

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of
Bath Petroleum Storage, Inc. for a
Declaratory Ruling

DECLARATORY
RULING
DEC 23-08

Statute & Regulations

Petitioner, Bath Petroleum Storage, Inc. ("BPSI"), by New York Capitol Consultants, Inc., seek a Declaratory Ruling pursuant to State Administrative Procedure Act §204, and 6 NYCRR Part 619, that under Article 23, Title 13, of the Environmental Conservation Law ("ECL"), a permit from the Department of Environmental Conservation ("Department" or "DEC") is not required for its underground storage reservoir.

Background

BPSI is the owner and operator of an underground gas storage facility located in Bath, New York. BPSI advises, and for purposes of this ruling we assume to be true, that the underground storage reservoir was purchased by BPSI in April 1983 and was placed in operation prior to October 1, 1963 and has not been abandoned. There has been an exchange of correspondence between BPSI and Department staff, and I take official notice of that correspondence. As a result of that correspondence, Department staff notified BPSI that "a modification of the storage capacity of an existing underground storage reservoir

requires a permit application and a fee of \$5,000." Letter from Randall C. Nemecek, DEC Region 8, to Matt Slezak, BPSI, dated June 30, 1995. Subsequently, BPSI advised DEC that "BPSI believes it is entitled to proceed to expand its solution mined cavern capacity...without a 'modification permit'...." Letter from Robert V.H. Weinberg, President, BPSI, to Sandra F. Brennan, DEC, dated August 31, 1995. BPSI contends that inasmuch as the underground gas storage facility existed prior to 1963, no permit is required to expand its gas storage capacity and it seeks a ruling to that effect.

Analysis

The policy of the Oil, Gas and Solution Mining Law, ECL §23-0301, requires the Department to regulate the development, production and utilization of the natural resources of oil and gas in a manner that will prevent waste, provide for a greater ultimate recovery, and protect the correlative rights of all owners and the rights of all persons, including landowners and the general public.

Subdivision 1 of ECL §23-1301 provides, in pertinent part, that:

No underground reservoir shall be devoted to the storage of gas, or liquified petroleum gas unless the

prospective operator of such storage reservoir shall have received from the department, after approval in writing of the state geologist, an underground storage permit which shall be in full force.

Subdivision 2 of ECL §23-1301 establishes procedure for issuance of the permit and authority for permit revocation or suspension for certain enumerated violations.

Subdivision 3 of ECL §23-1301 provides:

Subdivisions 1 and 2 of this section shall not apply to underground storage reservoirs or the storage of gas therein provided that such reservoirs have been placed in operation prior to October 1, 1963 and so long as such operation is not abandoned (emphasis added).

ECL §23-1301 was amended, effective January 1, 1985, to add a new subdivision 5 that provides:

5. The applicant for a permit for the following purposes shall submit with his application the following fees:

a. for a new underground storage reservoir, a fee of ten thousand dollars.

b. for a modification of the storage capacity of an existing underground storage reservoir, a fee of five thousand dollars (emphasis added).

Where the words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.

McKinney's Statutes §76. Subdivision 3 of ECL §23-1301 clearly grandfathers the pre-October 1, 1963 operation of underground storage reservoirs or the storage of gas therein from the permit requirement of subdivision 1. It clearly does not grandfather

new or modified operations subsequent to that date. Accordingly, changes or modifications to pre-October 1, 1963 operations at BPSI's facility would require a permit. This conclusion is supported by the 1985 amendment adding subdivision 5. There, it is clear that the modification of an existing underground storage reservoir, without regard to when operations commenced, requires a permit and a fee. Reading ECL §23-1301 as a whole, it is clear that such section was intended to require a permit for post-October 1, 1963 modifications to underground storage reservoirs or the storage of gas therein.

