittees argued that it would not. Nevertheless, I directed Department staff to produce the 2011 report by November 9, 2015, and gave permittees until November 29, 2015 to respond.

By email dated November 9, 2015, Department staff informed the parties that the annual report had not been prepared since 1999 and, therefore, the report for 2011 was not available. In addition, Department staff made further argument in support of its motion for reconsideration. By email of the same date, permittees responded to Department staff's further arguments.

DISCUSSION

On its motion for reconsideration, Department staff challenges two rulings made during the April 8, 2015 conference call: (1) that permittees may use proceedings under 6 NYCRR 481.10 to raise their constitutional challenge to the fees imposed pursuant to ECL 72-0602, and (2) that permittees should be allowed discovery to develop the record on their challenge. Motions for reconsideration of prior rulings issued in Departmental hearing proceedings are analyzed applying the standards governing CPLR 2221(d) motions for leave to reargue (see Matter of Pierce, Ruling of the Commissioner on Motion for Reconsideration, June 9, 1995, at 1; Matter of 2526 Valentine LLC, Ruling of the Administrative Law Judge on Motion for Reconsideration, March 10, 2010, at 3). Under CPLR 2221(d), a motion for leave to reargue shall only be granted upon a showing that the decision-maker overlooked or misapprehended the law or facts, or for some reason mistakenly arrived at the earlier ruling (see id.). A motion for leave to reargue does not provide a vehicle for raising new facts or legal questions not raised on the prior motion (see CPLR 2221[d]; Simpson v Loehmann, 21 NY2d 990, 990 [1968]). Nor is it "designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]).

Based upon the arguments of counsel, consideration of the constitutional standard applicable to permittees' challenge, and further research into and consideration of applicable case law, I conclude that I erred in granting discovery in this matter. Accordingly, Department staff's motion for reconsideration should be granted and my ruling granting discovery reversed.

As an initial matter, permittees cite an incorrect standard as the basis for their constitutional challenge. Citing Jewish Reconstructionist Synagogue, permittees argue that the fees authorized by ECL 72-0602 constitute an unconstitutional tax because the fees generated are not reasonably related to the actual costs associated with the administration of the SPDES program. Jewish Reconstructionist Synagogue, however, concerned a challenge to fees established by a municipality pursuant to an implied limited delegation of power to the local government by the State Legislature (see 40 NY2d at 162-163). As discussed during the conference call, however, permittees' challenge is not to the Department's exercise of any implied powers to enact fees. Rather, it is to fees enacted by the Legislature itself. Accordingly, the reasonable relation standard involved in Jewish Reconstructionist Synagogue is inapposite to this proceeding.

Instead, the appropriate standard is supplied by the principles governing substantive due process challenges to statutes enacted by the Legislature, not the standards applicable to regulations adopted by a municipality or State agency. Inasmuch as permittees have not identified any suspect classification or fundamental right implicated by the ECL 72-0602 SPDES program fees, the applicable standard is rational basis review (see Affronti v Crosson, 95 NY2d 713, 718, cert denied 534 US 826 [2001]). Under the rational basis standard, permittees carry the heavy burden of establishing that, as applied to them, the statute is unreasonable or arbitrary, and is not reasonably related to the accomplishment of a legitimate governmental objective (see Matter of Toia v Regan, 54 AD2d 46, 55, affd for the reasons stated below 40 NY2d 837 [1976], appeal dismissed 429 US 1082 [1977]; Montgomery v Daniels, 38 NY2d 41, 54 [1975]). As stated by the Court of Appeals,

"The rational basis standard is a 'paradigm of judicial restraint'" (Port Jefferson Health Care Facility v Wing, 94 NY2d 284, 290 [quoting Federal Communications Commn. v Beach Communications, 508 US 307, 314], cert denied 530 US 1276). On rational basis review, a statute will be upheld unless [it] is "so unrelated to the achievement of any combination of legitimate purposes that . . . [it is] irrational" (Kimel v Florida Bd. of Regents, 528 US 62, 84 [quoted case and internal quotation marks omitted]). Since the challenged statute is presumed to be valid, "[t]he

burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it . . . whether or not the basis has a foundation in the record" (Heller v Doe, 509 US 312, 320-321 [quoted case and internal quotation marks omitted][emphasis supplied]). Thus, "those challenging the legislative enactment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" (Minnesota v Clover Leaf Creamery Co., 449 US 456, 464 [quoting Vance v Bradley, 440 US 93, 111])

(Affonti v Crosson, 95 NY2d at 719).

Applying the correct legal standard, I conclude that ECL 72-0602 passes the rational basis test as a matter of law, and no further record development is necessary or warranted. In the declaration of policy supporting the environmental regulatory program fees, the Legislature stated that "comprehensive environmental regulatory management programs are essential to protect New York state's environmental resources and the public's health and welfare" and that "those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state" (ECL 72-0101). The imposition of fees upon the users of governmental programs so as to make those programs self-sustaining and paid for by their users rather than by taxpayers in general has been recognized as a legitimate legislative purpose (see Matter of Salvador v State of New York, 205 AD2d 194, 200 [3d Dept 1994], appeal dismissed 85 NY2d 857 and lv denied 85 NY2d 857 [1995] [due process challenge to user fees under ECL 43-0125]; Matter of Joslin v Regan, 63 AD2d 466, 470 [4th Dept 1978], affd 48 NY2d 746 [1979] [due process challenge to fees under the Surrogate's Court Procedure Act]).

