

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

JAMAICA WATER SUPPLY COMPANY

DECLARATORY
RULING

For a Declaratory Ruling Pursuant to Section 204
of the State Administrative Procedure Act and
Part 619 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York

DEC
No. 15-07

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INTRODUCTION

Jamaica Water Supply Company ("Jamaica"), by its attorneys, Read & Laniado, has petitioned for a Declaratory Ruling whether a water supply permit is required to reconstruct and deepen an existing water supply well pursuant to Environmental Conservation Law ("ECL") §15-1501 and the implementing regulations, 6 NYCRR Part 601.

It is in the public interest to grant the instant Petition and to issue a Declaratory Ruling to inform Petitioner, and the general public, whether a water supply permit is required when an existing water supply is deepened to install a new screen.

For the sole purpose of issuing this Declaratory Ruling, the Department will assume the facts set forth in the Petition to be true, without any formal determination as to their accuracy. Neither the State Administrative Procedure Act nor Department regulations concerning Declaratory Rulings, 6 NYCRR Part 619, provides authorization or procedures for the determination by the Department of the accuracy of the facts alleged in a Petition for

a Declaratory Ruling. The binding effect of the Ruling will accordingly be limited by its assumed factual predicates. Power Authority of the State of New York v. NYSDEC, 58 N.Y.2d 427, 461 N.Y.S.2d 769 (1983). The Department can take official notice of facts.

FACTS

Petitioner has an existing operational water supply well with a valid water supply permit which requires a new screen because the existing screen is passing sand. This permit was originally issued in 1956 and has not been modified since that time. Petitioner intends to redrill and deepen the well when installing such screen and states that the well is proposed to be screened at a depth of 105 to 135 feet below grade as compared to the existing screen which is at a depth of 85.5 to 105.5 feet below grade. The aquifer extends to approximately 169 feet below grade. Finally, Petitioner states that the capacity of the well will not be changed.

A well screen is a filtering device that serves as the intake portion of the well in unconsolidated or semi-consolidated aquifers. The screen permits water to enter the well from the saturated aquifer, prevents sediment from entering the well and serves structurally to support the unconsolidated aquifer material.¹

¹ Driscoll, Fletcher G., Groundwater and Wells, (2d Ed., 1986) p.395

DISCUSSION

The law governing water supply is ECL Article 15, Title 15 and its implementing regulations, 6 NYCRR Parts 601 and 602. ECL §15-1501 requires any person or public corporation who is engaged in the acquisition, development, use or distribution of water for potable purposes to obtain a permit from the Department prior to engaging in certain activities. Among the enumerated activities that require a permit is the acquisition or taking of a water supply or an additional water supply from an existing approved source. ECL §15-1501.1(a). In addition, a water supply permit is necessary to install or operate "any new or additional wells" (in excess of 45 gallons per minute) in Long Island counties. ECL §15-1527.1. The implementing regulations require a water supply permit to:

(b) acquire, take or develop any new or additional source of water supply in connection with an existing water supply system;

* * *

(1) sink or drill additional wells in connection with an existing water supply system;

* * *

(6 NYCRR §601.3(b), (1))

Essentially, Petitioner contends that the rescreened, although deepened, well is not a new well or an additional well, but merely a reconstructed well since there is no request for additional capacity, the installed pumping capacity will remain the same and the proposed well is in the same water bearing

formation, the Upper Glacial Aquifer. Petitioner's argument is that a permit is not necessary "... for the reconstruction or replacement of existing facilities in connection with an existing plant wherein the capacity of the plant is in no way increased, nor for the construction of filtration or other treatment facilities which will not in any way increase the amount of water which can be made available from the present sources of supply." ECL 15-1501.2. However, ECL §15-1501.2 applies only to municipal or county water authorities. Petitioner is neither, being a private corporation.

Assuming arguendo, that §15-1501.2 applied, the Department would agree if Petitioner sought merely to replace the screen at the same depth as it currently exists. However, by deepening the well and screening it in a different portion of the aquifer, Petitioner has replaced the existing well with a new well. This is confirmed by Petitioner's existing permit (WSA 3111) for this well which states that the well is to have a depth of 100 feet. Deepening the well to go below 100 feet would, therefore, at a minimum, require a permit modification.