Even presuming that the language of ECL §23-1301(5) is ambiguous, "the primary consideration...is to ascertain and give effect to the intention of the Legislature." McKinney's Statutes §92. We have reviewed the legislative bill jacket for L. 1984, c. 891, and conclude that the legislative history of ECL §23-1301(5) supports our interpretation that the Department may require a permit application and fee for a modification to the storage capacity of an underground storage reservoir where the underground storage reservoir was in operation prior to October 1, 1963. The comments on the bill lend support to the conclusion that the 1984 amendment to ECL §23-1301(5) was not intended as a limitation on the types of underground storage reservoirs subject to the statute's permit requirements. Moreover, the historical interpretation avoids the illogical

result which would follow if ECL §23-1301(5) was interpreted to allow unlimited expansion, without a permit or any environmental review, of underground storage capacity. Although the legislature clearly did not intend to prohibit the continued operation of underground storage reservoirs in existence prior to October 1, 1963, nothing in the language of ECL §23-1301(5) implies that the exemption extends beyond the use which has been in existence. The permit exemption would be inapplicable for an expansion or modification of the storage capacity of an underground reservoir.

It is appropriate to consider another doctrine when reviewing the present situation. In Guptill Holding Corporation v. Williams, the Court held that a request for a permit amendment representing a "significant expansion of the project..." was an adequate basis on which DEC could subject the mining operation to "full environmental review..." 140 AD2d 12, 20 (3d Dept., 1988), app. dismissed, lv. den., 73 NY2d 820 (1988). The Court held that the grandfathering provisions of ECL §8-0111(5) does not exempt from the State Environmental Quality Review Act ("SEQRA") applications to increase the amount of land to be mined, substantially, as compared with the amount which was mined or approved for mining before the September 1, 1976 effective date of SEQRA, as follows:

Nonetheless, the exemption does not apply upon "proof of change in the level of operation so substantial as to be sufficient to remove an activity from the exclusion clause...notwithstanding that the basic nature of the activity remain unchanged" (citation omitted).

The Court's decision in Matter of Atlantic Cement Co., Inc. v. Williams is consistent with the extent of an exemption from statutory requirements [129 AD2d 84 (3d Dept., 1987)]. Under Atlantic Cement, the only lands which are exempted or excluded from further environmental review are the areas which the Department was deemed to have already reviewed.

The federal courts under the Clean Air Act have interpreted the grandfather clause similarly, and have held that when "there is additional construction or a modification" to an existing facility, the state can require a permit. Idaho Dept. of Health & Welfare v. United States DOE, 959 F.2d 149, 34 E.R.C. 1812 (9th Cir. 1992). A "modification" is significant enough to trigger the requirements of a permit, where none was required before under the grandfathering provision, where "the changes result in an increase in the amount or type of pollutants emitted by source." United States v. Narragansett Improvement Co., 571 F.Supp. 688 (D.C.R.I., 1983). The grandfathering clause does not constitute a perpetual immunity, where there is a modification that increases pollution, a permit will be required. Alabama Power Co., V. Costle, 636 F.2d 323 (D.C. Ct. App., 1979).

Similarly, in zoning cases, only the existing nonconforming use may continue; not a change, expansion or alteration of the use (I Anderson's American Law of Zoning Section 6.35). Even

zoning ordinances that do not contain formal statements with respect to the restriction and eventual elimination of nonconforming use generally show an intent to eventually eliminate the nonconforming use by including limits on change, expansion, alteration, and abandonment (I Anderson's American Law of Zoning Section §6.07). A view expressed by courts regarding nonconforming uses is expressed by the Court of Appeals in Village of Valatie v. Smith as follows:

In light of the problems presented by continuing nonconforming uses, this Court has characterized the law's allowance of such uses as a 'grudging tolerance,' and we have recognized the right of municipalities to take reasonable measures to eliminate them. (83 NY2d 396, 400)

The permit requirements set forth in ECL §23-1301(1) and (5) are not as restrictive or difficult to meet as the general zoning standard for nonconforming uses. The legislature did not intend to eliminate existing underground storage reservoirs. However, the statutory language does not imply that the exemption for pre-existing operations extends to modifications to storage capacity after the effective date of the Act.

Conclusion

For the reasons set forth above, we conclude that BPSI is required to obtain a permit before undertaking any activity which

will change, modify, or extend the underground storage capacity of its underground storage reservoir. This ruling does not mean that BPSI is precluded from future development of its underground storage reservoir. Rather, when an ECL §23-1301 permit application is submitted, Department personnel will review the project application consistent with "a suitable balance of social, economic and environmental factors" [6 NYCRR §617.1(d)].

John P. Cahill
General Counsel

Dated: May 2, 1996
Albany, New York