Moreover, in the declaration of policy, the Legislature recognized "the department's regulatory programs and corresponding costs vary according to certain relevant technical criteria which shall be considered in determining adjustments to fees as provided in this chapter" (ECL 72-0101). It may be presumed that the Legislature considered the estimated costs of the SPDES program when setting the fee structure in ECL 72-0602 and apportioning the fees among the various program users (see

Matter of Salvador, 205 AD2d at 199). Even assuming, without deciding, that the Legislature's assessment lacked mathematical precision, in the area of economics, only rough accommodations are required to pass the rational basis test (see Matter of Toia, 54 AD2d at 55).

The rationality of the Legislature's choices need not be supported by any evidence (see Affronti v Crosson, 95 NY2d at 719). Nevertheless, examination of the annual reports required by ECL 72-0203 that were prepared by the Department reveal that only a portion of the costs of administering the SPDES program have been recouped through the regulatory fee program. For example, the annual report for 1994, of which I take judicial notice,³ reveals that the administrative costs of the Department's water program totaled \$18,502,000 for the period from October 1, 1992 through September 30, 1993 (see New York State Department of Environmental Conservation, Annual Report of the Environmental Regulatory Fee Program Established by Article 72 of the Environmental Conservation Law, January 1994, at 17). For the 1993 calendar year, however, the Department assessed only \$9,596,000 (about 52 percent of total water program costs) and collected only \$9,097,000 (about 49 percent) in water program fees (see id. at 3). Moreover, 1993 represented the highest percentage of recoupment during the first twelve years of the regulatory fee program. The fees assessed and collected averaged only 31 percent and 29 percent, respectively, of costs during the first twelve years of the program. This information alone provides a rational basis for the program fees assessed in ECL 72-0602.

In support of their constitutional challenge to the fees assessed by the Department for 2011, permittees argue that the fees generated by the program are excessive and not reasonably related to the costs of administering the SPDES program (see Attorney Affirmation in Opposition at 6). Accordingly, permittees seek discovery to develop a record of the costs incurred by the Department for the administration of the SPDES program and the fees generated by the program (see id. at 7).

³ The annual reports filed in 1985 through 1996, which are publicly available, are public records subject to judicial notice (see Affronti v Crosson, 95 NY2d at 720; see also 6 NYCRR 481.10[1][1]).

Although I previously granted permittees' discovery request, upon reconsideration, permittees' request should be denied. By seeking to litigate the administrative costs of the SPDES program and the fees generated by ECL 72-0602, permittees are seeking to challenge the legislative facts underlying the statute (see Affronti v Crosson, 95 NY2d at 720). Although the exhaustion of administrative remedies doctrine requires that constitutional challenges hinging upon factual issues reviewable at the administrative level be initially addressed to the agency so that the necessary factual record can be established (see Matter of Schultz, 86 NY2d at 232), legislative facts and the legislative choices made based upon those facts are "not subject to courtroom factfinding." Thus, challenges to those legislative facts and choices do not provide a basis for concluding that the statute fails to pass the rational basis review (see Affronti v Crosson, 95 NY2d at 720; Port Jefferson Health Care Facility, 94 NY2d at 291). Accordingly, because discovery will not assist in defining and limiting the scope of issues in this proceeding, permittees' request for discovery should be denied as unnecessary (see 6 NYCRR 481.10[f][1]).

In sum, review of the legislative purposes of ECL 72-0602 and judicially noticed public records compels the conclusion that the fees authorized by ECL 72-0602 are rationally related to a legitimate government interest and, therefore, do not violate permittees' substantive due process rights. Accordingly, permittees' constitutional challenge to the fees assessed for 2011 is rejected. Moreover, permittees' request to conduct discovery in an attempt to litigate the legislative facts supporting the SPDES program fee program is denied as unnecessary.

With respect to the remainder of permittees' challenge to the fees assessed for 2011, the parties have stipulated to the underlying facts, as summarized in Appendix A. No disputed issues of fact remain. Accordingly, because permittees' challenge involves only the interpretation or application of ECL article 72, pursuant to 6 NYCRR 481.10(f)(4), the hearing is canceled, and the matter is referred to the Department's General Counsel for a declaratory ruling in accordance with 6 NYCRR part 619.

Finally, given the rulings above, Department staff's request for leave to appeal to the General Counsel is rendered academic.

RULING

Department staff's motion for reconsideration is granted. Upon reconsideration, permittees' request to conduct discovery is denied.

