If the director does fix consumer resale prices, he must take into consideration a reasonable return to dealers, processors and subdealers. N.J.S.A. 4:12A-22. If the director did not reset prices monthly, the handlers' return might diminish upon an Order 27 price increase, possibly below a reasonable minimum. If the Order 27 price dropped, the return to handlers would tend to become excessive at the expense of the statutory purpose of providing maximum assurance of an adequate supply of wholesome milk to consumers. L. 1941, c. 274, Preamble. Therefore, monthly adjustments of any fixed minimum consumer resale prices are necessary in the area where Order 27 determines the price the handler pays.

But if the course of adopting specific prices for one month terms were adopted, serious practical disadvantages would result. No Office of Milk Industry order is effective until fifteen days after filing with the Secretary of State. N.J.S.A. 4:12A-23. Recurrent hearings would unduly burden both the Office of Milk Industry staff and the representatives of the various groups in the milk industry who find it necessary to appear at price fixing hearings. Where the cost of processing and distribution remains substantially constant but the wholesale price fluctuates, as under Order 27, we suggest that the most effective way for determining consumer prices is to fix an increment to the Order 27 price. The Legislature anticipated this exigency by giving the director power to fix prices "under varying conditions". N.J.S.A. 4:12A-22.

If the Office of Milk Industry exercises the power to fix cosumer prices in terms of an increment to Order 27 handler prices, it must be done after a hearing at which evidence of the appropriate increment or "spread" is presented. N.J.S.A. 4:12A-23.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

NOVEMBER 7, 1957

HONORABLE JOSEPH E. MCLEAN
Commissioner of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1957—No. 24

Re: New York City Release Flows in the Delaware River

DEAR COMMISSIONER:

You have requested our opinion as to the obligation of New York City to maintain release flows in the Delaware River pursuant to the 1954 decree of the United States Supreme Court in the case of *New Jersey* v. *New York,* 347 U.S. 995 (1954). The inquiry also involves the authority of the River Master to permit the City to reduce the amount of water released where the circumstances might appear to warrant such reduction.

The decree enjoins the State and City of New York from diverting water from the Delaware River "except to the extent herein authorized and upon the terms

and conditions herein provided". Various diversion rates and correlative release flow requirements are provided for the different stages of completion of the New York City reservoir system on the Delaware River. At the present time, the Neversink and East Branch Reservoirs have been completed, but the Cannonsville Reservoir has not. For this stage, the decree authorizes a diversion of 490 m.g.d., but requires the City to let down enough water to maintain a minimum basic flow of 1525 c.f.s. at Montague, and to make additional releases in accordance with a formula set forth in paragraphs B-1(c) and (d) of the decree.

The questions here presented arise because New York has for a considerable number of days this past summer failed to maintain either the minimum or the excess release flows. Furthermore, the River Master has permitted diversions by New York to continue in spite of these failures to make the required releases, and the basis for his action appears in the following statement submitted by him to the members of the Delaware River Advisory Committee dated October 2, 1957:

> "In administering the terms of the Decree, in the interim period prior to completion of Cannonsville Reservoir, the River Master has taken the view that it would be totally unrealistic to contend that the intent of the Decree was that New York City should have to forego use of the Delaware Basin reservoirs or overcome natural limitations to the extent of guaranteeing that the release capacity would be sufficient to maintain a flow of 1525 cfs at Montague at all times. Because of the various extenuating circumstances brought about by the current unprecedented drought, the emergency facing New York City necessitating shutting down the Delaware Aqueduct for cleaning, the change in pattern of operation of the Wallenpaupack power plant, and the physical condition of constructed release works, it is the view of the River Master that during the 1957 low flow season to date, releases from Neversink and Pepacton Reservoirs, as limited by the capacity of the release works, has constituted acceptable compliance in carrying out the intent of the Decree. This is not to be construed as setting a precedent for future operations."

The questions before us were recently passed upon by the Attorney General of Delaware, and on July 18, 1957 he rendered an opinion to the Delaware State Geologist. He concluded that under the terms of the decree, the City's right to divert water from the Delaware River is conditioned upon its meeting its obligations to release sufficient water to maintain at all times a minimum flow of 1525 c.f.s. at Montague until the Cannonsville project is completed; that the City may not divert any water from the Delaware except upon complying with this condition, which is unqualified; and that the River Master may not permit diversions by New York without first having determined that the present release requirements and the requirements for the predictable future can be met.

For the reasons given in the opinion of the Delaware Attorney General, we fully concur in his conclusions as above stated. As we have already noted, the Supreme Court enjoins New York from diverting water from the Delaware River except upon the terms and conditions set forth in the decree; and while the City is permitted at the present stage to divert 490 m.g.d., the decree specifically states that *"in no event* shall such diversion impair the obligation of the City to make the releases hereinafter specified". (Underlining ours). In view of the unqualified language used by the Court, the City cannot plead impossibility of maintaining release flows because of the structure of its release works, while it continues to divert in violation of the Supreme Court's injunction.

Nor do we find any authority in the River Master to allow New York to cut down its releases below the minimum while it continues to divert. An examination of the duties and responsibilities of the River Master as set forth in the decree indicates that his functions are ministerial rather than discretionary so far as the amount of the minimum release flow is concerned. He must "administer the provisions of this decree relating to yields, diversions and releases so as to have the provisions of this decree carried out with the greatest possible accuracy". The provision that "compliance by the City with directions of the River Master with respect to such releases shall be considered full compliance with the requirements" of the decree in respect to the basic minimum flow of 1525 c.f.s. does not, in our opinion, vest discretionary authority in the River Master to permit a relaxation of the minimum flow requirements under extenuating circumstances. So long as the decree remains in its present form, New York and the River Master must comply with its express terms.

In our opinion, relief by way of equitable apportionment during dry seasons can be granted only by further action of the Supreme Court, which might take the form either of a relaxation provision such as was written in the original Montague formula in the 1931 decree, or of vesting authority in the River Master to adjust the release flow requirements in cases of unforeseen hardship. By paragraph X of the decree, the Supreme Court has retained jurisdiction of the matter, so that any of the parties may at any time apply at the foot of the decree for other or further relief. Until the decree is so modified, New Jersey and its sister downstream states have the right to insist upon literal compliance with its terms by New York and the River Master.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

TPC:tb.