In conjunction with well drilling, the procedural regulations which govern the issuance of water supply permits are set forth in 6 NYCRR Part 621. Pursuant to this part, projects are classified as major or minor. Minor water projects include:

replacement of a well with an equivalent well in the same aquifer having a capacity not more than 110 percent of the original; (6 NYCRR §621.4(b)(2)(ii)).

Consequently, this confirms that a replacement well (100-110%) needs a permit.

The purpose of the water supply law is for the State to control and preserve its water supply for the benefit of all its inhabitants. (City of Syracuse v. Gibbs, 283 N.Y.275 (1940)).

In Mitchell v. Village of Croton-on-Hudson, the Court found that the purpose of the Department requiring approval for acquisition of an additional water supply from an existing approved source was to insure that an existing approved source would not be overburdened or used to an extent greater than authorized or contemplated at time of approval. [45 Misc.2d 910 (Sup.Ct., Westchester Co., 1965).] Additionally, pursuant to ECL §15-1503.2 the Department must consider whether a water supply project

is just and equitable to all affected municipalities and their inhabitants and in particular with regard to their present and future needs for sources of water supply....

In a situation such as this, where a deepened well is potentially pumping from a different portion or strata of the aquifer, the Department must consider the effect of the well to be deepened on other existing wells before granting a permit. Additionally, the Department, through consultation with the Department of Health, must consider water quality. This is an issue here, since Petitioner states in a December 2, 1986, letter that water quality is poor at certain depths.

Furthermore, the variables that go into determining the specific capacity of a well are so complex that the replacement of a screen on an existing well with a new screen at a greater depth is in fact more akin to replacing the well with a new well than merely rescreening it.

In addition, the Department's concern in this area is heightened by the fact that there are special federal designations and state laws protecting the underground aquifer of Long Island. While this particular well is in Queens, it is located on that portion of Long Island that is very dependent on groundwater for its drinking water supply.

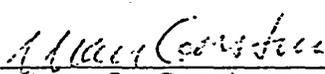
At the federal level this has resulted in the designation of the entire Island (Kings, Queens, Nassau and Suffolk counties) as a sole source aquifer, pursuant to §1424 of the Safe Drinking Water Act (42 USC §§300f et seq.). This means that the aquifer has been determined to be the sole or principal drinking water source for the area, which, if contaminated, would create a significant hazard to human health (42 USC §1424(e)). In addition, state law gives special protection to the area:

- ° well drillers in Long Island, but not elsewhere, must obtain a certificate of registration. ECL §15-1525.
- ° a well permit is required for most new or additional wells on Long Island in excess of 45 gallons per minute. ECL §15-1527.
- ° the land disposal of solid waste in Nassau and Suffolk counties has been severely restricted and will be phased out in order to protect the aquifer. ECL §27-0704.

- a moratorium has been imposed by statute (ECL §15-1528) on new wells in the Lloyd Sands aquifer on Long Island (except for coastal communities).
- authority to prohibit incompatible uses over federal sole source aquifers has been granted the Department by statute (ECL §15-0514).
- special restrictions apply to sewage system cleaners and additives in Nassau and Suffolk counties (ECL Article 39).
- special restrictions on hazardous waste management facilities exist for all of Long Island (6 NYCRR 373-1.1(d)(1)(iv)).
- DEC has recently imposed a ceiling on the amount of water that can be withdrawn from the aquifer by the Long Island Water Corporation and other large suppliers. In the Matter of the Proposed Modification of Water Supply Permits of the Long Island Water Corporation, March 8, 1988.

Therefore, given the seriousness of the water supply situation in Long Island and the Department's statutory obligation to allocate the State's water resources so as to preserve it for the benefit of all its inhabitants, it is my opinion that Petitioner's activity of deepening an existing well constitutes a replacement of an existing well with a new well and requires a permit pursuant to ECL §§15-1501.1(a), 15-1527 and 6 NYCRR §§601.3, 621.3(b)(2)(ii).

Dated: Albany, New York
April 10, 1989



Marc S. Gerstman