Because no disputed issues of fact remain, pursuant to 6 NYCRR 481.10(f)(4), the hearing is canceled and the matter is referred to the General Counsel for a declaratory ruling in accordance with 6 NYCRR part 619. The parties may file briefs with the General Counsel on the issues set forth in this report in accordance with a schedule to be established by the General Counsel.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: April 4, 2016
Albany, New York

Attachments

Cc: Thomas S. Berkman, Deputy Commissioner and
General Counsel

Louis A. Alexander, Assistant Commissioner for
Hearings and Mediation Services

Matter of CIMATO ENTERPRISES, INC., et al.

DEC Case No. OHMS 2015-69821

Appendix A

Permit No.	Permitee	Facility	2011 Fee Assessed	Disturbed Acres	Future Impervious Acres	2011 Disputed Amount*
NYR10T740	Cimato Enterprises, Inc.	Woods at Versailles Sub. Part 4, Shadow Lane, Hamburg, NY	\$5,870.00	22.9	5.8	\$5,770.00
NYR10T761	Cimato Enterprises, Inc.	Woodlane Hills Subdivision, Greiner Road, Clarence, NY	\$17,930.00	63.7	19.1	\$17,830.00
NYR10T859	CL & F Development	Westcott Estates Subdivision, Raymond Road, Lockport, NY	\$10,260.00	45.2	9.4	\$10,160.00
NYR10U277	David Homes Energy Solutions, Inc.	Audubon Landing Patio Homes, 259 North French Road, Amherst, NY	\$1,830.00	6.5	1.8	\$1,730.00
NYR10T633	DJC Land, Inc.	Holly Ridge Estates Subdivision, Holly Ridge and Silent Meadows Lane, Orchard Park, NY	\$5,470.00	21.9	5.3	\$5,370.00
NYR10T746	DJC Land, Inc.	Hidden Pines Subdivision, Aurora Street, Lancaster, NY	\$3,000.00	11.0	3.0	\$2,900.00
NYR10T148	Dockside Development Corp.	Dockside, Dockside Parkway, Amherst, NY	\$4,170.00	13.7	4.5	\$4,070.00
NYR10T751	Fairway Hills Development, LLC	Summer Farms Subdivision Phase 5, 308 Brunck Road, Lancaster, NY	\$8,430.00	26.9	9.4	\$8,330.00
NYR10T087	Hamlet of Clarence LLC	Shadow Woods O.S.D.D. Subdivision, Goodrich Road, Clarence, NY	\$6,040.00	23.4	6.0	\$5,940.00
NYR10T695	K & D Development, LLC	Cornerstone Subdivision, Jackson Street, Akron, NY	\$4,770.00**	14.9	5.3	\$4,670.00
NYR10T611	The Marrano/Marc Equity Corp.	Central Square Villas, Juniper Blvd., Lancaster, NY	\$9,170.00	26.5	10.7	\$9,070.00
NYR10T768	The Marrano/Marc Equity Corp.	Deer Springs Sub. Part 4 Phase 2, Heltz Road, Hamburg, NY	\$13,540.00	48.0	14.4	\$13,440.00***

Permit No.	Permittee	Facility	2011 Fee Assessed	Disturbed Acres	Future Impervious Acres	2011 Disputed Amount*
NYR10T891	The Marrano/Marc Equity Corp.	Caldwell Drive Subdivision, Caldwell Drive, West Seneca, NY	\$950.00	4.9	0.6	\$850.00
NYR10S912	Pleasant Acres West, LLC	Pleasant Acres West Subdivision, N/S New Taylor Road, Orchard Park, NY	\$18,920.00	67.0	20.2	\$18,820.00
NYR10T614	Pleasant Meadows Associates, LLC	Cove at Pleasant Meadows Subdivision 5, Juniper Blvd., Lancaster, NY	\$3,330.00	12.5	3.3	\$3,230.00
NYR10T556	T.K. Property Holdings, LLC	Emma Woods Subdivision, Paradise Road, Amherst, NY	\$2,640.00	6.2	3.2	\$2,540.00
NYR10S900	Vanderbilt Properties, Inc.	Villas at Deerwood, 1250 & 1308 Walck Rd., N. Tonawanda, NY	\$9,900.00	23.0	12.5	\$9,800.00
NYR10T824	1000 Queen's Grant, LLC	Queens Landing, South Drive, West Seneca, NY	\$5,320.00	20.4	5.3	\$5,220.00

* The section 481.9(h) summary statements executed by permittees and Department staff all included the \$100 annual fee assessed by the Department pursuant to ECL 72-0602(t) in the listed 2011 disputed amounts. However, permittees do not dispute the ECL 72-0602(t) annual fee assessed for 2011. The parties stipulate that the disputed amount for each permit should be \$100 less than the amounts shown on the summary statements. The corrected disputed amounts appear on this chart.

** K & D Development, LLC's November 22, 2011 letter challenging the assessed regulatory fee incorrectly states that the amount assessed was \$4,470.00. The parties stipulate that the actual amount assessed was \$4,770.00.

*** The section 481.9(h) summary statement for the Marrano/Marc Equity Corp. SPDES Permit No. NYR10T768 incorrectly lists the amount of acreage and the disputed amount. The parties stipulate that the correct acres disturbed is 48.0, future impervious acres is 14.4, and the disputed amount is \$13,440.00.